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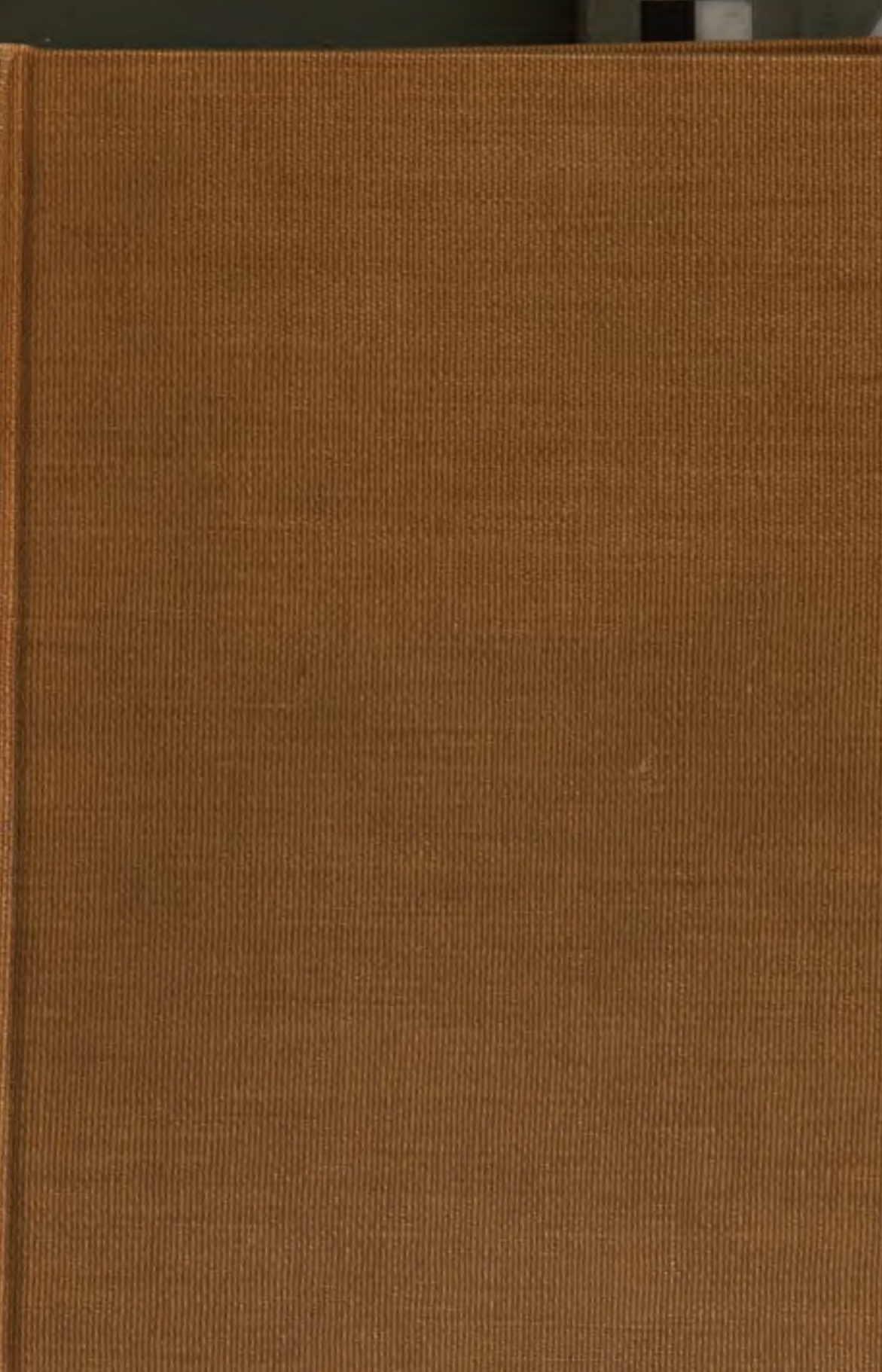
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## JEREMIAH SMITH

**J**EREMIAH SMITH, second of that name, died at St. Andrews, New Brunswick, September 3, 1921, in the eighty-fifth year of his age. He was the last of that older generation of teachers who conducted the Harvard Law School in the deanships of Langdell and Ames, and shared the enthusiastic and affectionate admiration which their pupils gave to these remarkable men. His life, like theirs, was full, useful, happy; like theirs, too, his death was a peaceful, painless falling asleep. Faithful all: and all alike enshrined in the hearts of thousands of men of law throughout the nation.

Judge Smith came of forbears to whose vigor of mind and body the best blood of New Englander and Scot contributed. His father, born in 1759, was Revolutionary soldier, legislator, member of Congress, Judge of the United States Circuit Court, Chief Justice and Governor of New Hampshire. After surviving his first wife and their children he married, at the age of seventy-one, a second wife; and his son Jeremiah was born in 1837. The father died five years later.

The son was educated at Phillips Exeter Academy and at Harvard, graduating with the degree of A.B. in 1856, and A.M. in 1859; after a year in the Harvard Law School he went to Dover, where he was admitted to the bar in 1861. In 1867, at the age of thirty he was appointed to the bench of the Supreme Court of New Hampshire.



This court was the principal trial court of the state, as well as the law court; and it sat for both purposes in every county of the state.

The venerable and revered Chief Justice Perley was in his last year of service. The vigorous and painstaking Bellows, soon to be Perley's successor, was one of the older members; and Doe, one of the greatest of our American judges, had recently taken his seat on the bench. The next vacancy was to be filled by the brilliant Foster. It was a strong court, and one in which Judge Smith, short as was his term of service, took a prominent part. The writing of opinions was not laborious,—in his seven years of service Judge Smith hardly finished his fourth score,—but the trial work was heavy and difficult. The confinement indoors, the bad air of the primitive court-rooms, perhaps the atmosphere of petty contention always so distasteful to him, sapped his strength and he was seriously threatened with tuberculosis. He resigned, and went for several years to Minnesota. In the bracing air of that state he was completely cured.

While he was called upon to write few opinions during his service on the Supreme Court, several of these were distinguished. His best-known opinion is probably that in *Eaton v. Boston, Concord & Montreal Railroad*.<sup>1</sup> In this masterly essay on the nature of property, the force of an unconstitutional statute, and the meaning of a "taking" by eminent domain, Judge Smith established the law as it is generally held to-day upon an impregnable basis. *Eastman v. Clark*<sup>2</sup> is an important decision on the nature of partnership. *Rich v. Errol*<sup>3</sup> denies the power of a selectman to bind the town by a promissory note. *Northern Railroad v. Concord Railroad*<sup>4</sup> is a scholarly investigation of the consequences of an equal division of the judges on appeal. *State v. Franklin Falls Company*<sup>5</sup> deals with the right to obstruct a fishway, and the possibility of barring it by adverse use. *Palmer v. Concord*<sup>6</sup> is a nice question of libel and of causation arising upon the destruction of property by a mob. These and all his opinions are characteristic: learned without

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<sup>1</sup> 51 N. H. 504 (1872).

<sup>2</sup> 53 N. H. 276 (1872).

<sup>3</sup> 51 N. H. 350 (1871).

<sup>4</sup> 50 N. H. 166 (1870).

<sup>5</sup> 49 N. H. 240 (1870).

<sup>6</sup> 48 N. H. 211 (1868).

prolixity, full of common sense, but searching first for legal principles, lawyer-like, convincing, sane.

Upon his return to New Hampshire after the re-establishment of his health, Judge Smith entered practice again at Dover, and at once became a leader of the bar of the state. His secure position and lofty character, his strong public spirit, joined with a mind excellently qualified to think through and present clearly the most intricate legal problems raised by modern industrial conditions, led to his useful employment in the difficult causes of the whole state. He seems always to have shown an interest in the recruiting of the legal profession. A lecture he delivered before the students of Harvard College on "The Law as a Profession" greatly impressed those who heard it. Soon after the delivery of this lecture, in 1890, he was appointed Story Professor of Law.

The appointment of a man to teach law after thirty years of practical life is an experiment fraught with more danger now than when, two generations ago, teaching was neither an art nor a profession. Many men have tried it and failed, others have become tolerable teachers; a few have reached success in time by making experience their ladder. Judge Smith attained success almost from the first. His method differed from those of his colleagues,—indeed they all differed from one another,—but he made his students think, and he so presented his subjects that they remembered the law he taught. In his first year his courses were Torts, Agency, and Corporations: a stiff dose for a new teacher who had not recently received instruction in the courses. One reason for the greater immediate success as teacher of law of one who has graduated within a few years is that he has recently been familiar with the methods of teaching, and very probably with the very subject-matter he is to teach and the book from which he teaches it. Judge Smith had no such help. There was indeed a case book in Torts, but it covered only half the subject-matter of the course. In Agency there was a list of cases which Professor Keener had been using in the course. Corporations was a new course altogether, and the few lectures on the subject which Professor Ames had been giving at the end of his course in Partnership can have been of little help. Judge Smith's success as a teacher in his first year was the highest proof of his skill in teaching. He taught two other subjects later,—Persons, and the Interpretation of Statutes; but Torts

and Corporations continued to be his principal subjects, and in the domain of Torts he made investigations and wrote articles which distinctly advanced scientific knowledge of this important and very modern portion of the law.

During his twenty years' service as teacher in the Harvard Law School he won the respect, the admiration, and the affection of pupils and colleagues alike. It was his immediate adoption of the case method of teaching which Langdell regarded as the mark of its complete success; and the experience upon the bench and in active practice which he brought to the school was a welcome element in the diversity of gifts within the faculty. As a teacher he was clear and painstaking, pointing out difficulties rather than glossing them over. He was interested in his pupils; and those in particular who came from New Hampshire soon learned that he knew their families, and expected much of them. On reaching his seventieth year he expressed a wish to retire; but at the earnest request of his colleagues he remained two years longer, until he had completed twenty years on the faculty; he then retired, in 1910, full of honors, happy in the thought that the only thing his colleagues and his pupils regretted about his membership in the faculty was his ending of it.

After his retirement he continued his regular methods of work. Every working day he spent several hours in the Library, at a table in the stack; and there he wrote several of his most useful legal essays, and with reluctance—for he modestly doubted their value—he published them. Among these articles may be mentioned: "Legal Cause in Actions of Tort,"<sup>7</sup> a careful and suggestive article on a subject just coming into prominence; "Sequel to the Workmen's Compensation Acts,"<sup>8</sup> a thoughtful consideration of one of the fundamental principles in Torts; "Tort and Absolute Liability,"<sup>9</sup> a further discussion of the fundamental requisites for liability; "Liability for Substantial Physical Damage to Land by Blasting,"<sup>10</sup> a careful and critical examination of the theories on the subject.

He accepted an honorary degree from Dartmouth "in his youth," as he apologetically explained; but he refused the degree of LL.D.,

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<sup>7</sup> 25 HARV. L. REV. 103, 223, 303 (1917).

<sup>8</sup> 27 HARV. L. REV. 235, 344 (1914).

<sup>9</sup> 30 HARV. L. REV. 241, 319, 409 (1917).

<sup>10</sup> 33 HARV. L. REV. 542, 667 (1921).

which he might several times have had from Harvard, because he would not appear in person at Commencement to receive it. No one more avoided display. He probably never attended the Commencement exercises after robes were worn. He disliked also contentious argument. He never would defend his opinions after he had explained them. If a pupil attempted to question his views on a point of law, and cited the alleged opinion of a colleague as against his own, he invariably replied, "Mr. A. is undoubtedly right and I am wrong," and said no more. So absolutely modest and gentle was he!

Goodness, gentleness, purity, modesty—what blessed quality did he lack? And withal he was a thinker whose mind remained active and intensely modern to the last day of his life, and a thorough scholar, whose work in the newer aspects of Torts commands the study of every worker in that field of the law.

Of his qualities and his services to the law several of his associates and successors on the faculty have spoken. Dean Pound, successor in his professorship and his principal course, writes: "So open-minded a man of his years—or any years—is a rare phenomenon. Nor do I think we commonly appreciate the great influence he had on the law of Torts. His part of Ames & Smith shaped a great deal of current thinking." Professor Williston has said:<sup>11</sup> "Distinguished as was his career as practitioner, judge, teacher, scholar and writer, it is not in these aspects that his friends will first or chiefly recall him, but as one of the best and kindest men who ever trod the earth. He had a marvellous faculty for distinguishing and remembering persons. A class of students, however large, was never to him merely a collective unit. Each member was a distinct individual, and it was surprising how often he would identify a student's father or uncle or cousin as an old friend, or find some other thread with which to bring himself closer to the young man; and no trouble was too great if it would aid a student either in intellectual problems, or in personal difficulties. This affectionate interest in his students seemed no effort, but the spontaneous manifestation of a kind and sympathetic nature. All who were ever his pupils can be called to testify that his interest in them was warmly appreciated. His younger colleagues still more deeply treasure the

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<sup>11</sup> *Boston Transcript*, September 6, 1921.

memory of a companion whom this brief notice too inadequately portrays."

In a characterization in the manner of Chaucer, Professor Wambaugh wrote.<sup>12</sup>

"Wide was his law, and wide his common sense —  
 For learning could not make that sound head dense.  
 Wide was his taste for men and eke for reading —  
 Old heads and young, old books and new, all leading  
 Unto the wisdom of the perfect man,  
 And all him keeping young as he began,  
 Till you 'gan wonder, all that you were able,  
 How one so young could be so venerable.  
 And, best of all, his charity was kind —  
 In all the world no enemy could find."

Professor Frankfurter, one of his pupils, writes: "No teacher could more persistently have taught loose-minded youth the great lesson of thinking things, not words. Judge Smith was neither deluded nor deterred in his thinking by phrases, however time-honored and authoritative. He compelled his students, sweetly but relentlessly, to cross-examine words like 'malice,' 'coercion,' 'rights,' and other enemies of clear thought, until they pierced beneath the labels to the conflicting interests which they covered. This method was one manifestation of his deep devotion to the painful pursuit of truth, of his belief in unflagging loyalty to reason as the essential condition of ordered life. He was effective in conveying that lesson to his students because he lived, and not merely taught, a life of calm and unflagging devotion to the conquest of truth. Never did he give deeper proof of this faith than during his last years. All about him men, whose training and position imposed the *noblesse oblige* of the disciplined mind, were carried away by post-war fears and hysteria. Judge Smith wanted to *understand*. He sought and read out-of-the-way reports and documents—the coal report of Mr. Justice Sankey, for instance—in order to come closer to the real issues, and to realize more vividly the human impulses back of the crude expression of them, in the tangled and vexed field of industrial relations. He who did so much, with insight and disinterestedly, to formulate the legal issues in

<sup>12</sup> *In re J. S.*, 16 GREEN BAG, 803.

labor controversies, insisted to the last day of his life on knowing the facts; and, knowing, he brought the serene calm of his mind to bear upon the solution, with patience and with tolerance even for views which he did not share. To the end, in his ninth decade, he believed unflinchingly in the processes of a sympathetic, searching mind as the prerequisite of legal thought."

Professor Chafee writes: "Precise and thorough as he was in his definition of legal rights and duties, Judge Smith had little respect for the man who always insists on those legal rights, and will not do more than the law requires. It was his wont each year, after showing how few positive acts were demanded by the law, to recommend the students to read the last part of the twenty-fifth chapter of Matthew, and thus call to mind the obligations above and beyond law.

"I knew Judge Smith only after his retirement, but he was constantly in the Law School Library, arriving early in all weathers, and working hard as if he wanted to learn the law all over again. Though he taught the students no longer, the faculty was privileged for many years in the opportunity of learning from him. It was a pleasure to show him some new striking case in Torts, and see his eager interest and listen to his discriminating analysis. He had, moreover, a quality which I have never seen equalled in any one else: an intimate knowledge of biographical and historical facts which enabled him to furnish a background of reality for any important legal controversy in America during the last century. He drew not only on his wide reading in legal biography, but also on local tradition and the friendships of a long life. His power of stating the personal characteristics of judges and eminent lawyers was always delightful.

"Judge Smith was no *laudator temporis acti*. Despite his knowledge of the past, he was never gloomy about the present. Perhaps his memories of the intolerance of the Civil War, which men later came to regret, enabled him to touch on present disputes with calmness and breadth of vision. He continually gave encouragement and valuable suggestions to younger men, engaged with the controversial issues of their day. His hopefulness made him seem a contemporary; but he combined with the modernity of his thought the experience and wisdom of age. As one leaves youth behind, the problem of growing old well acquires unexpected importance.

Judge Smith will always stand out as a man who had mastered that problem. As his years, so was his strength; and to the last each day brought him new pleasures and new work."

It is delightful to see how to each of these associates the remarkable qualities of Judge Smith made its appeal. Few men have been able so to satisfy such varying qualities among their friends, or to keep the mind so young in interest, so old in experience.

*Joseph H. Beale.*

"A CONTEMPORARY STATE TRIAL—THE UNITED STATES *VERSUS* JACOB ABRAMS *ET ALS.*"

AN article with the above title, written by Professor Zechariah Chafee, Jr., was published in April, 1920 (33 HARVARD LAW REVIEW 747). Thereafter two charges were made: (1) that the writer of this article misstated facts which he could not have misstated, honestly, if he had, in fact, taken the pains to consider the case as a whole; (2) that Dean Pound, Professors Frankfurter, Chafee, and Sayre, and Mr. Adams, the Librarian, had signed a petition for executive clemency in the case of Abrams which contained misleading statements of fact. The matter was referred by the Board of Overseers to the Committee to Visit the Law School. That Committee reported as follows:

In the matter of the statement of Austen G. Fox, Esq., with respect to an article by Professor Zechariah Chafee, Jr., in the Harvard Law Review of April, 1920, entitled "A Contemporary State Trial."

REPORT OF THE COMMITTEE TO VISIT THE LAW SCHOOL

To the Board of Overseers of Harvard College:

At a meeting of the Board of Overseers, held on the 9th day of May, 1921, a statement signed by Austen G. Fox, Esq., and an accompanying letter signed by certain graduates of the Harvard Law School with respect to an article by Professor Zechariah Chafee, Jr., in the April, 1920, number of the Harvard Law Review, and with respect to a petition for pardon signed by Dean Pound, Professors Frankfurter, Chafee and Sayre, and Mr. Adams, the Librarian of the Law School, were referred to this committee to consider and report its conclusions to the Board of Overseers.

This committee had a hearing on the issues raised by this statement, at the Harvard Club of Boston, on the 22nd day of May, 1921, at which were present the President of the University, Mr. Fox and several of the gentlemen who signed the letter of transmittal, Dean Pound, Professors Chafee, Frankfurter and Sayre, Librarian Adams and others.



The committee has carefully considered the issues involved and begs to report as follows:

1. The charge of impropriety in signing a petition for the pardon of Jacob Abrams was not sustained and was abandoned.
2. The committee are unanimously of the opinion that Professor Chafee made no statements in his article which were consciously erroneous.

A majority of the committee are of the opinion that he made no statements in his article that were culpably negligent and so far as any material statements of law or fact may have been erroneous, the errors, if any, were in matters of opinion only.

A minority of the committee are of the opinion that the article contains erroneous statements of fact which should not have been made, and having been made, should have been corrected in the Harvard Law Review.

The committee therefore recommend that no further action be taken by the Board of Overseers.

Respectfully submitted,

For the Committee.

(Signed) FRANCIS J. SWAYZE,  
*Chairman.*

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Professor Chafee desires to make the following corrections and statements with respect to the article.

(1) The article stated (page 755) that it was the duty of the court to warn them (the jury) explicitly against the Russian theory of guilt, and confine their attention to the Pro-German theory, and that "there is no trace of such a warning in the record." For this second statement should be substituted: "The judge failed to give any adequate warning against this theory of guilt,—the jury certainly may have, and probably did, misunderstand the issue."

(2) Prober, one of the defendants, admitted that he was opposed to intervention in Russia. He was not shown to have had anything to do with the pamphlets. The article stated (page 761) that "the acquittal of the other prisoner, Prober, was directed by the

court." For this statement should be substituted: "The jury acquitted Prober."

(3) The article stated (page 750) that this was Judge Clayton's "first Espionage Act case." The author relied on the Bulletins of the Department of Justice on the Interpretation of War Statutes, which contained no previous trial before Judge Clayton. The fact, however, is that Judge Clayton had tried previously two or three Espionage Act cases, which, so far as the author knows, have never been reported.

(4) Strike out the statement on page 774 that "The wife of one prisoner has been deported to Russia without even a chance for farewell."

(5) The article stated (page 750) that all the prisoners except one who died before trial were indicted. The fact is that this prisoner was indicted at the same time as the other prisoners, that his indictment was severed on motion of the prosecution, and that he died before completion of the trial.

(6) For the last paragraph on page 761 of the article, substitute the following. New matter is bracketed.

"Two features of the trial demand a passing notice. The method by which confessions were obtained from the defendants after arrest was not raised on appeal, since the overt acts were proved in other ways, but their testimony [if it can be believed] throws a significant light on the question, important to criminologists, of the treatment which political prisoners may expect in this country, especially if they be obscure aliens. [The deportation raids prove that abuses are possible, but such a conclusion cannot be reached in the Abrams case without a detailed investigation of the conflicting evidence.] The army sergeants deny threats and force. [The assistant district attorney, who showed much consideration toward the prisoners, noticed no traces of violence on the morning after the arrest, and is convinced that none was used.] [On the other hand,] ('but' in the original) the charges of brutality [seem] ('are' in the original) disquietingly specific and sincere. The defendants and their counsel also insisted [though the influenza epidemic and the long interval since the arrest render it improbable,] ('but not so convincingly' in the original) that Schwartz's fatal illness [was caused by] ('resulted from' in the original) the violence of one soldier, whom Judge Clayton relieved from the necessity

of telling whether or not he was called by his associates, 'The Tiger.' The court observed, 'There is no evidence as to who killed Schwartz any more than there was any evidence as to who killed cock robin.'"

In the second line of page 749, substitute "captured" for "entrapped." In fourth line from the bottom of page 773, substitute "young aliens" for "youngsters."

(7) The article stated (page 774) that "The whole proceeding, from start to finish, has been a disgrace to our law." The author remains of the opinion that (a) the conduct of the trial by Judge Clayton was very unfair to the prisoners, and (b) that the sentences recommended by the prosecuting officers and imposed by the court (details below) were much too severe. But the author did not intend to charge, and does not charge, that the prosecuting officers tried the case in an unfair manner.

(The court asked John M. Ryan, Assistant United States Attorney, for a suggestion as to sentences. He recommended leniency in the case of Rosansky, and maximum prison sentences for the other defendants. The sentences imposed were: Abrams, Lipman, and Lachowsky, twenty years in the penitentiary, with a fine of \$1000 each; Mollie Steimer, fifteen years with a fine of \$500; Rosansky, three years with a fine of \$1000.)

(8) The soundness of the author's conclusions (page 773) that "the trial judge ignored the fundamental issues of fact" and "allowed the jury to convict them for their Russian sympathies and their anarchistic views" should be tested by an examination of the whole record, including the stenographer's minutes, and these minutes should be added to the list of principal sources (footnote, page 747). These minutes are in the office of the United States Attorney in New York City. Criticism of the soundness of the author's conclusions is mainly based upon certain passages in the stenographic minutes. The author remains of the opinion that the judge during the trial, by bringing out the fact that the defendants were anarchists and by examining them as to their anarchistic views, had created a prejudice against them which was not cured by his charge, and that taking the proceedings as a whole the jury certainly may have thought, and probably did think, that an intent to prevent intervention in Russia was a criminal intent under the indictments; but the author wishes to give in full the passages

from the stenographer's minutes upon which his critics mainly rely.

Toward the close of the main charge, the court said:

"If you find that the defendants purposely and intentionally wrote, uttered, printed and published what they are charged to have written, uttered, printed and published, in a wilful attempt to bring the form of the government of the United States into contempt, scorn, contumely and disrepute, or to encourage resistance to the United States, or to urge and advocate the curtailment of the production of ordnance and ammunition necessary and essential to the prosecution of the war, with intent by such curtailment to cripple and hinder the United States in the prosecution of the war, this would constitute criminal intention, notwithstanding you may also find that the motives of the defendants were to serve a certain faction in Russia in so doing, and the defendants were not conscious of doing anything unlawful, because they did not know the law." (pp. 237, 238, printed RECORD; p. 777, Sten. Min.)

The court charged at request of defendants' counsel:

"No. 19.—The law does not punish earnest attempts to spread beliefs or ideas which may be entertained by an individual whatever may be his political creed or economic beliefs, unless by so doing he intends to commit a crime and violate some provision of our criminal law." (pp. 797-8, Sten. Min.)

The first of the requests to charge presented by defendants' counsel was charged in the following words:

"No. 1. I do not have to remind you that every man has the right to have such economic, philosophic or religious opinions as seem to him best, whether they be socialistic, anarchistic or atheistic, and you should divorce yourselves from any prejudice you may have against any defendant by reason of proof of any such opinions on his part. (p. 780, Sten. Min.)

The defendants' counsel requested the following instruction (p. 808, Sten. Min.):

"That if from the fact that an army had been sent to Russia without a declaration of war, the jury should become of the belief that the defendants merely intended to protest against that intervention, they must find the defendants not guilty."

The court said:

"I permitted you to read that to the jury, and I will say this to the

jury, that whatever may have been done by an army of intervention is not in this case, and I leave it to you . . . to say what the intention of the defendants was in the printing and distributing of the pamphlets. . . . Did they intend to do those things that the indictment says they did? That is for you."

Immediately following this request appears the following in the stenographer's minutes:

"Mr. Weinberger: That if the jury should find that the defendants' intentions were only to protest against intervention in Russia, they must find them not guilty.

"The Court: I have told you over and over again, and I do not think it is serving a good purpose to repeat it —

"Mr. Weinberger: I just wanted to make it clear.

"The Court: I endeavored to make it clear, and I have left it to the jury and told them to take into consideration all the facts and circumstances."

*Zechariah Chafee, Jr.*

## THE VALUATION OF PROPERTY IN THE EARLY COMMON LAW<sup>1</sup>

THERE are probably ten thousand cases in the English and American law reports on the proper methods of valuing property for various judicial and administrative purposes. These decisions, however, are nearly all subsequent to the middle of the nineteenth century, and when we seek the origin of the present rules of valuation in the earlier law we are unexpectedly confronted with an almost total absence of authorities. So few, indeed, are the early precedents upon this subject which the writer has been able to discover, that he would shrink from publishing the results of his investigation if it were not for two considerations. In the first place any discussion of the great mass of valuation law which has accumulated during the past half century should, on general principles, be preceded or accompanied by a study of the earlier authorities, if there are any. A historical introduction is generally and properly considered necessary to the treatment, whether theoretical or practical, of any branch of law. And if it turns out, as to that particular subject, that all the law on it is of modern origin, this very fact may be useful in the construction of statutes and contracts, and in the further development of this branch of jurisprudence.

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<sup>1</sup> This article, like that on the Roman law which appeared in the January number of this REVIEW (vol. 34, pp. 229-259), was originally prepared for possible use as a chapter in a general treatise on the law of valuation. The writer submits that the former article revealed the existence of an unexpected amount of ancient law, relating to rules, methods, and evidence in the valuation of property for legal purposes. The results of the present inquiry, however, are practically negative, and it may be doubted whether they are worth publishing in any form. The best excuse for doing so is the hope that the curiosity or industry of others may be stimulated to discover sources and authorities which the writer has overlooked. The inherent difficulties of the subject matter, the mixture of languages, the exasperating abbreviations, the Gothic type, the bad print, and the absence of indexes should make the most industrious investigator of legal topics between Edward I and the time of Coke reluctant to assume that he has overlooked nothing of importance.

The writer wishes to acknowledge his indebtedness to Miss Bertha H. Putnam, assistant professor of history in Mount Holyoke College for her kindness in permitting him to inspect her copy of one of the Marrow manuscripts, and to Mr. C. H. Baesler, Harvard Law School 1919, for general assistance in the preparation of the article.

The absence in the Anglo-American common law, until a relatively recent date, of all discussion of the methods of valuing property is difficult to reconcile either with the fact that the decisions on value in cases of trespass, trover, contract, taxation and eminent domain are now accumulating at the rate of about five hundred per annum, or with the fact that judicial or administrative valuations for all these purposes have been common during several generations, and for some of these purposes during many centuries.

Equally strange, in view of the frequency of contact in the formative period of the common law with the principles of the Roman law, is the total ignorance displayed by our professional ancestors of the rules and methods of valuation which obtained in that system of jurisprudence. While the effort of Bracton to romanize the English law was a failure, both as to theory and procedure, Latin was nevertheless the language of our legal writers for about two centuries, and of our legal documents for six; references to and quotations from the Roman jurists are to be found in every period; and the development of some branches of our law has been considerably affected by the learning of the civilians, ancient or modern. It is cause for astonishment, therefore, not only that no use was ever made in England of the carefully worked out principles of valuation to be found in the Roman law, but that the whole terminology of the subject, as it appears in the Digest, was ignored.<sup>2</sup>

The first treatise on English law, Glanville's "*Tractatus de legibus et consuetudinibus regni Angliae*," which dates from about the year 1187, contains a significant question. Where a thing loaned has been lost by the borrower Glanville says that he must pay its reasonable value. "*Ad rationabile pretium mihi restituendum.*" He adds, however, "*sed sub qua vel cujus probatione prae-standum . . . in quantum id emendare debeat vel sub qua probatione vel cujus idem fit judicandum, quaero.*"<sup>3</sup> It was nearly seven hun-

<sup>2</sup> An amusing illustration of the failure of Bracton's efforts to identify Roman procedure with English practice is furnished by the conversion in fol. 183 b of BRITTON — a book written only a generation later than BRACTON'S DE LEGIBUS — of the *actio familiae heriscundae* (correctly described by Bracton, fol. 100 b and fol. 443 b, also by Fleta, bk. 5, ch. 9, § 2, as an action for the division of inheritances) into an action named after a lady of the Heriscunda family! See the notes to Nichols' edition of BRITTON, vol. 2, p. 65. All the surviving manuscripts seem to contain the same error.

<sup>3</sup> GLANVILLE, bk. 10, ch. 13.

dred years before our courts began to give serious consideration to this and similar questions. Yet from the beginning valuations of real estate must have been necessary in proceedings of dower, in partitions for other purposes, in the determination of a *valor maritagii*, and in other cases; and the "subsides" of the middle ages involved the valuation for taxation of some kinds of personal property. Later on, as the action of trespass was developed, personal property of all sorts had to be valued by the court or jury both in proceedings *quare clausum fregit* and in actions *de bonis asportatis*. So also in detinue and replevin. Then came actions of trover, which extended very much the field of valuation practice. Property valuations, whether of lands or chattels, whether capital or annual, were also involved in writs of elegit, debt, waste, warranty, and in extents for various purposes. Yet throughout this long period of time we find little or no valuation law. Questions of value seem to have been left to the decision of the court or jury in each case, with no thought that there was any need for uniformity of decision, that is for the elaboration of rules of law.

Pollock and Maitland refer to a twelfth century grant in which the relief which must be paid on the grantee's death by his son is described as "*tantum pecuniae quantum nobilis homo dare debet pro tali terra*." This may be an attempt to establish a standard of value; but, so far as we have discovered, it is confined to a single deed.<sup>4</sup> Bracton says that the annual value of an advowson is to be figured at what it is worth "*singulis annis secundū cōmunem aestimationem*;"<sup>5</sup> but no further explanation of this basis of valuation is given. In discussing the law applicable to the case mentioned by Glanville, Bracton merely says, without comment or question, that the defendant *vel ad ipsam restituendam tenetur vel ejus precium*.<sup>6</sup>

Nothing has been found in Fleta, Britton or the early statutes and Year Books which throws any light upon the basis or methods of

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<sup>4</sup> 1 HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, 316. The authors of this learned work also refer (p. 291) to a good definition of annual value — "the best rent that can reasonably be gotten" — as sometimes used in grants in socage tenure. In neither case is the authority given.

<sup>5</sup> DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE, circa 1256, fol. 75 b. Compare this phrase with the "rule of common estimation" in our colonial tax system. See, for instance, the Massachusetts Tax Act of 1651. COL. REC., 3, 287.\*

<sup>6</sup> De Legibus, fol. 99 b.



valuation, except that market value, meaning price current, called by Fleta *forum bladi*,<sup>7</sup> and by Britton the *foer coraunt de ble*,<sup>8</sup> is defined in the statute of 31 Edward I (1304) entitled the "*Parva Custuma*" as "*pretium pro quo ipsi mercatores aliis hujusmodi mercimonia vendere possint.*" This is a good definition of market value in the sense of current price, as we understand it.<sup>9</sup>

The phrase *secundum* (or *juxta*) *verum valorem* is frequently found in the Latin texts, and "*la verraye value*" in the French ones of this period. Stat. 4 Edw. III, ch. 3 (1330), recites that corn, etc., taken for the King's use, having been paid for "a meydru value qils ont value," should thereafter be appraised and paid for "a la vroie value." The phrase becomes in English the "verrey value,"<sup>10</sup> later "very value."<sup>11</sup> The words themselves might be regarded as a translation into medieval Latin and French of the *verum pretium* of the Roman law, if it were not that this concept of value was a technical and highly artificial one,<sup>12</sup> of which there is no trace in English law. These phrases seem, from the context, to mean merely the real or actual value of the property.

The acts for the regulation of the prerogative of purveyance contain definitions of current price and also what may, it is submitted, be regarded as instances or anticipations of the law of eminent domain. The *pretium regium* of medieval continental Europe was fixed under the *jus quod regi competit res mercales comparandi certo et definito pretio*; and an earlier instance, from the Roman law itself, of the exercise of what afterwards came to be known as *jus regium* is furnished by the edict of A. D. 491.<sup>13</sup> The earliest reference to the subject in England is found in Magna Carta, ch. 28 (1215), wherein it is provided that no corn shall be

<sup>7</sup> COMMENTARIUS JURIS ANGLICANI, bk. 2, c. 11.

<sup>8</sup> BRITTON, fol. 75 b.

<sup>9</sup> See also "*le sorti et pris due pays*" in STAT. 15 EDW. III, ch. 5 and 6, and the definition in 36 Edw. III, ch. 32 referred to below.

<sup>10</sup> OXFORD DICT., A. D. 1338.

<sup>11</sup> See *Bond v. Tricket*, Cro. Eliz. 853, case 12, and *Noy*, 38 (1602), where the annual value of an ecclesiastical benefice is held to be its "very" or present full value, not the value put upon it in the official valuation of some earlier period. And see *Sharpe v. French*, Lutw. 1301 (1684) where the value according to the King's Books is contrasted with the *realis valor*, or *modo clari annui valor*, of the time of trial. See also *Ashby v. Power*, 3 Gwillim's Tithe Cases, 1238 (1781).

<sup>12</sup> See 34 HARV. L. REV., 231, 241-244.

<sup>13</sup> See Ducange's Glossarium, and 34 HARV. L. REV. 240, 254.

taken by any constable, etc. *nisi reddat denarios*, that is without compensation; but the basis of payment is not specified. The act of 4 Edw. III (1330), fixing the price at the "vroie value" has already been referred to; and stat. 36 Edw. III, ch. 2 (1362) provides specifically that payment shall be made at "*le pris pr quel autiels vitailles sont venduz cõement en marcheés environ*."<sup>14</sup>

In *Filow's case*<sup>15</sup> there is a long discussion as to what makes a deer, dog or other animal the subject of private property so that its owner may maintain trespass for the loss of it, and several of the judges evidently thought that when an animal was private property its utility for its owner's mere pleasure was a proper element of value. This is in accord with modern law.<sup>16</sup>

The foregoing precedents are the meager results of much reading; and they amount to little or nothing as explanations of the legal methods for valuing property which obtained in medieval England.

In the fifteenth and sixteenth centuries discussions over questions of value seem to have been confined to the matter of language considered below. A study of the Year Books of this period fails to reveal any valuation law; and the same statement holds good of

<sup>14</sup> In the recent case of Attorney General v. DeKeyser's Hotel, [1920] A. C. 508 which involved the right of the Crown in time of war to take over a hotel for use in connection with the national defense, the lower court decided in 34 T. L. R. 329 (1918) that no compensation except that offered by the government was due the owner. The case was appealed, and pending its decision it was agreed that an exhaustive search should be made of the ancient records and other precedents bearing on the question. The result of this search was negative; but from the fact that no case was found in which property had been taken under the royal prerogative but not paid for, the Court of Appeals in [1919] 2 Ch. 197 reversed the decision of the lower court; and in [1920] A. C. 508 this decision of the Court of Appeals was affirmed by the House of Lords. The writer of the present article cannot refrain from calling attention to the inconclusiveness of this investigation, with all the money of the government behind it, into medieval English law on the subject of value. It also seems to him that some of the precedents which are cited in this article as showing that when the prerogative of purveyance was exercised the goods were to be paid for at their market value, were not discovered in the investigation in the De Keyser case; and it certainly is the fact that the various judges who rendered opinions in this case seem to be entirely ignorant of the general practice in such matters which obtained throughout medieval Europe, and also of the learned opinions which are to be found in a half a dozen American state court decisions on the right of the property owner to compensation when his property is taken for a public use, notwithstanding the absence of any provision in the state constitution to that effect.

<sup>15</sup> Y. B. 12 H. 8, p. 3 (1520).

<sup>16</sup> See the discussion of luxury values in the Roman law, 34 HARV. L. REV. 251.

the "abridgements" and other law books from Fortescue, Statham, and Littleton to Coke.

During the sixteenth and seventeenth centuries, an active controversy prevailed over the question whether *pretium* or *valentia* was the proper word to use for the value of the property in a writ of trespass or an indictment for larceny. As the controversy over this question of pleading seemed to open up an obvious field for the discussion of kinds or definitions of value, the precedents and cases bearing on the subject have been carefully studied.

Before taking up this question it will be necessary to give a short account of the words and phrases used in the Latin, French, and English sources of the common law to indicate the value of property.<sup>17</sup> The word *pretium*, which was the ordinary Latin word for value, as well as for price, both in common speech and in the Roman law, is found in Glanville, Bracton, Fleta and the early statutes, in both senses; but before the time of these writings other words had been invented by medieval writers to fill the gap in the Latin language caused by the absence of any word used exclusively for value as distinguished from price. A great number of words were coined during the Middle Ages, mostly out of the verb *valere*, and used as nouns to indicate value in the broader sense. Duncange's Glossarium (1681) gives *valens*, *valentia* (1080), *vale tudo* (1175), *valor*, *valorium* (1092),<sup>18</sup> and many others. The only words

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<sup>17</sup> Down to the time of Edward I statutes, charters and legal writings of every kind, including the treatises of Glanville, Bracton, and Fleta are in Latin; and this language continued to be used in deeds and miscellaneous documents for several centuries, and in writs and other judicial papers until the eighteenth century. French was generally substituted for Latin in the acts of Parliament in the time of Edward I, and "Britton" was written in that language, *circa* 1290. It is also the language of the Year Books. This was poorly spelled thirteenth-century French, but still French. About the time of the accession of Henry VII, English came into use for the statutes; but the legal authors of the period, including Littleton, Statham, Fitzherbert, Brooke and others down to the time of Coke, used in their writings and "abridgements" a jargon of French, Latin, and English, which continued to be the favorite language of the reports until towards the close of the seventeenth century.

<sup>18</sup> All these post-classic substitutes for the *pretium*, *aestimatio* or *utilitas* (as to when these words meant value and when something else, see 34 HARV. L. REV. 241-247) of the Roman law, probably originated in popular usage in the Middle Ages, and were then taken up by the law writers. One of these substitutes, *valor*, is said by an early lexicographer to have been used by Pliny the Elder in the sense of value; but no one has been able to find the passage. The dictionary writer probably confused the prac-

in this list which came into common use in England were *valor* and *valentia*, which appear in legal writings as early as the twelfth century and continued to be employed (for writs and indictments) down to the eighteenth century. Glanville, as already noted, used the word *pretium* as the equivalent of value in the phrase "*rationabile pretium*," the reasonable price or value of an article which the borrower has lost and must account for. He also uses *valentia* when describing a writ to recover land from which the plaintiff's ancestor had taken profits or produce *ad valentiam* so many shillings.<sup>19</sup> Bracton uses *pretium* in the sense of price<sup>20</sup> and also for value generally;<sup>21</sup> that is, he employs the word in both of its Roman-law meanings. He also makes frequent use of *valor* and *valentia*. The same indifferent use of the three words is found in the writs collected and published under the title of Bracton's Note Book;<sup>22</sup> but *valor* and *valentia* are more common than *pretium*. The same statement may be made as to Fleta. Both *valor* and *valentia* are found in the acts of Parliament when these were written in Latin; also in the Court Rolls, the Parliamentary Rolls, the Assize Rolls, and in charters and other legal documents of the early period.

After the substitution, *tempore* Edward I, of French for Latin in the acts of Parliament, the word uniformly used in these documents is the old-French "value," long since obsolete in the language of its origin. This is also the word used in the Year Books, by Britton, and by all the later law writers who composed their works in Anglo-Latin-French. Once in awhile we meet with varia-

tice of his own day with an unverified recollection of a passage in Pliny. See a similar mistake by the English poet Marlowe noted below p. 22.

Professor Leo Wiener of Harvard has been kind enough to assist the writer in tracing back the use of *valor* and *valentia*, with the result that the former word is found in the Laws of Canute, 1027-1034 (Liebermann's *Gesetze der Angelsachsen*, 2, p. 327), and in the book on Norman custom law known as "*Summa de legibus Normannie in curia laicali*" (ed. E. Tardif, 2 pp. 233, 326), which is supposed to have been written at least as early as the first part of the 12th century; and that the words *ad valenciam* appear in the Anglo-Norman "*Leis Willelme*," the Latin translation of which dates from about 1200 (Liebermann, *op. cit.* 493, 505, 517, 519), and in the "*Leges Henrici*," 1114-1118, the Latin texts of which also go back to the year 1200 (Liebermann, *op. cit.* 575).

<sup>19</sup> Bk. 2, ch. 3.

<sup>20</sup> DE LEG., fol. 61 b; 208 b; 39 b.

<sup>21</sup> *Ib.*, fol. 99 a *ad fin*; 102 b; 146 a. The word is mistranslated in the Travers Twiss edition as "price;" what Bracton evidently meant was "value."

<sup>22</sup> Edited by F. W. Maitland, 1887.

tions such as "vaillance," also with "montance" and "pris;" but the word generally used was "value," treated indifferently as either masculine or feminine.

The English "value" is of course the old-French word, and appears in general literature as early as 1303.<sup>23</sup> It is the only word used in the Acts of Parliament after these began to be published in English about the year 1485; but *valentia* continued to be employed in writs and other legal documents for two hundred years more. *Valor* also was in use for the writ *de valore maritagii*, for proceedings in dower, and for other purposes; and the legal authors of the fifteenth, sixteenth, and seventeenth centuries when writing in Latin, or interlarding their French or English with Latin phrases, continued to use *valor* for the value generally of property, either capital or annual. *Valor* is also found in Scotch law until late in the eighteenth century.<sup>24</sup> The word also was used in the sense of appraisal or valuation; as in Domesday and in the lists of the annual value of benefices made for the Popes in the Middle Ages and later for the Crown. See those of Innocent IV (1253) and Nicholas IV (1288), the Nova Taxatio of 1318, and the Valor Ecclesiastus, Liber Regis, or Liber Valorum, compiled under Stat. 26 H. 8, ch. 3 and subsequent laws.

Both *valor* and *valentia* were in common use in the sixteenth century; and the former is to be found in a passage in Marlowe's Doctor Faustus, written about 1590. The learned doctor is represented as quoting "Justinian" to this effect:

Physic, farewell. Where is Justinian?  
Si una eademque res legatur  
Duobus, alter rem, alter valorem rei,  
A pretty case of paltry legacies.<sup>25</sup>

*Valentia* is now quite obsolete; but *valor* has survived in the phrase *ad valorem*, still used in customs' acts and occasionally in other connections. It may be remarked that not only are these words of post-classic origin, but the grammar is not classic Latin. *Valentiae*

<sup>23</sup> In Robert of Brunnes' "Handlyng Synne," line 5966. See other instances in the Oxford Dictionary. The word was sometimes spelled "valour" or "valure."

<sup>24</sup> See KAMES' PRINCIPLES OF EQUITY, ed. of 1825, 358, 462.

<sup>25</sup> The reference is perhaps to DIG., lib. 30, § 33, which, it may be said, incidentally, does not state the law according to Marlowe, and in which the word used for value is not *valor* but *pretium*. Neither here nor anywhere in the Corpus Juris is the word *valor* to be found.

or *valoris*, the *genetivus pretii* of the grammarians, should have been used; and *valoris* was sometimes used by early English writers.

Coming now to the controversy over the use of *pretium* or *valentia* in a writ of trespass, we find that *valentia*, generally spelled *valencia*, seems to have been used from the beginning in the *ad damnum* clause; the usual conclusion of the writ being that the plaintiff says that by reason of etc. he *deterioratus est et damnum habet ad valentiam* so many pounds or shillings. Where the suit was for the destruction or abstraction of personal property it was considered necessary to allege in the body of the writ that the property had a certain value; and it was on this point that the dispute arose. Originally *pretium* and *valentia* seem to have been used indifferently in this clause in a writ of trespass; as also in other writs, such as those involving a valuation of property in proceedings of dower, partition, wardship and the like. Some diversity of practice, however, arose during the fifteenth century with respect to the use of *pretium* and *valentia* in the descriptive clause in a writ of trespass, and in the next century it was contended by some lawyers that an erroneous selection between these words was cause for the abatement of the writ. It was also claimed that the same rule applied to a presentment or indictment for larceny or trespass. The controversy seems to have been started by Thomas Marrow, or Marow, a sergeant at law who delivered a course of lectures at the Inner Temple in the year 1503 on the duties of Justices of the Peace.<sup>26</sup> Marrow's views were the basis of the discussion of the subject by Fleetwood, Lambard and other sixteenth-century writers; and the question figures in the law reports as early as the middle of the sixteenth century. It was not settled till the case of *Usher v. Bushell*, decided in 1661.<sup>27</sup>

According to Marrow, in a presentment for trespass or the asportation of or damage to personal property, it was necessary of some things to say *precii* so much, and of other things *ad valenciam* so much, and the use of the wrong phrase made the indictment bad in law. He mentions about twelve cases in which *precii* must

<sup>26</sup> Marrow died in 1505 and the lectures have never been printed; but several manuscripts, consisting apparently of notes taken down by students in the law-French of the period, have survived. One of them is being edited for the "Oxford Studies in Social and Legal History," by Miss Bertha H. Putnam, associate professor of history at Mount Holyoke College.

<sup>27</sup> *Infra*, p. 25.

be used, about a half dozen in which *ad valenciam* is the proper phrase, and an equal number in which neither phrase should be used. One distinction is between living animals and inanimate property; another between a definite number of units and an indefinite quantity; another between a single article and several; another between foreign coins which are current in England and those which are not; and so on. The two dozen distinctions cannot be justified by any consistent theory which the writer has been able to formulate. They seem to be arbitrary and fanciful, and they were evidently so regarded by Marrow's contemporaries and successors. Fitzherbert in his *Natura Brevium* (1534) denies that the distinction between *pretium* and *valentia* for use in a writ of trespass is valid.<sup>28</sup> Lambard in his *Eirenarcha* or Treatise on the Office of Justice of the Peace, (1579-1582) says that "the value (or price) of the thing is commonly to be declared; in felony, to make it appear (distinct) from petit Larcinie: and in Trespasse, to aggravate the fault and fine;" quotes extensively from Marrow; and appears to think that authority for the latter's views can be found in the Year Books and the Register of Writs. He concludes, however, with the following statement:

"Sundry other dainty and nice differences doth M. Marrow make, where a man shal say *praetii*, and where *ad valentiam*, binding the Enditement to that rule which the Register taketh for original Writs of Trespasse: But for as much as Nele (9. E. 4. 26) sayeth, that Enditements bee not tied to that forme, and because that rule of the Register is not verie constantly observed in Trespasse itselfe (as a thing not materiall, in the opinion of Ma. Fitzh. in his Nat. Br. fol. 88), I thoughte it best to make choyce of these (that I have) for publique use, and to leave the rest for private learning."<sup>29</sup>

West's *Symboleography* (1590)<sup>30</sup> quotes, without acknowledgment, some of the distinctions asserted by Marrow and discredited by Lambard.

Cowel's "Interpreter" (1607) under "Value" says that "Valencia, valor is a known word, yet West nicely distinguishes between value and price," and then quotes from the *Symboleography* without further comment.

<sup>28</sup> Fol. 88M — "Et per ceo appiert, sil soit viue chose ou mort chose, de q lacion soit port, il nest material sil dit precii &c. vel ad valentiam &c." See also *supra*, note 26.

<sup>29</sup> Ed. 1582, pp. 395, 396.

<sup>30</sup> Part 2, § 70; ed. of 1627, fol. 95 b.

In the case of *Mounteagle v. Worcester*,<sup>31</sup> decided by the court of Common Pleas in 1555, the question was raised whether in trover for a chain it was proper to allege in the writ *precii* 100 marks. It was suggested that *ad valorem* should have been used because the chain was a "mort chattel," and reference was made to the Register of Writs and the practice in trespass; but (as nearly as can be made out from the report in Dyer) the point was not regarded with favor, and the final decision appears to have been that the writ was good.<sup>32</sup> *Wood v. Smith*<sup>33</sup> (1606) was trover for the conversion of various articles, and the court refers to the difference between price and value. *Southern v. How*<sup>34</sup> (K. B. 1618) was an action on the case for fraud in the sale of jewels, and Doddridge, J., refers to the "difference between *pretii* and *valoris*." In *Dell v. Brown*<sup>35</sup> (1649) we have a case of trespass in which the distinction between *pretii* and *ad valentiam* was said by Rolle, C. J., to be sound. Finally, in *Usher v. Bushell*<sup>36</sup> (1651), a case of trespass, the Court of Kings Bench swept these "dainty and nice differences" away by holding that either *pretii* or *ad valorem* could be used. Hale in his *History of Crown Pleas*<sup>37</sup> (written before 1676) and Hawkins in his *Pleas of the Crown*<sup>38</sup> (1716), both agree that the distinction was never sound as applied to either writs or indictments.

So far as the precedents go, the writer has been unable to discover any sure judicial basis for the distinction between price and value which seems to have troubled the lawyers and judges from 1500 to 1650. The words "value" and "price" appear to have been used interchangeably in acts of Parliament;<sup>39</sup> the cases cited from the Year Books are inconclusive; Statham's *Abridgement* (*circa* 1470) contains ninety-five cases under "Trans" (= transgressio or trespass), but nothing to indicate any legal difference between price and value in writs of trespass; the case in Dyer is

<sup>31</sup> Dyer, fol. 121; Benl. & Dal., p. 41, pl. 73 (1555).

<sup>32</sup> Counsel for plaintiff might have cited the appeal of robbery set out in BRACTON, fol. 146, in which a gold chain and a robe are alleged to be *talīs precii*. See *infra* p. 26.

<sup>33</sup> Cro. Jac. 129 (1606).

<sup>34</sup> Cro. Jac. 468 (1618).

<sup>35</sup> Style, 174, 182 (1649).

<sup>36</sup> Sid. 39 (1651).

<sup>37</sup> First Am. ed., vol. 2, p. 183.

<sup>38</sup> Bk. 2, ch. 25, 8th ed., vol. 2, p. 322.

<sup>39</sup> See, for instance, "le pris et valure" of wool in the subsidy or tax act of 31 HEN. VI, ch. 8.



against the distinction; the actual practice in drawing writs, as disclosed in the "Registrum Brevium," was not uniform; the high authority of Fitzherbert is that it was immaterial whether one used *precii* or *ad valentiam*; and the final decision of the courts was to the same effect. Other evidence in support of this conclusion is to be found in the Coroners' Rolls<sup>40</sup> where *precii* is frequently associated with single inanimate objects; the writ of admeasurement of dower in Bracton's Note Book<sup>41</sup> in which a building is described as *precii* so much; the use by Bracton<sup>42</sup> already referred to of *precii* in connection with a gold ring and a robe; the use by Fitzherbert<sup>43</sup> of a sword, a necklace, etc., as *precii* or *valoris* so much; the description of a ship *precii* so much in the Registrum Brevium, 95 a, 102 b.

For a modern case see *State v. Sparks*,<sup>44</sup> where an indictment for the larceny of property with a "price" of \$100, was held good under a statute which said property of the "value" of \$100.

The present writer concludes that the difficulty arose largely in the technical mind of Thomas Marrow, and, as by itself it has no bearing on the basis or methods of valuation, it would not have been thought worth discussing, except for the apparent attempt in one of the cases, *Southern v. How*,<sup>45</sup> and also by Lilly in his Abridgement<sup>46</sup> (1719), to spell some principles or definitions in the substantive law of valuation out of the assumed distinction between price and value. *Southern v. How* is very badly reported;<sup>47</sup> but it is apparently the case referred to by Lilly, and that author evidently thought that the court meant to draw certain legal distinctions between value generally and market value. The present writer is unable to make any sense out of either case or comment.

The almost complete absence of valuation law in England is largely to be accounted for by the treatment of all questions of value as matters of fact respecting which the decision of the trial court and jury was final. The leading case on this point would

<sup>40</sup> SEL. SOC. SELECT CORONERS' ROLLS, pp. 22, 92, 100.

<sup>41</sup> No. 632, vol. 2, p. 482.

<sup>42</sup> DE LEG., fol. 146.

<sup>43</sup> Justice of the Peace, 245b-246b.

<sup>44</sup> 30 W. Va. 101, 3 S. E. 40 (1887).

<sup>45</sup> Cro. Jac. 468.

<sup>46</sup> Vol. 2, pp. 628-629.

<sup>47</sup> The report in 2 Roll. Rep. 26 is even more meager than that in Cro. Jac. 468.

seem to be *Hixt v. Goats*<sup>48</sup> (1615), in which the Court of Kings Bench sustained a verdict of £400 in a suit by the vendee in a contract of sale for a deficit in the number of acres to be conveyed, which deficit, figured at the contract price, £11 per acre, amounted to £700. Coke, C. J., says (as translated by Dean Pound in his "Readings"):

"It seems to be good enough, for there may be divers reasons why in equity they ought not to give so much damage as this amount, for it seems here that the jurors are chancellors, and it seems such verdict is good in an action on the case because only damages are to be recovered."

Another case cited in Dean Pound's "Readings" is *Ravencroft v. Eyles*<sup>49</sup> (1766), an action against a sheriff for damages caused by permitting a debtor to escape. A verdict for the plaintiff was sustained; the court, per Wilmot, C. J., saying:<sup>50</sup>

"The quantum of the damages is nothing to the purpose, for if the jury had power in this case to give damages, we must now take it that they have done right; and I am of the opinion that the jury were not confined to give the exact damages in the final judgment, but had a power and discretion to assess what damages they thought proper, for this being an action upon the case, the damages were totally uncertain and at large."

These authorities certainly go far towards explaining the lack of valuation law in damage cases;<sup>51</sup> but they do not, in terms, account for the same absence of rules of valuation and evidence in partitions and other real actions or in detinue, replevin, tax cases, and other early common-law proceedings which involved the valuation of property. It may, of course, be that the rule laid down in *Hixt v. Goats* was understood to apply to all judicial valuations, and that, as intimated at the beginning of this article, no necessity for uniformity of decision, that is for the elaboration of rules of law, in cases of property valuation was perceived until an astonishingly late period in the development of our law. The writer cannot, however, avoid the suspicion that somewhere in the morass of medieval and post-medieval Anglo-French reports and legal docu-

<sup>48</sup> 1 Rolle, 257 (1615).

<sup>49</sup> 2 Wilson, 294 (1766).

<sup>50</sup> Page 295.

<sup>51</sup> According to Professor Pound's views the damages in actions of tort were at large, at least until the end of the eighteenth century.

ments some one more industrious or fortunate than he has been may discover some real law on the subject which he has overlooked.

The eighteenth century was almost as unproductive of valuation law as any of its predecessors. The only decisions on the subject which the writer has found are those relating to the legal determination of the annual value of property for purposes of taxation.

The original Poor Relief Act,<sup>52</sup> which merely authorized the overseers to raise "by taxation . . . competent sums" for the relief of the poor, without stating any principle or method of assessment, was construed from the beginning as contemplating a tax on the net annual value of the land to the occupier. The "land tax" of 1692,<sup>53</sup> provided for a tax on the "true yearly value" or the "full yearly value" of property, but laid down no basis of assessment, and it became the custom to adopt the net poor-rate valuations.

Under these statutes certain legal rules of valuation were worked out in the eighteenth century and the early part of the nineteenth; the most important of which were the rule that the object to be sought is the fair annual value of the property as it stands considered as unencumbered or unaffected (except by way of evidence) by outstanding leases, and irrespective of the fact that an actual lease may carry a rent greater or less, as the case may be, than the fair rental value of the property;<sup>54</sup> and the rule that annual value means the net income to be fairly expected from year to year, not the possibly greater or smaller income of the year for which the tax is levied.<sup>55</sup> These rules are still good law for application to the determination of annual value, either as a finality in itself, or as evidence of capital value.

These cases on taxation showed the necessity for rules of law for the guidance of courts and juries in the valuation of property, and by the middle of the nineteenth century it was well settled in England that there are certain definite rules or methods of valuation, which must be adhered to by trial courts and juries.<sup>56</sup> This prin-

<sup>52</sup> STAT. 43 ELIZ. ch. 2.

<sup>53</sup> Established by STAT. 4 W. & M., ch. 1.

<sup>54</sup> *King v. Skingle*, 7 T. R. 549 (1798); *King v. Bedworth*, 8 East, 387 (1807).

<sup>55</sup> *Atkins v. Davis*, Cald. 317 (1783); *King v. Hull Dock Co.*, 5 M. & S. 394 (1816); *King v. Agar*, 14 East, 256 (1811).

<sup>56</sup> See *Alder v. Keighley*, 15 M. & W. 117, 120 (1846); *Hadley v. Baxendale*, 9 Ex.

ciple had been recognized by the courts of this country half a century earlier.<sup>57</sup>

From this time on, the valuation of property has occupied a constantly increasing share of judicial attention, until at the present time there is hardly any branch of law which is not concerned more or less with property values. The result is an enormous and rapidly increasing number of valuation cases, and a vast amount of discussion about the definitions, methods, and rules of law which are to be observed in the valuation of property.

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341, 354 (1854). For a recent English opinion to the contrary see BROWNE AND ALLAN, *LAW OF COMPENSATION*, 2 ed. p. 543, where the authors, writing of the Lands Clauses Acts, say: "Strictly the law has nothing to do with the way in which an arbitrator arrives at the amount. Its function is to define the subject to be assessed." This is not a correct statement of the law of eminent domain as administered in England ever since the enactment of the original Lands Clauses Act in 1845; but it illustrates what is still a tendency of the courts.

<sup>57</sup> *Walker v. Smith*, 1 Wash. C. C. (U. S.) 152, 154 (1804). On this development of the law of damages see SEDGWICK, §§ 19, 31, and the long list of authorities in 17 C. J., pp. 1061, 1067.

## THE LEGAL LEGISLATIVE AND ECONOMIC BATTLE OVER RAILROAD RATES

FOR nearly fifty years railroad rates have been a prolific source of trouble in the courts, in the state legislatures and in the workings of economic forces. Apparently we have reached a point where the legal battle is nearly over. The problem has shifted to Congress, where economic forces, pressing on the farmers, manufacturers and shippers generally are forcing some kind of change.

The legal battle, long drawn out, is now closing for lack of argument. The opening of this trouble was a reduction of rates by the different states and not by Congress. Since then there has been a bewildering maze of litigation. When the panic of 1873 burst the bubble of inflated values and credit, due to the Civil War and European financing of American railroads, prices declined rapidly, and wheat, corn, hogs and cattle in the Mississippi Valley netted little to the farmer after paying freight rates, and so the western legislatures enacted "Granger Laws" reducing railroad rates. In 1876 the Supreme Court sustained those reductions.<sup>1</sup>

Ten years later, in 1886, in the *Wabash* case, the state power to reduce rates was cut down by a decision of the Supreme Court that a state has no control over rates beyond the borders of the state; in other words, that a state may reduce intrastate rates, but not interstate rates.<sup>2</sup>

Meantime the decisions in the Granger Cases did not go unchallenged. While the original American Constitution of 1787 did not contain the words "law of the land" from Magna Charta of 1215, nor the words "due process of law" from enactments in the next century in the reign of Edward III, yet the Fifth Amendment of 1791 to the American Constitution remedied this omission

<sup>1</sup> *Munn v. Illinois*, 94 U. S. 113 (1876); *Chicago, B & Q. R. R. v. Iowa*, 94 U. S. 155 (1876); *Peik v. Chicago, etc. Ry.* 94 U. S. 164 (1876); *Chicago, M. & St. Paul R. R. v. Ackley*, 94 U. S. 179 (1876); *Winona, etc. R. R. v. Blake*, 94 U. S. 180 (1876); *Stone v. Wisconsin*, 94 U. S. 181 (1876). *Munn v. Illinois* involved grain elevator charges under an Illinois statute of 1871, but the other cases involved railroad rates under statutes enacted in 1874. The *Winona* decision referred to above probably involved the Minnesota Law of March 6 1874 (MINN. GEN. L. 1874, ch. 26).

<sup>2</sup> *Wabash, etc. Ry. Co. v. Illinois*, 118 U. S. 557 (1886).

and provided that no person shall "be deprived of . . . property, without due process of law." That Amendment applied, however, only to the federal government, and it was not until 1868 that it was applied to the states by the Fourteenth Amendment. At first the Supreme Court was not inclined to hold that this Amendment had any application to a state statute reducing rates. In the Granger Cases in 1876, mentioned above, the court declined to make that application. The bar, however, continued to insist that the Amendment did give to the courts the power to set aside a confiscatory rate imposed by state statute or commission. Finally, in 1886, (the same year as the Wabash decision mentioned above) the court intimated that a confiscatory rate might be unconstitutional.<sup>3</sup> Four years after that, in 1890 the court set aside a reduction of rates by a state commission as a violation of the Fourteenth Amendment.<sup>4</sup>

Immediately the question arose — how can a railroad prove that the reduced rate is confiscatory; what elements make up the value of the railroad; what is a fair income on that value; in short, what is "a reasonable rate" in a case of alleged confiscation? On that last short question there have been hundreds of lawsuits waged; thousands of lawyers engaged; millions of money expended. The Supreme Court has studiously refrained from foreclosing itself by a definite answer to this question, just as all courts refrain from defining fraud, lest the definition be not broad enough. The Supreme Court names many elements that help determine what is a reasonable rate, but clearly says there may be others.<sup>5</sup>

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<sup>3</sup> Stone v. Farmers L. & T. Co., 116 U. S. 307, 331 (1886).

<sup>4</sup> Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418 (1890). This case, as correctly stated in the dissenting opinion, practically overruled *Munn v. Illinois*, and it established as a fixed principle of American jurisprudence that the courts might inquire into the reasonableness of legislative reductions of railroad rates. The state commission had ordered a reduction of rates, and the railroad company refused to obey, and the commission applied to the court for a *mandamus*. The Supreme Court of Minnesota sustained the commission, but the Supreme Court of the United States reversed that decision. The court held that the railroad should be given an opportunity to show that the reduced rate was unreasonable.

<sup>5</sup> *Smyth v. Ames*, 169 U. S. 466 (1898), where the court held (p. 540) that the "kind and amount of business and the cost thereof are factors which determine largely the question of rates." The court held that the payment of dividends and interest is subject to the rule that the fair value of the property and the fair value of the services rendered were to be considered, and also the right of the public to be exempt from unreasonable exactions, especially where the bonds may exceed the fair value or the

And, in fact, there is one other that has lately come to the front and now dominates the whole railroad situation. It is that the

capitalization may be largely fictitious. The court said (p. 546) that the amount of compensation to which the railroad is entitled "and what are the necessary elements in such an inquiry, will always be an embarrassing question," but that the alleged basis of all such calculations "must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth" (pp. 546, 547). This whole subject of elements making up a reasonable rate is complicated by the difficulty of dividing railroad expenses incurred jointly for interstate and intrastate business, and also other charges common to both. In *Broesbeck v. Duluth, etc. Ry.*, 250 U. S. 607 (1919), the court said (pp. 614, 615): "Fifth: The remaining objection relates to the formula adopted by the lower court for dividing charges and expenses common to freight and passenger services, and not capable of direct allocation. What method should be pursued in making such division is a very difficult problem, to which railroad accountants, the Interstate Commerce Commission and state railroad commissions have for years given serious attention. Despite much patient study and the exhibition of great ingenuity no wholly satisfactory method has yet been devised. The variables due to local conditions are numerous; and experience teaches us that it is much easier to reject formulas presented as being misleading than to find one apparently adequate. The science of railroad accounting is in this respect in process of development; and it may be long before a formula is devised which can be accepted as satisfactory. For the present, at least, the question what formula the trial court should adopt presents a question, not of law, but of fact; and we are clearly unable to say that the lower court erred in adopting the method there pursued."

The author of this article, in the seventh edition of his work on *CORPORATIONS*, volume 4, page 3614, said that "a reasonable rate is a rate which will sustain the credit of an established railroad, in a particular part of the country, and enable it to raise fresh capital to fulfill its public duties of good service, improvements, betterments, increased facilities and extensions." That was eight years ago, and that view apparently is now the general view of what the rates must be, irrespective of values, costs, depreciation, reproduction and all the other theories, which have given so much trouble and cost so much money. The railroads must be kept going.

I doubt the soundness of the theory that a reasonable rate may be different in a shipper's case from what it is in a confiscation case. The burden of proof may shift from the railroad, but in both cases the railroad is entitled to only a fair return. The shipper's case may be local and be decided on comparisons, etc., but fundamentally it would seem to be the same as a confiscation case. Even if the rate is based on the fair value of the property, without any margin for credit to obtain fresh money, this

rate must be high enough to give profit enough to make safe for investors the investment of a billion dollars a year in railroad stocks and bonds—fresh money for railroad extensions and improvements. Congress had that element of a reasonable rate in view when in 1920 it enacted that the rates must include consideration of enlargement of railroad facilities, and, in fact, might include one half of one per cent of the value of the railroad, “for improvements, betterments or equipment.”<sup>6</sup> All this adds to the complexity of the question of what is a reasonable rate, and yet, strange to say, by reason of this new element, namely, the practical insolvency of many of the railroads, litigation on the whole subject of rates will now probably decrease, so far as railroads are concerned, although it may continue as to street railways, gas, electric light, waterworks and other quasi-public utilities, which are not insolvent.

Railroad rate reductions are due to three sources: (1) Congress; (2) state legislatures and state commissions; (3) the Interstate Commerce Commission, representing Congress.

## I

### CONGRESS

Congress has rarely reduced rates directly,<sup>7</sup> but does so through the Interstate Commerce Commission. But Congress increased railroad wages in 1916,<sup>8</sup> and the effect was the same as reducing rates. Congress did this to avert a strike; and the Supreme Court sustained the Act, but pointed out that it was not confiscatory in

applies equally to a shipper's complaint, and, in fact, the legislatures represent the shippers in legislating a reduction.

<sup>6</sup> Interstate Commerce Act, § 15, a (3) and (4), as amended February 28, 1920.

<sup>7</sup> The case *Atlantic, etc. R.R. Co. v. United States*, 76 Fed. 186 (1896), upheld an Act of Congress reducing rates charged by a land-grant railroad (chartered by Congress July 27, 1866) for the transportation of government troops, etc., there being no showing as to the railroad expenses and receipts for an adequate period. In the case *United States v. Louisville etc. Canal Co.*, 4 Dill. (U. S.) 601 (1873), per Miller, J., sitting at circuit, it was held that although the United States government owns all the stock of a canal company, yet, if there is a mortgage on the property, Congress cannot reduce the tolls to a point where the mortgage is affected. “It is a legislative attempt to destroy vested rights, and a taking of private property for public use without due compensation” (p. 611). In England there is no constitutional provision protecting bondholders against an Act of Parliament affecting the bonds. See *Brown v. Mayor, etc. of London*, 9 C. B. (N. S.) 726 (1861).

<sup>8</sup> Section 3 of “An Act to establish an eight-hour day for employees of carriers engaged in interstate and foreign commerce, and for other purposes” (Act of Sept. 3, 5, 1916; 39 STAT. AT L., pp. 721, 722) reads as follows:



its effects.<sup>9</sup> Congress in 1920 ordered an increase in rates so as to net at least five and one half per cent on the value of the railroads.<sup>10</sup> Congress, on the other hand, in 1913, in response to a public belief that the railroads were over-capitalized, passed an Act that their value should be ascertained by the Commission.<sup>11</sup> The Act did not state whether it was to ascertain that value as a basis for railroad rates or for condemnation proceedings. It is true that the Commission had recommended that such valuation be made, but Congress ignored that recommendation until public opinion demanded a valuation, evidently in the belief that it would demonstrate that the railroads had watered stock and bonds, not representing real value.<sup>12</sup> The Commission has been laboring with that proposition ever since and is now about to report. The indications are that the report will show that the railroads are not over-

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"Sec. 3: That pending the report of the commission herein provided for and for a period of thirty days thereafter the compensation of railway employees subject to this Act for a standard eight-hour work-day shall not be reduced below the present standard day's wage, and for all necessary time in excess of eight hours such employees shall be paid at a rate not less than the pro rata rate for such standard eight-hour work-day."

Dean Bates of the University of Michigan Law School well said in an address before the Texas Bar Association in July, 1921, in regard to this Adamson Act, that it "has opened a Pandora's box and released a swarm, which probably neither God nor the devil has been able yet fully to appraise."

<sup>9</sup> *Wilson v. New*, 243 U. S. 332 (1917). In a later decision, *Ft. Smith & W. R. R. Co. v. Mills*, 253 U. S. 206 (1920), the court held that this Act, although by its general terms purporting to apply to all railroads and railroad employees subject to the Act to Regulate Commerce, was not intended to govern the exceptional case of an insolvent railroad operating at a loss under an agreement with its men, which they desired to keep, allowing them less wages than the act prescribed. See also *Birmingham T. & Sav. Co. v. Atlanta, etc. Ry. Co.*, 271 Fed. 731 (1921).

<sup>10</sup> The Transportation Act of February 28, 1920.

<sup>11</sup> Act of March 1, 1913; 37 U. S. STAT. AT L. 701.

The Commission held that it could not comply with the Act, but the Supreme Court held that it must do so. *United States v. I. C. C.*, 252 U. S. 178 (1920).

<sup>12</sup> It is a curious fact that although the public has for forty years vociferously denounced and legislated against watered stock, yet now the legislatures of the different states are passing laws authorizing the issue of stock with no par value. The claim is made that this will obviate frauds. The obvious answer to that is that if stock *with* par value represents property of that value there is no fraud, while with stock of no par value the real value of the property received in payment is concealed, and this encourages fraud indeed, because the penalty, *i.e.* the liability by statute or common law, is removed. The public knows the value of merchandise but not of stock, and hence is easily defrauded. The writer published an article on this subject in 19 *MICHIGAN L. REV.* 583 (April, 1921).

capitalized, but on the contrary are under-capitalized. This is due largely to the fact that in 1913 (the same year as the Valuation Act, but a few months later in that year), the Supreme Court held in the Minnesota Rate Cases<sup>13</sup> that the present value of railroad lands, terminals and rights of way should be taken as a basis, and not the original cost of those terminals, rights of way and land. These, of course, have increased enormously in value as compared with their original cost fifty or more years ago. In other words, Congress seems to have brought forth a legal basis for even higher rates than we have now. It is true that the Supreme Court has held that enormous increases in value will not be allowed to be the basis of an unfair public rate;<sup>14</sup> but the high values of these terminals and rights of way can hardly be attacked, inasmuch as enormous sums of money have been lost as well as made in railroads,<sup>15</sup> and, moreover, present values are represented by securities in the hands

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<sup>13</sup> *Simpson v. Shepard*, 230 U. S. 352, 454 (1913), where the court said: "It is clear that in ascertaining the present value we are not limited to the consideration of the amount of the actual investment. If that has been reckless or improvident, losses may be sustained which the community does not underwrite. As the company may not be protected in its actual investment if the value of its property be plainly less, so the making of a just return for the use of the property involves the recognition of its fair value if it be more than its cost. The property is held in private ownership, and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law." See also *Denver v. Denver Union Water Co.*, 246 U. S. 178 (1918).

Professor Goddard of the University of Michigan Law School, in the *MICHIGAN LAW REVIEW* for June, 1921 (vol. 19, p. 849), gives a valuable synopsis of the decisions to the effect that the courts, in passing on rate questions, depend chiefly on reproductive cost, while the commissions are impatient with this and rely largely on other elements, especially original cost if ascertainable.

<sup>14</sup> In this same Minnesota Rate Case, 230 U. S. 352, 454 (1913), the court said: "But still it is property employed in a public calling, subject to governmental regulation, and while under the guise of such regulation it may not be confiscated, it is equally true that there is attached to its use the condition that charges to the public shall not be unreasonable."

And in the previous case, *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 52 (1909), the court said: "If the property, which legally enters into the consideration of the question of rates, has increased in value since it was acquired, the company is entitled to the benefit of such increase. This is, at any rate, the general rule. We do not say there may not possibly be an exception to it, where the property may have increased so enormously in value as to render a rate permitting a reasonable return upon such increased value unjust to the public."

<sup>15</sup> The fact is that most American railroads were built ahead of population and the original investment was largely lost. Subsequent successes are talked about, but original losses are forgotten. The hits are history; the misses are mystery.

of investors, and certainly present railroad rates (which even now are not high enough to pay an income on these securities) will apparently have to be borne by the public, although burdensome. On the whole, Congress has not been particularly friendly to the railroads. Even its charity in 1920, limited to six per cent, had an air of condescension towards a poor relative, and merely served to keep the wolf a little farther away from the door. Congress will now have to choose some other plan, because the public will not tolerate any further increase in rates, and in fact is insistently demanding lower rates.

## II

### STATE LEGISLATURES AND STATE COMMISSIONS

These have caused a great deal of trouble. Our dual system of government, excellent though it is, has its drawbacks, and the separate sovereignty of the states has been a prolific source of discord on the railroad question. The Granger decisions in 1876 made the states supreme on the question of rates, Congress not having acted; but, as mentioned above, the Wabash decision in 1886 cut out most of the trouble in confining state activities to intrastate rates.<sup>16</sup> Then came the Shreveport decision, in 1914, that the Interstate Commerce Commission, representing the federal government, could override state statutes and state commissions where intrastate rates, as fixed by them, interfered with reasonable interstate rates as fixed by that commission.<sup>17</sup> That principle has now been applied by the Commission in increasing intrastate rates so that they correspond more closely to the seventy-two per cent increase in interstate rates.<sup>18</sup> Once more the question has gone to the Supreme Court, and its decision may settle the question once for all, so that a harmonious system of rates may at

<sup>16</sup> *Wabash, etc. Ry. Co. v. Illinois*, 118 U. S. 557 (1886).

<sup>17</sup> Where a state commission has reduced the intrastate rate of a railroad so as to discriminate in favor of points within the state as against points outside of the state, the Interstate Commerce Commission may order that railroad to abolish the discrimination by lowering its interstate rate, or by partly lowering its interstate rate and partly raising its intrastate rate, or by raising the intrastate rate alone. *Houston, etc. Ry. v. United States*, 234 U. S. 342 (1914). See also *American Express Co. v. Caldwell*, 244 U. S. 617 (1917), and *Illinois Central R. R. Co. v. Public Utilities Com.*, 245 U. S. 493 (1918).

<sup>18</sup> The decisions of the lower court are reported in *Lehigh Valley R. R. Co. v. Public Ser. Com.*, 272 Fed. 758 (1921), and *City of New York v. United States*, 272 Fed. 768 (1921).

length be possible. The monetary importance of these intrastate rates is not so great as is generally supposed, inasmuch as railroad receipts from these are small as compared with those from interstate business. The state commissions have made a noise on this subject out of all proportion.

### III

#### THE INTERSTATE COMMERCE COMMISSION

This has been the chief storm center of litigation during the past fifteen years. The Interstate Commerce Act was enacted in 1887. It was based in part at least on the English Act of 1845,<sup>19</sup> which was the first English statute regulating railroads. The English Commission works very well, but it has no state legislatures or state commissions, claiming independent jurisdiction, to deal with. The American Commission has had a stormy time indeed. It claimed the power to reduce rates from the beginning, but the Supreme Court ten years later held that it had no such power.<sup>20</sup> For ten years more this was the situation, and then in 1906 Congress gave that power to the Commission. Immediately reductions of rates by the Commission began; but it was on the retail plan, instead of the wholesale plan of the states. The Commission dealt and still deals with specific complaints as to certain shipments or between certain points. It, of course, obeyed the order of Congress in 1920, increasing rates generally, but its function is to deal with rates piecemeal. In so doing it has relieved the courts of a great mass of litigation, because in 1907 the Supreme Court held that a shipper complaining of the unreasonableness of a rate must complain first to the Commission instead of suing in a court,<sup>21</sup> and only after the Commission has made a ruling is he entitled to sue in the courts for violation of such ruling.<sup>22</sup> And there is a further

<sup>19</sup> Railway Clauses Consolidation Act of 1845, 8 & 9 Vict., c. 20. See statement as to this in *Texas & Pacific Ry. Co. v. I. C. C.*, 162 U. S. 197, 222 (1896).

<sup>20</sup> *Cincinnati, New Orleans, etc. Ry. v. I. C. C.*, 162 U. S. 184 (1896); *I. C. C. v. Cincinnati, New Orleans, etc. Ry.*, 167 U. S. 479 (1897).

<sup>21</sup> *Texas, etc. Ry. v. Abilene, etc. Co.*, 204 U. S. 426 (1907); *Southern Ry. Co. v. Tift*, 206 U. S. 428 (1907); *Baltimore & Ohio R. R. Co. v. United States*, 215 U. S. 481 (1910); *Director General v. Viscose Co.*, 254 U. S. 498 (1921).

<sup>22</sup> The Interstate Commerce Commission has exclusive jurisdiction as to the reasonableness and non-discriminatoriness of a railroad company's rule in the distribution of cars, but for a violation of that rule by the railroad company itself the shipper may sue for damages in either the state or federal courts. A state court has

check on such litigation. The rulings of the Commission, like the verdict of a jury, cannot be set aside by the courts, except for errors of law.<sup>23</sup> The result of all this is that few cases now reach the Supreme Court involving reduction of rates by the Commission. From January 1, 1915, to 1921, only twelve such cases appear in the reports,<sup>24</sup> and only sixteen involved reductions by state legislatures or state commissions, while none at all involved reductions by Congress.

jurisdiction of a suit for damages against a carrier for failure to deliver cars in accordance with its own rule, where the rule is not attacked but discrimination and violation of the rule is charged. *Illinois Central R. R. v. Mulberry Coal Co.*, 238 U. S. 275 (1915). Suit does not lie to attack a rule of a carrier as being unfair or discriminatory as against one class of interstate shippers in favor of another, the Interstate Commerce Commission having exclusive jurisdiction as to that, but after the Commission has declared the rule unjust, redress may be before the Commission or in the United States courts. If, however, the rule is fair on its face but has been unequally applied, a suit for damages therefor may be brought in either the state or federal court. *Pennsylvania R. R. v. Puritan Coal Co.*, 237 U. S. 121, 131 (1915). A shipper's claim to be reimbursed for expense for placing inside doors on cars on an interstate shipment may be sustained in the state court as to intrastate shipments under the New York statute (*Loomis v. Lehigh Valley R. R.*, 208 N. Y. 312, 101 N. E. 907—1913), but not in the federal courts as to interstate shipments until after the Interstate Commerce Commission has passed upon the matter. *Loomis v. Lehigh Valley R. R.*, 240 U. S. 43 (1916). If no administrative question is involved, a claim for damages for failure, upon reasonable request, to furnish to a shipper in interstate commerce cars sufficient to meet his needs may be enforced in a state as well as a federal court, and without preliminary finding by the Interstate Commerce Commission. *Pennsylvania Railroad Co. v. Sonman Shaft Coal Co.*, 242 U. S. 120 (1916). A state court has jurisdiction of a suit involving unlawful interstate discrimination where the administrative power and discretion of the Interstate Commerce Commission is not involved and where the jurisdiction of the federal courts is not exclusive. The Commission has exclusive jurisdiction if a rule is unfair on its face, but if the carrier has no rule or regulation on the subject a state court may have jurisdiction. *Langhill v. Pennsylvania R. R.*, 254 Pa. St. 119, 98 Atl. 873 (1916).

<sup>23</sup> *Illinois Central R. R. Co. v. I. C. C.*, 206 U. S. 441 (1907); *Seaboard Air Line Ry. Co. v. United States*, 254 U. S. 57 (1920). In the case *I. C. C. v. Union Pacific R. R. Co.*, 222 U. S. 541 (1912), the court held that the orders of the Commission cannot be set aside by the courts unless beyond the constitutional or statutory power of the Commission, or were based upon a mistake of law, or were confiscatory, or were without evidence or contrary to the evidence, or were palpably unreasonable. To the same effect, see *I. C. C. v. Louisville & N. R. R. Co.*, 227 U. S. 88 (1913), and *Florida E. C. Ry. Co. v. United States*, 234 U. S. 167 (1914), where there was no evidence to sustain the ruling. In the case *Manufacturers' Ry. Co. v. United States*, 246 U. S. 457 (1918), the court ruled, as stated in the syllabus, that where the Commission, after full hearing sets aside a rate as unreasonably high, only a clear case would justify a court, upon evidence newly adduced but not newly discovered, in annulling the Commission's action upon the ground that the same rate was so unreasonably low as to deprive the carrier of its constitutional right of compensation.

<sup>24</sup> In addition some nineteen decisions involved discriminations.

The litigation phase of the whole subject is passing into the economic phase, with Congress as the storm center. The legal battle has become merged into the economic battle between railroad insolvency and trade necessity.

The Supreme Court has certainly done its work well. It was confronted with one of the most difficult, complicated questions in the history of jurisprudence, and it has brought order out of chaos. The power of that Court to declare unconstitutional and void the acts of states, municipalities, commissions, and even of Congress and the Executive itself — a power which has made it the greatest court that ever existed, and enables it to safeguard the rights of all — has been invoked often and earnestly in these rate reduction cases, and its decisions *pro* and *con*, conscientiously considered and learnedly expressed, have commanded the absolute confidence of the people.

Now let us approach the subject from another standpoint. Congress and the state legislatures and the Interstate Commerce Commission and the state commissions are all affected and at times controlled by the great economic forces that control the industrial life of the nation. Formerly, railroad capitalists, such as Vanderbilt and Huntington, and railroad bankers and reorganizers, had much to say, but their power has declined. They fought for themselves, their bondholders and stockholders. Sometimes they warred among themselves. Their wars of competition reduced railroad rates to the lowest in the world.<sup>25</sup> They gave good service, better than any government could or would give. They prospered, however, and although they earned what they got in comparison with what they did, yet the public resented their attitude and actions. They became a great money power and a menace to the country. Capital has learned, just as union labor has learned, that no class will be allowed to dominate this country.

But there is another great economic force that has not declined, namely, the trade necessity for low rates for the farmer, the manufacturer, the miner and the shipper generally. Their power will

<sup>25</sup> Judge Cooley in his opinion *In re Chicago, St. Paul, etc. Ry. Co.*, 2 I. C. C. 231, 261 (1888), holding that the Commission could not stop railroad wars of rates, pointed out that these reckless carriers by giving ruinously low rates were "giving the public to understand that those rates are reasonable and remunerative," and were establishing as against themselves a low standard of rates for all time. His ruling was approved in the *Maximum Rate Cases*, 167 U. S. 479 (1897).

prevail. When in 1886 the Supreme Court held that a state legislature could reduce intrastate rates, but not interstate rates, the latter being exclusively controlled by Congress,<sup>26</sup> Congress immediately in the following year enacted the Interstate Commerce Act.<sup>27</sup> As originally enacted, as stated above, that Act did not give the Commission much if any control over rates. In 1906, however, Congress, impelled by the pressure of public opinion, gave the Commission almost unlimited power over rates.<sup>28</sup> And the Commission was not chary in the use of that power. It refused to allow an increase in rates in 1911.<sup>29</sup> Even in 1917 it refused to allow a fifteen per cent increase.<sup>30</sup> Then came McAdoo and War Control and the rates were put up thirty-three per cent on freight and twenty per cent on passengers. But McAdoo put up the expenses faster than he did the rates, especially the labor expense. The result was that when the Government turned back the railroads to the railroad companies, in 1920, bankruptcy stared them in the face. One government commission controlled their income, while another government commission controlled their labor bill, without the Government being responsible in the slightest. The absurdity of the situation is without a parallel in industrial or governmental history, and of course it cannot last. It is worse than the ship-owning proposition, because there at least the Government pays the deficit. The American fad that all railroad troubles can be shifted to a commission will go the way of all fads. Irresponsible commission rule — irresponsible in the sense that the Government avoids all financial responsibility — will be displaced by some plan, under which the Government will pay the bills, if it makes the rates too low or the expenses too high.<sup>31</sup> Even the

<sup>26</sup> *Wabash, etc. Ry. Co. v. Illinois*, 118 U. S. 557 (1886).

<sup>27</sup> Act of February 4, 1887, 24 STAT. AT L. 379.

<sup>28</sup> Act of June 29, 1906, 34 STAT. AT L. 584.      <sup>29</sup> 20 I. C. C. 243, 307 (1911).

<sup>30</sup> *The Fifteen per cent Case*, 45 I. C. C. 303 (1917).

<sup>31</sup> Theoretically and originally a commission was supposed to be administrative in its character, but in these latter days it has become quasi-legislative, quasi-executive and quasi-judicial; in fact, in Arizona it is declared to be practically a fourth department of the government itself. *State v. Tucson, etc. Co.*, 15 Ariz. 294, 138 Pac. 781 (1914). Those who are interested in the legal status of commissions and the justification for the delegation of powers to them, notwithstanding the written constitutions and jurisprudence of America, will find the subject treated in *Honolulu R. T. Co. v. Hawaii*, 211 U. S. 282 (1908); *Grand Trunk Ry. v. Michigan R. R. Comm.*, 231 U. S. 457 (1913); *Trustees, etc. v. Saratoga Gas, etc. Co.*, 191 N. Y. 123, 83 N. E. 693 (1908);

states may conclude that, having lost control over intrastate rates, it is better to have responsible federal railroad corporations to deal with than irresponsible federal commissions.

Meantime a complete realignment of forces is going on. The bankers and investors are tightening their purse strings and refuse to buy any more railroad securities, thus cutting off the commissary department. The shippers and legislatures have temporarily acquiesced in an increase in rates, but are belligerent. Congress in February, 1920, ordered the Commission to increase rates, so as to pay at least five and one-half per cent on the value of the railroads,<sup>22</sup> and in July, 1920, the Commission raised freight rates about thirty four and five-tenths per cent above the McAdoo rates, making the entire increase about seventy-two per cent on freight.<sup>23</sup> The prospects of a general decrease in rates is dim and distant indeed. The railroads find that even the above increase is not enough to pay interest and dividends and raise fresh money, and yet fresh money they must have. On the other hand, the shippers are rising in their wrath that the rates are so high. International and interstate trade is declining and prices are going down. The farmer is handicapped by the high freight rates. They take too much of the price at which his products are finally sold.<sup>24</sup> The demand is becoming insistent that rates be reduced. The railroads are vaguely promising better

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*Bessette v. Goddard*, 87 Vt. 77, 88 Atl. 1 (1913); *State v. Baltimore & Ohio R. R.* 76 W. Va. 399, 85 S. E. 714 (1915). Compare *State v. Great Northern Ry.*, 100 Minn. 445; 111 N. W. 289 (1907).

JUDSON, *INTERSTATE COMMERCE*, 3 ed. § 53 (p. 100), in speaking of commission rule says, "We are thus compelled to revise our time-honored conception of the distribution of the powers of government, as we have not only executive, legislative and judicial departments, but also the department of administration, distinct from, and yet to a degree exercising the functions, which have been deemed appropriate to each of the others." Mr. Judson points out that the Interstate Commerce Commission exercises legislative, executive and judicial powers.

If, as many expect, the national, state and municipal governments ultimately acquire all public utilities, these "fourth departments" would disappear.

<sup>22</sup> Act of February 28, 1920, 41 STAT. AT L. 488.

<sup>23</sup> FEDERAL RESERVE BULLETIN, May, 1921, p. 135 (final edition, p. 507).

<sup>24</sup> The FEDERAL RESERVE BULLETIN for May, 1921, says (p. 136) (final edition p. 508): "The result of existing conditions in the railroad rate structure is twofold (1) railroad charges and costs are at present retained upon a basis which has undergone no readjustment such as has occurred in other branches of industry, so that they exact too large a proportion of the selling price of commodities, while (2) the lack of satisfactory adaptation of the rates to the various types of freight has resulted in preventing the movement of some classes of commodities to competitive markets."



things. Congress is vaguely intimating that government aid will again become necessary and vaguely intimating that that means government ownership. All this is alarming to conservative minds. Vice-President Coolidge, in an interview June 1, 1921, said:

"No one can say where the tremendous sum of money necessary for the purchase of the railroads, the equivalent of our war debt, could be secured. Certainly it would not result in any less charge for capital than is now paid. The saving in taxes would be merely a shifting of the burden, and it does not appear from experience that other operating expenses would be less. So I do not see that government ownership offers an easy avenue of escape.

"The nation has not liked, and would not like, being taxed for the direct maintenance of transportation. Some solution must be found in the reduction of expenses, for it is obvious that there can be no increase in rates. In fact, the demand is all for a decrease."

The brilliant representative of the railroad presidents, Mr. Kruttschnitt, at a hearing before the Senate Committee on Interstate Commerce, on May 10, 1921, on the railroad problem, said that great economies could be made by

- (1) Charging tolls to common carriers using the highways.
- (2) Charging tolls to common carriers using the inland water-ways.
- (3) Stopping public aid to water competition with railroads, such as the Panama Canal in competition with the trans-continental railroads.

All this involves a great fact — misapplied. The public certainly is expending hundreds of millions of dollars annually on highways that give free roadbed to motor trucks carrying freight; hundreds of millions on waterways used without charge by steamboats; and has spent hundreds of millions on the Panama Canal with little or no income. But would Mr. Kruttschnitt raise the price of commodities by charging for the use of highways and waterways in order that traffic may be driven to the railroads? That is a startling proposition. He might better have said:

"The Government gives cheap transportation facilities on highways and waterways, by furnishing free that which corresponds to a railroad roadbed. Why should not the Government aid the railroads by assisting in their finances? Is water and highway transportation more important or more entitled to public assistance than railroad transportation? If public funds and credit are used for the one, why not for the other?"

Of course Mr. Kruttschnitt did not say this, inasmuch as the railroad presidents know that government aid means government control, much the same as the present control over highways and waterways by the national, state and municipal governments. But there certainly is no reason why the Government should aid waterways and highways and yet refuse aid to that bankrupt institution, the railroad system of the United States. The living, pressing question is, not whether aid shall be given (the situation compels that), but how shall it be given and how shall the national control be exercised?

The Interstate Commerce Commission to-day is Congress, so far as railroad rates are concerned, and the Commission responds to the pulsations of public sentiment, the same as Congress. The Commission is in control, but is not responsible for results. This is power without responsibility, and cannot last. The railroad managers are helpless. The investor will not invest. The railroads cannot add to their facilities, and yet the country is growing all the time. The public is willing to vote hundreds of millions for highways, but is unwilling to vote anything further for the railroads. This is on account of private control.

One way out is the application of the principle of the Federal Reserve Banking System to the railroads. This can be done by Congress incorporating federal railroad corporations for districts, into which the whole country could be divided, and then providing for a Federal Railroad Board to control those federal railroad corporations. Senator Lenroot, in a bill introduced by him in the Senate, provided for but one such federal railroad corporation to cover the whole country, but the vastness and diversity of this country, and the suspicions, jealousies and hostilities that would attend one centralized federal railroad corporation, controlling all the railroads of the country, will probably prevent any such plan being adopted.

And the millennium would not dawn even if a Federal Railroad Board controlled all the railroads by means of subsidiary federal railroad corporations. Rates would not be much lower and service would not be better. But at least the money would be forthcoming to make this national transportation system what it should be. That is the crucial point. The country will wait to see what the railroads can do with the present situation, but if they fail, as fail

they probably will, the present system of control will be swept aside as incompetent and outgrown. It will not be sufficient for the railroads to earn just enough to pay present dividends and interest. They must earn enough surplus to win back the confidence of investors, in order to sell new stock and bonds to the amount of a billion dollars a year. The billion must be had, and if the railroads cannot command it without a government guaranty, that guaranty must be given. With that guaranty will go a new system of control.<sup>35</sup>

This plan is not government ownership. The Government would not own any of the property, either stocks, bonds or the railroads themselves.<sup>36</sup> The Government would merely name the Federal Railroad Board and guarantee the dividends. The Federal Railroad Board, appointed by the President and confirmed by the Senate, would be governmental in its origin, but not governmental in its work. Neither capital nor labor nor the present railroad management nor the farmer nor the commercial classes should, as such, be given representation on that Federal Railroad Board. Members, of course, would be chosen from those classes, but when they became members they would cease to represent any class, just as the President of the United States represents no class, but all classes. That Board *would* have complete control of all of the railroads. It could select, employ and discharge at will, directly or indirectly, any railroad general manager in the United States. It would have complete and absolute control over receipts and expenditures, the same as the old railroad kings used to have. There would be no divided responsibility, no delayed decisions. It would be a unified power and would be workable and logical in

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<sup>35</sup> On June 30, 1921, a representative of the Interstate Commerce Commission proposed to the Senate Committee on Interstate Commerce that Congress incorporate a company, the entire capital stock to be owned by the government, to buy and sell railroad securities, to loan moneys to the railroads, and to buy equipment and lease or sell it to the railroads, subject always to the approval of the Commission. As an opening wedge this comes pretty close to the plan outlined above. Its weak feature is that it does not carry real control of the railroads.

<sup>36</sup> Government ownership is thoroughly discredited in this country at present, on account of war experiences, resulting in a loss of about one and a half billion dollars to say nothing of the bad service. Yet the American Federation of Labor, at its annual convention, held in Montreal, voted on June 17, 1920, by 29,059 to 8,349, that the American Government should own the railroads and exercise "democratic management." This position was reaffirmed in 1921.

its structure. At present the country is disgusted with guaranties, and naturally so in view of recent experiences; but if Congress is to control rates with one commission and the labor bill with another commission, Congress must guarantee results to the investor; and on the other hand, if the investor is to be guaranteed results he must give up the control — such little control as he has. On that file the present situation will break its teeth.

The legal side of this proposition is attractive. Federal corporations, owning the railroads, need not be subject to state laws. Two cent laws, full crew laws and other choice assortments of state laws would exist only by the lethargy of Congress. States could then regulate railroads only by the implied or express consent of Congress, and state regulation would be reasonable and useful if permissive instead of under claim of right. Congress incorporated several railroad corporations during or soon after the Civil War,<sup>37</sup> and while they are now practically extinct, the decisions as to their status in regard to the states show that federal incorporation is the short and effective way to relieve the railroads from the pernicious activity of state legislatures and state commissions.<sup>38</sup>

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<sup>37</sup> The first one was that of the Union Pacific granted July 1, 1862, 12 STAT. AT L. 489. In 1864 Congress chartered the Northern Pacific R. R. Co., and authorized it to build a railway line from a point in Minnesota or Wisconsin to Puget Sound. 13 STAT. AT L. 365. In 1866 Congress chartered the Atlantic & Pacific R. R. Co. to construct a railroad from a point in Missouri to the Pacific Ocean. 14 STAT. AT L. 292. In 1871 Congress chartered the Texas Pacific Railroad to construct a railroad in California and Texas. 16 STAT. AT L. 573.

<sup>38</sup> Mr. Justice Brewer, sitting at Circuit in the case *Ames v. Union Pacific R. Co.*, 64 Fed. 165 (1895), said, p. 170, as to the *Reagan case*, 154 U. S. 413 (1894), in the decision of which he wrote the opinion:

"It is insisted that the Union Pacific Railway Company cannot be subjected to the provisions of this statute, because it is a corporation created by Congress, and as such, in the discharge of any of its functions, is subject only to the control of that body. The general question of the power of a state in respect to rates for local freight over a corporation organized under the laws of Congress was considered in 154 U. S. 413, and it was there held that the mere fact that the corporation was so organized did not exempt it from state control in that respect. *It was conceded in the opinion in that case that Congress could wholly remove such a corporation from State control*; but it was held that, in the absence of something in the statutes indicating an intention on the part of Congress to so remove it, the state had the power to prescribe the rates for all local business carried by it. Of course, that decision is controlling." *Italics are mine.*

In this same case on appeal, *Smyth v. Ames*, 169 U. S. 466 (1898), the Supreme Court took practically the same view on pages 521, 522. See also the quotation in *Banker's Trust Co. v. Texas & Pac. Ry.*, 241 U. S. 295, 305 (1916).

There is also an economic side to the proposition, which is equally attractive. On January 1, 1920, the par value of all railroad stocks and bonds was \$19,576,000,000, consisting of \$10,684,000,000 funded debt and \$8,982,000,000 stock.<sup>39</sup> Of this stock, however, \$4,330,493,806 is held by the railroads themselves.<sup>40</sup> This reduces the \$19,576,000,000 to \$15,245,506,194. The market price of these securities is on the average far below par. This would reduce the \$15,245,506,194 that much more. On the other hand, the indications are that the physical valuation of the railroads will show a value of over \$19,576,000,000. Hence a plan by which government guaranteed stock be issued in exchange for these bonds and stock at their fair value would be an attractive proposition and would not require any cash. It would be like the Government accepting \$10,000,000,000 foreign government bonds, and then exchanging those bonds, with a guaranty, for this government's outstanding bonds to that amount. If the American people can obtain full and permanent control of about twenty billion dollars value of transportation facilities by guaranteeing a moderate income on something over ten billions of federal corporation stock, this is an opportunity, especially as it would substitute real control for present pseudo control, and avert railroad bankruptcy.

There are those who argue that government control, through a Federal Railroad Board, is trusting too much to voters. But that would be no more than we are now doing by exercising government control through the Interstate Commerce Commission and the Labor Board. Moreover, this lack of faith in the plain people is not justified. He who studies carefully the history of this country will find that in every great national emergency and on every great national question, the intuitions and instincts of the plain people have found the right way; and where they had no leader they produced one out of obscurity, such as Lincoln, and when diplomacy failed they marched to battle. The American people want transportation at cost and they are determined to have it.

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<sup>39</sup> INTERSTATE COMMERCE COMMISSION, 34th Annual Report, p. 100, for the year ended October 31, 1920.

<sup>40</sup> STATISTICS OF RAILWAYS IN THE UNITED STATES, 32d Annual Report for year ended 1918, p. 34.

## THE OWNERSHIP OF COMMUNITY PROPERTY

THIS paper does not purport to discuss the origin and history or present status of the community property system. It may however be desirable to make a brief introductory statement for the benefit of those who have not found it necessary or convenient to familiarize themselves with the general notions of the system. To most of us who grew up on the common-law pabulum of dower and curtesy the *jus mariti* and tenancies of the entirety, the idea of a system which recognizes the proprietary equality of the spouses is attractive, and we have seen efforts being made toward such equality by legislative reformation of the common law.

The community system occupies itself with two kinds of property, separate property being as essential to the system as community property. It is rather easier to define separate than community property, and one may thereafter say, to cover up his difficulty, that all other is community. All property possessed at the time of marriage by either spouse, and all acquired thereafter by gift, devise, or descent, is separate. All other property is community. But one may do a little better than that, by indicating the chief sources of acquisition of community property, to wit: property in public lands acquired from the government, as under the homestead laws;<sup>1</sup> property acquired by adverse possession, borrowed money and purchases on credit; accessions and fixtures; damages resulting from personal injuries to a spouse; earnings of spouses and the investments thereof and the enhancement of investments; reinvestments; proceeds from life insurance; rents, issues, and profits of separate property, in some jurisdictions, etc. The chief notion concerning such acquisitions is, that they result mainly from the joint efforts of the spouses, while the marital relationship is sustained — the matrimonial gains.

The nature of the community property system on the Continent and the ownership of the community property there, is likewise beyond the purview of this paper, which attempts to make a

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<sup>1</sup> See brief discussion of this topic by the writer in May number, 1921, 9 CALIFORNIA L. REV. 267.

dogmatic exposition of such ownership, more especially of the nature of the wife's interest, in the eight states of the Union where the system has been established.<sup>2</sup>

Mr. Tiffany, in the new edition of Tiffany on Real Property, in Chapter VII, under the heading Co-ownership, discusses Joint Tenancy; Tenancy in Common; Coparcenary; Tenancies by the Entireties; Partnership Property; and devotes in addition one section consisting of about two full pages, or about four pages with footnotes, to community property. He does not examine the general sources of acquisition during marriage. He refers to the liability of community property for "community debts" without suggesting the character of the "community debts," and briefly refers to the descent of community property. As to the nature of the ownership of such property he seems to indicate that there are but two views, — a California-Louisiana view, and a Texas-Washington view.<sup>3</sup> These statements are substantially all borrowed and many of them are exceedingly misleading.

As a matter of fact there are four theories regarding the nature of the ownership of community property, and they differ essentially from each other in regard to the nature of the wife's interest. These theories are here called, for convenience, the California or single ownership, the Washington or entity, the Idaho or double ownership, and the Texas or trust theories, respectively.

#### THE CALIFORNIA OR SINGLE OWNERSHIP THEORY

The California theory is that the husband owns the community property, that the wife has a mere expectancy and not a vested interest, that her interest, whatever it is, is a sort of incumbrance upon the husband's absolute title;<sup>4</sup> that her interest vests only when the husband predeceases her.<sup>5</sup> This view of absolute

<sup>2</sup> The states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington.

<sup>3</sup> 1 TIFFANY, REAL PROPERTY, 2 ed., 1920, § 195.

<sup>4</sup> Spreckels v. Spreckels, 116 Cal. 339, 48 Pac. 228 (1897); Clavo v. Clavo, 10 Cal. App. 447, 102 Pac. 556 (1909); *In re Burdick's Estate*, 40 Pac. 35 (Cal., 1895); Fennell v. Drinkhouse, 131 Cal. 447, 63 Pac. 734 (1901). In the opinion of Attorney General Palmer rendered February 26, 1921, at page 435, it is held that in California the income-tax returns from community property may not be reported, one half by each of the spouses, but they should be reported as a whole by the husband.

<sup>5</sup> Packard v. Arellanes, 17 Cal. 525 (1861).

ownership is regarded by the courts apparently as consistent with the fact that the husband cannot alienate in fraud of the wife,<sup>6</sup> nor dispose of more than one-half interest by will,<sup>7</sup> together with other statutory impediments imposed on his absolute ownership.<sup>8</sup> A statute requiring the wife's consent in writing before the husband can dispose of community property by gift was held, in *Spreckels v. Spreckels*,<sup>9</sup> not to be applicable to property acquired before the statute was passed, because it deprived the husband of a vested interest. It was also held that when property was acquired after that date, the statute did not make a voluntary alienation by the husband wholly void where the wife did not so consent, but that it was voidable at the election of the wife, and that it became valid by the recognition of it by the surviving widow when in her will she referred to such gift made by her husband as a reason for making a particular disposition therein;<sup>10</sup> and that she was put to her election to take under her husband's will, and her election was sufficient to validate the title created by her husband's gift. The court further said that there was no intention by this statute to interfere with the husband's ownership and that the title remained wholly in him as before. Such a provision does not vest in the wife any interest in the community property during the marriage; she has nothing more than a right to revoke the gift.<sup>11</sup>

In California the one-half interest which the wife receives on the death of the husband is inherited,<sup>12</sup> and so as heir of her husband she must pay an inheritance tax.<sup>13</sup> An action can be maintained against the spouses for specific performance of a contract entered into with the husband to convey community land, and the husband has the power to convey without the consent of the wife.<sup>14</sup>

The statute requiring that "the wife must join with him (the husband) in executing any instrument by which the community

<sup>6</sup> *Smith v. Smith*, 12 Cal. 216 (1859); *Lord v. Hough*, 43 Cal. 581 (1872).

<sup>7</sup> *Beard v. Knox*, 5 Cal. 252 (1855).

<sup>8</sup> *KERR, CYCLOPÆDIC CODES OF CALIFORNIA*, 1920; *CIVIL CODE*, §§ 146, 164, 168, 172, 172 a, 1401, and 1402. *Cf. Steinberger v. Young*, 175 Cal. 81, 165 Pac. 432 (1917).

<sup>9</sup> 116 Cal. 339, 48 Pac. 228 (1895).

<sup>10</sup> *Spreckels v. Spreckels*, 158 Pac. 537 (Cal., 1916).

<sup>11</sup> *Dargie v. Patterson*, 176 Cal. 714, 169 Pac. 360 (1917).

<sup>12</sup> *In re Burdick's Estate*, 40 Pac. 35 (Cal., 1895), 112 Cal. 387, 44 Pac. 734 (1896).

<sup>13</sup> *In re Moffitt's Estate*, 153 Cal. 359, 95 Pac. 653 (1908).

<sup>14</sup> *McClellan v. Lewis*, 25 Cal. App. Dec. 655, 169 Pac. 436 (1917); *Strauss v. Cauty*, 169 Cal. 101, 145 Pac. 1012 (1915). This rule was altered by statute § 172 a in 1917.



real property or any interest therein is leased for a longer period than one year, or if sold, conveyed, or incumbered,"<sup>15</sup> does not cause a contract of sale or exchange made by the husband alone to be void in the sense of passing no interest in the land. It is voidable only at the instance of the wife.<sup>16</sup> The property is community though the record title stands in the wife's name.<sup>17</sup> Of course then such property is liable for the debts of the husband,<sup>18</sup> but not of the wife,<sup>19</sup> though apart from statute it was held to be liable for the ante-nuptial debts of the wife.<sup>20</sup>

It results, then, that as the husband "is the absolute owner of the community property the same as he is of his separate property,"<sup>21</sup> on death of the wife he does not take anything that he did not have before, *i.e.*, he is not the wife's heir, but rather his interest is relieved of a sort of incumbrance and on her prior death she leaves no interest subject to administration.<sup>22</sup>

This was not always the view of the California court.<sup>23</sup> "Courts and counsel have occasionally endeavored to find some property right in the wife, or some respect in which the husband's interest falls short of full property."<sup>24</sup>

It is probably true, as Mr. Tiffany suggests,<sup>25</sup> that this theory is more nearly in accord with the Spanish theory than any of the others, but it seems interwoven with certain common-law concepts of vested interests probably not existing in the Spanish law. Under the Spanish law "the rents, issues, and profits of separate property" became community property, but the California court,

<sup>15</sup> CIVIL CODE, 172 a; *Packard v. Arellanes*, 17 Cal. 525 (1861); *Gwynn v. Dierssen*, 101 Cal. 563, 36 Pac. 103 (1894).

<sup>16</sup> *Goodrich v. Turney*, 186 Pac. 806 (Cal., 1920).

<sup>17</sup> *Riley v. Pehl*, 23 Cal. 70 (1863); *Parry v. Kelly*, 52 Cal. 334 (1877); *Svetinich v. Sheean*, 124 Cal. 216, 56 Pac. 1028 (1899). This rule was changed by statute in 1889. See CAL. CIV. CODE, § 164.

<sup>18</sup> *Farmers Bank v. Drew*, 192 Pac. 105 (Cal., 1920).

<sup>19</sup> CIVIL CODE, §§ 167 and 171 a.

<sup>20</sup> *Van Maren v. Johnson*, 15 Cal. 308 (1860); *Vlautin v. Bumpus*, 35 Cal. 214 (1868).

<sup>21</sup> *Wright v. Rohr*, 182 Pac. 469 (Cal., 1919).

<sup>22</sup> *In re Klumpke's Estate*, 167 Cal. 415, 139 Pac. 1062 (1914); *Packard v. Arellanes*, 17 Cal. 525 (1861).

<sup>23</sup> *Beard v. Knox*, *supra*, note 7; *Godey v. Godey*, 39 Cal. 157 (1870).

<sup>24</sup> See *Spreckels v. Spreckels*, 116 Cal. 339, 48 Pac. 228 (1897).

<sup>25</sup> 1 TIFFANY, REAL PROPERTY, 2 ed. (1920), § 195. Rule changed by statute in 1889. See CAL. CIV. CODE, § 164.

deriving its inspiration from the common law, has held that a statute transferring such future rents, issues, and profits to the community was unconstitutional.<sup>26</sup> The implied criticism of the logic of this view in *Warburton v. White*,<sup>27</sup> and particularly in *Arnett v. Reade*,<sup>28</sup> by Mr. Justice Holmes, should be noted. "The notion that the husband is the true owner arises by confusion between the practical effect of the husband's power and its legal ground; if not by a mistranslation of ambiguous words like *dominio*." He observes that the notion on which the state decision had been based was "that during the joint lives the husband was the owner in substance, the wife having a mere expectancy, and that the old saying was true, that the community is a partnership which begins only at its end."

#### THE WASHINGTON OR ENTITY THEORY

The Washington theory of the community of husband and wife is that the spouses constitute an entity,<sup>29</sup> and that this entity is the owner of the property, in which entity the members are equal in right and interest,<sup>30</sup> although the husband is constituted by statute the managing agent. Even the absolute power of disposition does not create in him a larger proprietary interest in the community property than the wife possesses.<sup>31</sup> The husband is the agent of the entity, not of the individuals, and this statutory agency may be altered or annulled at the pleasure of the legislature.<sup>32</sup> "The individuality of both spouses is merged, in so far as property acquired by either after marriage is concerned, and the title to property . . . vests in such entity."<sup>33</sup>

<sup>26</sup> *George v. Ransom*, 15 Cal. 322 (1860).

<sup>27</sup> 176 U. S. 484 (1900).

<sup>28</sup> 220 U. S. 311 (1911).

<sup>29</sup> *Holyoke v. Jackson*, 3 Pac. 841 (Wash., 1882); *Oregon Impr. Co. v. Sagmeister*, 4 Wash. 710, 30 Pac. 1058 (1892); *Stockland v. Bartlett*, 4 Wash. 730, 31 Pac. 24 (1892); *Shorett v. Signor*, 58 Wash. 89, 107 Pac. 1033 (1910); *Miller v. Maddocks*, 58 Wash. 695, 107 Pac. 1036 (1910); *Wasmund v. Wasmund*, 90 Wash. 274, 156 Pac. 3 (1916); *Olive v. Meek*, 103 Wash. 467, 175 Pac. 33 (1918); *Ostheller v. Spokane, I. E. Ry. Co.*, 107 Wash. 678, 182 Pac. 630 (1919).

<sup>30</sup> *Mabie v. Whittaker*, 10 Wash. 656, 39 Pac. 172 (1895); *Marston v. Rue*, 92 Wash. 129, 159 Pac. 111 (1916); *Holyoke v. Jackson*, 3 Pac. 841 (Wash., 1882).

<sup>31</sup> *Warburton v. White*, see note 27, *supra*.

<sup>32</sup> *Holyoke v. Jackson*, see note 29, *supra*; *Mabie v. Whittaker*, see note 30, *supra*; *Hill v. Young*, 7 Wash. 33, 34 Pac. 144 (1893).

<sup>33</sup> *Ostheller v. Spokane & I. E. Ry. Co.*, see note 29, *supra*.

Among the acquisitions after marriage are the damages arising from personal injuries to either spouse. The entity being the real party in interest must sue therefor through its managing agent, and if its agent has contributed to the injury by his negligence, there can be no recovery.<sup>34</sup>

A further result of the entity theory and the proprietary equality of the spouses is, that the community property is not liable for the separate obligations of the husband,<sup>35</sup> whether arising from contract<sup>36</sup> or tort.<sup>37</sup> It was at one time thought that although the community real estate could not be made liable for the husband's separate obligations, yet the community personalty could be so made liable, because the husband had the absolute power of alienation, equally as in the case of his separate property.<sup>38</sup> But the court subsequently saw the inevitable result of its own logic, and that power of alienation was not the equivalent of proprietary interest, and held that personalty also was not liable.<sup>39</sup>

The Washington court, however, does not always follow the logic of its position, and it seems desirable here to consider two different sets of cases. The first set<sup>40</sup> involves generally the question whether, when a husband acquires land within the state, under a statute which requires the wife to join in an incumbrance or alienation thereof, the wife not having come to the state for some reason or other, he may alienate the land to a *bona fide* purchaser for value without notice of the marital relationship, the husband having represented himself to be a bachelor or widower, and in some cases having recited such statement in his conveyance.

<sup>34</sup> *Ostheller v. Spokane & I. E. Ry. Co.*, see note 29, *supra*.

<sup>35</sup> *A fortiori* of course the community property would not be liable for the separate obligations of the wife since the husband is the statutory manager. The subject of "Community Obligations," however, will be discussed in a subsequent paper and so is not considered at length here.

<sup>36</sup> *Case Threshing Machine Co. v. Wiley*, 89 Wash. 597, 154 Pac. 437 (1916).

<sup>37</sup> *Schramm v. Steele*, 97 Wash. 309, 166 Pac. 634 (1917).

<sup>38</sup> *Powell v. Pugh*, 13 Wash. 577, 43 Pac. 879 (1896); *Gund v. Parke*, 15 Wash. 393, 46 Pac. 408 (1896); *Morse v. Estabrook*, 19 Wash. 92, 52 Pac. 531 (1898).

<sup>39</sup> *Schramm v. Steele*, see note 37, *supra*, where the cases are reviewed and the cases cited in note 38, *supra*, overruled.

<sup>40</sup> *Sadler v. Niesz*, 5 Wash. 182, 31 Pac. 630 (1892); *Nuhn v. Miller*, 5 Wash. 405, 31 Pac. 1031 (1892); *Schwabacher v. Van Reyepen*, 6 Wash. 154, 32 Pac. 1061 (1893); *Canadian & A. Mtg. & T. Co. v. Bloomer*, 14 Wash. 491, 45 Pac. 34 (1896); *Daly v. Rizzutto*, 59 Wash. 62, 109 Pac. 276 (1910).

In *Sadler v. Niesz*<sup>41</sup> the husband deserted his wife in Pennsylvania and came to Washington. Thereafter he purchased land, and while representing himself to be a widower, conveyed the same to the defendant. The wife on coming to Washington took up her residence with him for a time, and on discovering the fact of the conveyance, joined her husband in an action to recover the land. The court, being greatly influenced by the unfairness of the situation as regards the purchaser, the members of the court not really agreeing on the reason, held that plaintiff could not recover. The main ground, however, as to the wife, is estoppel from asserting the relationship, and that as to the public the marital relationship did not exist. *Nuhn v. Miller*<sup>42</sup> and *Schwabacher v. Van Reypen*<sup>43</sup> are similar, save that the latter involved a mortgage made by the husband which contained a recital that he was unmarried. It does not appear where the wife was at the time. The facts are also substantially the same in *Canadian & A. Mortg. Co. v. Bloomer*,<sup>44</sup> and in *Daly v. Rizzuto*.<sup>45</sup> In the latter case the court said that where a wife seeks to establish her community interest against one who purchased from her husband's grantee for value on a clear record title, she has the burden of showing that defendant purchased with notice of her equity.

The last case could probably be defended on the ground of express statutory provisions<sup>46</sup> then in force, but the court does not rely on them but rather on the prior cases. The court may have been unconsciously influenced by certain Texas decisions, which under the Texas doctrine are quite defensible.

But how, if the entity owns the property and the husband is expressly denied the power of alienation as its agent, can estoppel be asserted against the wife under such circumstances? Does a deserted wife owe an express duty to strangers to live with her husband? Judging from *Adams v. Black*,<sup>47</sup> we must so conclude. In the latter case the husband had likewise conveyed land to a purchaser, by representing himself to be an unmarried man and the purchaser did not have notice of the marital relationship. The

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<sup>41</sup> See note 40, *supra*.

<sup>42</sup> See note 40, *supra*.

<sup>43</sup> See note 40, *supra*.

<sup>47</sup> 6 Wash. 528, 33 Pac. 1074 (1893).

<sup>42</sup> See note 40, *supra*.

<sup>43</sup> See note 40, *supra*.

<sup>46</sup> REM. & BAL. CODE, §§ 8771 and 8772.

spouses were cohabiting, however, and the court held that no title passed by a conveyance by the husband alone.

The deserted wives in the above cases made no misrepresentation. Would it have made a difference if they had been insane or invalid? The hardship on the husband's grantee would have been equally great. If the husband does not own the property and is not the agent of the entity to alienate, what title can he pass? Dower which is an inferior and inchoate right cannot be so extinguished at common law.<sup>48</sup>

There is, strictly, only one objectionable case in what is above referred to as the other set of cases inconsistent with the Washington view.<sup>49</sup> But the majority of the court regarded certain three cases as being parallel. In *Anders v. Bouska*,<sup>50</sup> the record title to certain community land stood in the name of the wife. Thereafter an action was begun by B against the husband for a community debt, and a writ of attachment was levied on the land. Subsequently the wife conveyed this land to A, a purchaser who secured an abstract. The abstract did not show the attachment lien, because it was indexed against the husband and not against the wife. After judgment for plaintiff against the husband and levy of execution, a sale was ordered and B purchased the land at the sale. It was held that A took the land clear of the lien, the majority of the court relying upon two earlier cases, *Clerf v. Montgomery* and *Johnson v. Irwin*;<sup>51</sup> Rudkin, J., dissenting, pointed out clearly the majority's misconception of the law.

In the *Clerf* case, the land had been conveyed to the wife by the husband in fraud of creditors. Thereafter and without any action being brought to set aside this conveyance, an attachment was filed against the property of the husband in the county. Just before judgment was obtained against him by his creditor, the wife sold the land to a *bona fide* purchaser. Reversing the decree of the lower court, the Supreme Court held that the purchaser took the land clear of the attachment lien because there was no notice

<sup>48</sup> *Williams v. Lambe*, 3 Bro. Ch. 264 (1791); *Randolph v. Doss*, 4 Miss. 205 (1839); *Mason v. Dierks Lumber Co.*, 94 Ark. 107, 125 S. W. 656 (1910), 26 L. R. A. (N. S.) 574, where there is a note with citation of other cases, and circumstances.

<sup>49</sup> *Anders v. Bouska*, 61 Wash. 393, 112 Pac. 523 (1910). The other two are *Clerf v. Montgomery*, 15 Wash. 483, 46 Pac. 1028 (1896); and *Johnson v. Irwin*, 16 Wash. 652, 48 Pac. 345 (1897).

<sup>50</sup> See note 49, *supra*.

<sup>51</sup> See note 49, *supra*.

of the attachment given to the purchaser, the attachment not being indexed against her. It is submitted that this case in no wise supports the *Anders* case. Here the wife held the property as her own separate estate, because there is a clear presumption that when the husband conveys property to the wife he makes her a gift<sup>52</sup> if she does not pay a consideration from her own funds, and the statute so provides. She had a defeasible title good till defeated. There was no such presumption in the *Anders* case, the conveyance being from a third person, and when so conveyed a community interest is presumed.<sup>53</sup>

In the *Johnson* case, certain actions had been begun in November, 1894, against one Bennett, a non-resident defendant, and a certain tract of land was attached as his. In September, 1893, Bennett had conveyed this land to one Irwin. Irwin, on January 1, 1895, conveyed the same to one Johnson to secure his note to Johnson. On January 9, 1895, Irwin intervened in the suits against Bennett, claiming title to the attached land. On the trial it was adjudged that the conveyance to Irwin was *sans* consideration and in fraud of creditors, and the conveyance was ordered set aside and the attachment lien was adjudged good. Thereafter the land was sold to satisfy this judgment and the purchaser was let into possession. On Irwin's subsequent failure to pay his note Johnson foreclosed, and the court held his mortgage was a first lien. In this case, likewise, Irwin had a defeasible title, and before it was defeated his conveyance to a *bona fide* purchaser passed of course a valid interest. Thus neither of the two latter cases is in point in support of the first one.

#### THE IDAHO OR DOUBLE OWNERSHIP THEORY

In Idaho the interests of the spouses are equal and of the same sort. Whereas in Washington neither spouse owns the community property, in Idaho both own it, that is, each owns an undivided and indivisible one half of it. Each has a legal title equal to that of the other without reference to which spouse

<sup>52</sup> *Hayden v. Zerbst*, 49 Wash. 103, 94 Pac. 909 (1908); *Stewart v. Kleinschmidt*, 51 Wash. 90, 97 Pac. 1105 (1908); *Powers v. Munson*, 74 Wash. 234, 133 Pac. 473 (1913); *Woodland Lumber Co. v. Link*, 16 Wash. 72, 47 Pac. 222 (1896); *Patterson v. Bowes*, 78 Wash. 476, 139 Pac. 225 (1914).

<sup>53</sup> *Carpenter v. Brackett*, 57 Wash. 460, 107 Pac. 359 (1910).

holds the record title.<sup>54</sup> This theory has the largest numerical support of all, being followed in Arizona, Nevada, and New Mexico.<sup>55</sup>

The husband, accordingly, cannot convey alone a good title to a *bona fide* purchaser who has no notice of the community relationship even though that relationship has ceased to exist, and the land still stands in the husband's name,<sup>56</sup> when he is not the community heir of his deceased wife. Oddly enough, however, the community property is liable to be taken for the separate obligations of the husband whether they arise from contract<sup>57</sup> or tort.<sup>58</sup> Oddly, because since the conjugal interests are not severable,<sup>59</sup> the property of one person is taken to pay another's obligations. Thus if *Schramm v. Steele*<sup>60</sup> had arisen in Arizona,<sup>61</sup> and presumably in Idaho, the community property, including the wife's interest therein would be subject to levy of execution and sale. In that case the husband was sued for damages for the alienation of the affections of another man's wife, and judgment was awarded against him for a considerable sum. The community property, under the Washington theory, was properly held not liable.

The wife does not inherit her one half from the husband as in California, and so pays an inheritance tax only on the other one half received from the deceased,<sup>62</sup> of which the surviving spouse is made the statutory heir,<sup>63</sup> and on the husband's death her formerly vested interest is simply freed from his control.

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<sup>54</sup> *Kohny v. Dunbar*, 21 Idaho, 258, 121 Pac. 544 (1912); *Ewald v. Hufton*, 31 Idaho, 373, 173 Pac. 247 (1918); in *Hall v. Johns*, 17 Idaho, 224, 105 Pac. 71 (1909), the court with slight consideration followed the California theory and held that the wife has only an expectancy in community property. See opinion of Attorney General Palmer of Feb. 26, 1921, referred to in notes 4 *supra*. In *Bosma v. Harder*, 94 Ore., 219, 185 Pac. 741 (1919), the Oregon court held that in Idaho the husband was the absolute owner of the community property and could give it away *sans* the wife's consent, following the California and quite overlooking the Idaho cases.

<sup>55</sup> *LaTourette v. LaTourette*, 15 Ariz. 200, 137 Pac. 426 (1914); *Molina v. Ramirez*, 15 Ariz. 249, 138 Pac. 17 (1914); *In re Williams' Estate*, 40 Nev. 241, 161 Pac. 741 (1916); *Beals v. Ares*, 185 Pac. 780 (N. Mex., 1919). For the earlier view in New Mexico *contra*, see *Reade v. DeLea*, 14 N. Mex. 442, 95 Pac. 131 (1908).

<sup>56</sup> *Ewald v. Hufton*, *supra*, note 54.

<sup>57</sup> *Holt v. Empey*, 32 Idaho, 106, 178 Pac. 703 (1919).

<sup>58</sup> *Villescas et Ux. v. Arizona Copper Co.*, 20 Ariz. 268, 179 Pac. 963 (1919).

<sup>59</sup> *Stockand v. Bartlett*, 4 Wash. 730, 31 Pac. 24 (1892).

<sup>60</sup> 97 Wash. 309, 166 Pac. 634 (1917). See note 37, *supra*.

<sup>61</sup> *Villescas v. Arizona Copper Co.*, see note 58, *supra*.

<sup>62</sup> *Kohny v. Dunbar*, see note 54, *supra*.

<sup>63</sup> IDAHO COMP. STAT., 1919, § 7803.

Since the Idaho court has clearly declared that each spouse owns an undivided and, during marriage, indivisible one half vested, legal interest in the community property, without reference to which spouse holds the record title, it would seem that where a statute gives the other one half to the survivor on the prior death of the other without leaving a will, such survivor must take this other one half by succession and that the spouse so dying and having been possessed in life of such an interest in community property, must have left an estate subject to the jurisdiction of the probate court. In order to set out clearly the matter of the devolution of community property I quote at length the Idaho statute:<sup>64</sup>

"Upon the death of either husband or wife, one half of all the community property *shall go to the survivor*, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, in favor only of his, her, or their children or a parent of either spouse, subject to the community debts, provided that no more than one half of the *decedent's half of the community property* may be left by will to a parent or parents. In case no such testamentary disposition shall have been made by the deceased husband or wife of *his or her half of the community property*, it shall go to the survivor, subject to the community debts, the family allowance and the charges and expenses of administration; *Provided, however*, that no administration of the *estate* of the wife shall be necessary if she dies intestate."

On analyzing this statute we find in the first part of the section that "one half shall go to the survivor." How does it "go"? Since it is not inherited<sup>65</sup> because it is already owned, this must mean something like "becomes the separate property of the survivor" or is "freed from the limitations previously imposed on it."

<sup>64</sup> IDAHO COMP. STAT., 1919, § 7803.

<sup>65</sup> IDAHO COMP. STAT., 1919, § 7791. Other pertinent sections are as follows: § 7792, "The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the probate court, and to the possession of any administrator appointed by that court for the purposes of administration."

Sec. 7834, "When a person dies intestate, all his property, real and personal, without any distinction between them, is chargeable with the payment of his debts, except as otherwise provided in this code."

Sec. 6466 provides *inter alia* that the probate court shall have jurisdiction, "2. To grant letters testamentary of administration and of guardianship. . . . 3. To appoint appraisers of estates of deceased persons." Sec. 7803 determines in what cases this jurisdiction is to be exercised.



As to the other one half, it is distinctly referred to as "the decedent's half," which the decedent can dispose of by will absolutely save as to the express limitations therein contained. If it is not so disposed of how shall it descend? "It shall go to the survivor." Of course "go to the survivor" here means something different from the same words in the first part of this section, because we are now dealing with the property of a different person who is at this time deceased.

The writer believes that under this section the deceased's one half interest "passes" to the survivor by succession and not by some notion of survivorship, as in estates by the entirety, or as in joint tenancies, or as one lawyer expressed it, "simply by virtue of the statute," for the following reasons:

(a) The court has said that the interests of each spouse are vested and equal, and that on the prior death of the husband the wife must pay an inheritance tax on the share coming from the husband. The converse must be true that the husband would pay an inheritance tax on the share coming from the deceased wife.

(b) Another section of the code defines "succession" as the "coming in of another to take the property of one who dies without disposing of it by will."<sup>66</sup> That is precisely what happens here.

(c) Joint tenancies are expressly abolished.<sup>67</sup> If the same provision does not expressly abolish tenancies by the entirety, and likewise if the sections of the code establishing community property do not expressly accomplish the same result, they do at least inferentially, and unmistakably too, for the husband and wife cannot be tenants by the entirety and community tenants at the same time. The legislature intended to supplant the common-law system with something different coming from another source and not fettered with common-law notions of tenancy, and survivorship.

(d) In the last part of the above-quoted section the proviso should be noted, "Provided, however, that no administration of the *estate* of the wife shall be necessary if she dies intestate." If her interest went to the husband by a sort of common-law survivorship then there would be no *estate*. The declaration that administration of her estate shall not be necessary if she dies intestate, certainly is not equivalent to saying that she left no estate and the provision

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<sup>66</sup> IDAHO COMP. STAT. 1919, §§ 5328 and 5372.

<sup>67</sup> *Id.*, §§ 4656 to 4674.

is quite meaningless if she left no estate. Of course this is also not the equivalent of saying that administration is useless or meaningless. It is not necessary usually, because community debts can be recovered against the husband and out of the community property or his separate property. But if she left separate debts it seems to the writer that administration is quite necessary, for the statute as quoted *supra*<sup>68</sup> indicates that estates of all decedents are liable for their debts. It may be desirable also to have a finding whether she died intestate or not; whether or not she was a married woman; whether she is survived by her husband; and if property stands in her name just what her relation to it is. Otherwise a suit to quiet title would inevitably arise.

It is surprising, therefore, to find the Supreme Court of Idaho, in a recent decision, declaring that if a wife predeceases her husband, possessed of no separate property but leaving community property standing in her name, she left no estate. In *Glover v. Brown*<sup>69</sup> the husband has transferred to the wife certain community land, and the deed of transfer recited that the conveyance was made "to her and her heirs for her sole and separate use, benefit, and behoof, forever." The wife predeceased the husband and administration was had upon her estate. The probate court found the land to be community, and decreed it to the husband as the

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<sup>68</sup> See § 7834 and note 65, *supra*.

<sup>69</sup> 32 Idaho, 426, 184 Pac. 649 (1919). It should be said, however, that this case was decided under a different statute on devolution. Under the law from 1887 to 1907 the statute, § 5712, read as follows: "Upon the death of the wife, the entire community property without administration *belongs to* the surviving husband, except such portion thereof as may have been set apart to her, by judicial decree for her support and maintenance, which portion is subject to her testamentary disposition, and in the absence of such disposition goes to her descendants or heirs, exclusive of her husband." This statute was borrowed bodily from California, and under the earlier Idaho view (*Hall v. Johns, supra*) the same interpretation as in California would naturally be given to it. That view is in fact the one perhaps unconsciously followed by Morgan, C. J. But that view was *dictum*. The California statute does not easily fit in with the view of double ownership, but is not necessarily opposed to it. But the amendment quoted above (text, page 57) did not change nor purport to change the nature of the wife's interest, hence her interest under this section was a vested, legal title. Hence "belongs to" must equal "descends to" or "goes to" and is awkwardly said of the part that he already owned as well as that he inherited. The writer knows of only three ways by which the wife's interest could "belong to" the husband on her death (assuming it has been proved that there are no estates by the entirety in Idaho): (a) he was already the owner, as in California; (b) he received it by will; (c) he took it as an heir. There seems to be no fourth way. The first two ways being eliminated, the third remains.

community heir of his wife. After mortgaging the land the husband became insane and a guardian was appointed for him. The mortgage was foreclosed, but the guardian redeemed the land and later sold it at a guardian's sale. The appellants claimed under this guardian's sale. Years after, a minor child of the spouses brought an action to quiet title to a one half interest in this land, which he claimed on the ground that the land was separate, and not community, thus making a collateral attack upon the probate court's decree. The view of Budge, J., who delivered the opinion of the court, was that the probate court was wrong in its finding that the property was community, and that such finding and distribution based thereon was in excess of the court's jurisdiction, and that this attack was direct. Morgan, C. J., concurring in the conclusion, said:

"It is also clear, that tribunal did not have jurisdiction of the community property because *it did not belong to the wife's estate, but on her death, belonged without administration, to the husband.*"

Rice, J., dissenting, still held that the probate court had no jurisdiction because

*"The claim advanced by the husband that the property was community property and belonged to him, not as heir but as owner, is a claim adverse to the estate and presents a question of which the probate court had no jurisdiction."*

Judge Rice cites two California cases,<sup>70</sup> in which it was held that on the prior death of the wife community property cannot be inventoried as a part of her estate and distributed to the husband, because the husband's claim to the property as community is adverse to the wife's estate. Under the California view that the husband is the absolute owner of the community property, of course no other conclusion could be reached. But under the Idaho theory of ownership, the property standing in a deceased wife's name would presumably be community without a contrary recital, and might be where there was a contrary recital, and a claim that it is community would not be an adverse claim. Or if it is adverse, then on the prior death of the husband the claim that property

<sup>70</sup> *In re Rowland's Estate*, 74 Cal. 523, 16 Pac. 315 (1888); *In re Klumpke's Estate*, 167 Cal. 415, 139 Pac. 1062 (1914). See also *Plass v. Plass*, 121 Cal. 131, 53 Pac. 448 (1898).

standing in his name is community would likewise be adverse, and the probate court would have no jurisdiction. The result, that probate courts do not have jurisdiction over the great mass of community property in the state of Idaho, is probably sufficient to condemn this view. Rice, J., however, clearly points out the error of the court in permitting a collateral attack on what was probably an erroneous but not void judgment of the probate court. The judgment of the probate court presupposes a finding of the probative facts as well as the ultimate character of the property,<sup>71</sup> over which matters the probate court has exclusive original jurisdiction. In California the community property is administered with the husband's estate only, and not with the wife's, because he is the owner.<sup>72</sup> In Washington<sup>73</sup> the community property is administered with the estate of whichever spouse dies first, the interests of each spouse, as in Idaho, being equal. No question of adverse claim has been raised there. A like conclusion was reached in an Arizona case,<sup>74</sup> the argument of the court containing its own refutation.

While it seems illogical that community property under the Idaho view should be liable for the husband's separate obligations,

<sup>71</sup> *In re Hill's Estate*, 167 Cal. 59, 138 Pac. 690 (1914).

<sup>72</sup> *In re Young's Estate*, 123 Cal. 337, 55 Pac. 1011 (1899); *Fennell v. Drinkhouse*, 131 Cal. 447, 63 Pac. 734 (1901). Jurisdiction of probate courts over community property estates will be considered in a subsequent paper.

<sup>73</sup> *Ryan v. Fergusson*, 3 Wash. 356, 28 Pac. 910 (1891); *In re Hill's Estate*, 6 Wash. 285, 33 Pac. 585 (1893); *Wiley v. Verhaest*, 52 Wash. 475, 100 Pac. 1008 (1909). In *Doyle v. Langdon*, 80 Wash. 175, 141 Pac. 352 (1914), substantially the same problem as in *Glover v. Brown* was before the court, and it was held that where what was probably the wife's separate property was inventoried as community property, and the court so found, this finding was conclusive on collateral attack, and there being no fraud, the decree could not be set aside. The Texas court held similarly that a finding that what was perhaps separate property of the wife was community, was conclusive in favor of *bona fide* purchasers from the husband, *Alexander v. Barton*, 71 S. W. 71 (Tex. Civ. App., 1902). In *Wiley v. Verhaest*, *supra*, only the wife's one half interest in the community property was administered upon her death.

<sup>74</sup> *Escalada v. Wilson*, 19 Ariz. 205, 168 Pac. 503 (1917). The court observes, p. 207: "When there is a child or children, instead of the survivor being vested with the entire community property, he is vested with one half only, and the other half vests in the child or children of the deceased. The same law that gives immediate title to the survivor in the community property vests title in the child or children. It is true that one takes title by virtue of survivorship, whereas the other takes as an heir, but both titles are referable to the same statutory provision." See *In re Williams' Estate* (*supra*, note 55) the wife pays an inheritance tax only on the deceased husband's share. See note in Ann. Cas. 1913D, 492.

yet that view is preferable to one which would permit his share of the community property to be so taken.<sup>75</sup> It is of the very essence of the system that the interests of the spouses should be inseverable, except perhaps by their own voluntary acts.<sup>76</sup>

### THE TEXAS OR TRUST THEORY

The Texas courts hold that the interests of the spouses are beneficially equal but the legal title is in the husband, the wife's interest being vested but equitable.<sup>77</sup> Yet if the record title should chance to stand in the wife's name,<sup>78</sup> she is the legal owner and holds the husband's interest as a trustee. As a result she can convey a good title to a *bona fide* purchaser even in fraud of the husband.<sup>79</sup> In Texas the husband has with some exceptions the absolute power of alienation as well as the management, and this statutory provision probably at first influenced the court's view in

<sup>75</sup> It is refreshing to find that the court in *Ewald v. Hufton* (*supra*, note 54) did not fall into the error of the Washington court, discussed in the cases cited in note 40, *supra*. The doctrine of *bona fide* purchaser without notice of the community relationship was urged upon the court and the Washington and Texas cases cited. The Texas cases, while correct under the Texas theory, could not be followed in Idaho.

<sup>76</sup> *Blum v. Rogers*, 9 S. W. 595 (Tex., 1888); *Johnson v. Johnson*, 24 Cal. App. Dec. 407, 164 Pac. 421 (1917); *Noel v. Clark*, 60 S. W. 256 (Tex. Civ. App., 1901); *Teague v. Lindsey*, 31 Tex. Civ. App. 161, 71 S. W. 573 (1903); *Sharp v. Loupe*, 52 Pac. 134 (Cal., 1898); *Rawlins v. Giddens*, 5 So. 501 (La., 1894).

<sup>77</sup> *Burnham v. Hardy Oil Co.*, 108 Tex. 555, 195 S. W. 1139 (1917); see also 124 S. W. 221, 147 S. W. 330. See also advance sheets of the opinions of the Attorney General, Sept. 10, 1920, at page 298, holding that in Texas husband and wife in rendering separate income-tax returns may each report as gross income one half the total income from community property.

<sup>78</sup> *Houston Oil Co. v. Choate*, 232 S. W. 285 (Tex. Com. App., 1921); *Mitchell v. Schofield*, 106 Tex. 512, 171 S. W. 1121 (1915). In California, however, if community property stands in the wife's name, the husband is still the legal and not merely equitable owner of the whole. *Mitchell v. Moses*, 13 Cal. App. Dec. 75, 117 Pac. 685 (1911).

<sup>79</sup> See among others, *Zimpelman v. Robb*, 53 Tex. 274 (1880); *Edwards v. Brown*, 68, Tex. 329, 4 S. W. 380, 5 S. W. 87 (1887); *Burnham v. Hardy Oil Co.*, *supra*, note 77; *Kirby Lumber Co. v. Smith*, 185 S. W. 1068 (Tex. Civ. App., 1916); *Johnson v. Master-son Irr. Co.*, 217 S. W. 407 (Tex. Civ. App., 1920); *Hill v. Moore*, 62 Tex. 610 (1884); *Patty v. Middleton*, 82 Tex. 586, 17 S. W. 909 (1892); *Pouncey v. May*, 76 Tex. 565, 13 S. W. 383 (1890); *Randolph v. Junker*, 21 S. W. 551 (Tex. Civ. App., 1892); where, however, there was notice and the rule held not to apply. *Mangum v. White*, 16 Tex. Civ. App. 254, 41 S. W. 80 (1897); *Derrett v. Britton*, 35 Tex. Civ. App. 80, 80 S. W. 562 (1904). But a quitclaim conveyance does not protect a *bona fide* purchaser, *Gallup v. Huling*, 241 Fed. 858 (1917).

respect to the difference in the nature of the interest of the two spouses. The cases, therefore, from this state should have no application in Idaho and Washington, and as above observed such power is expressly denied in Idaho.<sup>80</sup> In Washington, however, the court seems to hold some such view as this, though this doctrine was not applied in *Adams v. Black*,<sup>81</sup> where the spouses were cohabiting, the purchaser from the husband having no notice of the latter's marriage. But it does seem to be followed to some extent in Washington in cases where the spouses do not cohabit and the general public has no notice of the relationship. This Texas doctrine of the rights of a *bona fide* purchaser is now statutory in Washington.<sup>82</sup>

The Texas court has not always been consistent in the expression of this proposition that the husband is trustee for the community, though substantially consistent in the application of it. It has sometimes been said that the interests of the spouses were in all respects equal, but it has finally been settled the other way.<sup>83</sup>

It seems probable that Louisiana adopts the Texas theory<sup>84</sup> more nearly than that of any other state, although expressions may be found which point to the California,<sup>85</sup> the Washington,<sup>86</sup> and the Idaho<sup>87</sup> views. It seems clear, however, that the interest of the wife in Louisiana is vested, and that on her one half she does not pay an inheritance tax.<sup>88</sup> The husband cannot alienate in fraud of the wife, but he has the power of alienation.

<sup>80</sup> *Ewald v. Hufton*, see note 54, *supra*. <sup>81</sup> 6 Wash. 528, 33 Pac. 1074 (1893).

<sup>82</sup> See *supra*, note 46. Cf. CALIFORNIA CIV. CODE, § 172 a.

<sup>83</sup> See cases cited in *Burnham v. Hardy Oil Co.*, *supra*, note 77, which latter case finally determines that the wife's interest is equitable only.

<sup>84</sup> Succession of McCloskey, 144 La. 438, 80 So. 650 (1919); *Beck v. Natalie Oil Co.*, 143 La. 154, 78 So. 430 (1918); Succession of Marsal, 118 La. 212, 42 So. 778 (1907); *Dixon v. Dixon's Ex'rs.*, 4 La. 188 (1832); Succession of Teller, 49 La. Ann. 281, 21 So. 265 (1897); *Baker's Succession*, 129 La. 74, 55 So. 714 (1911). In *Curtis' Succession*, 10 La. Ann. 662 (1855) it was said that a negotiable paper given by the husband for his individual debts may, unless acquired after maturity, or with notice, be enforced against the community property. Mr. McKay does not agree with this; see *McKAY, COMMUNITY PROPERTY*, § 288.

<sup>85</sup> *Guice v. Lawrence*, 2 La. Ann. 226 (1847); Succession of Boyer, 36 La. Ann. 506 (1884); *Luria v. Cote Blanche Co.*, 114 La. 385, 38 So. 279 (1905); *Peck v. Board of Directors*, 137 La. 334, 68 So. 629 (1915).

<sup>86</sup> *Fletcher v. Hodges*, 145 La. 927, 83 So. 194 (1919); *Garlick v. Dalbey*, 147 La. 18, 84 So. 441 (1920).

<sup>87</sup> *Dixon v. Dixon's Ex'rs*, see *supra*, note 84.

<sup>88</sup> Succession of Marsal, 118 La. 212, 42 So. 778 (1907). Where the wife bequeaths to her husband her one half interest in the community property, the husband must

## THE NATURE OF COMMUNITY OWNERSHIP

The problem of what community ownership is, it should be recalled, is being examined here with reference only to the eight states of the United States which purport to adopt the system, and which have been influenced naturally, in the way they look upon the system, by common-law notions.

What is, then, the nature of the ownership of community property? With the diversity of views outlined above, is it possible to generalize?

First, we observe that in all the states but California the wife has at least a beneficial interest equal to the husband's. California holds that the husband is the owner, not really because he has a larger equitable right in it, but because of a statute which provides that where a person has absolute power of dominion over property he is the owner,<sup>89</sup> thus confusing, as Mr. Justice Holmes suggests, agency with *dominium*.<sup>90</sup> When such power was gradually encroached upon by statute the *dominium* was thought to continue as before. Thus the agency gave rise to the *dominium*, but the revocation of the agency did not alter the *dominium*. So in California one may say, using Louisiana terms, that the wife is a forced heir of the husband in respect to one half of the community property if she survives him. If she is divorced, an equal division should be made, and if none is made they become equal tenants in common.<sup>91</sup> Even while he had the absolute power of alienation he could not alienate for the purpose of defrauding her.<sup>92</sup> If this makes her a mere heir and if she has a mere expectancy it is of a kind not known to the common law.

There are some respects in which this community of spouses resembles in its proprietary aspects, respectively, a partnership and a corporation. And to use feudal terms, this estate in lands bears resemblances also to a tenancy by the entirety, a joint tenancy,

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pay an inheritance tax. Succession of May, 120 La. 691, 45 So. 551 (1908). The view herein expressed is the opinion of Attorney General Palmer also, who in the advance sheets of his opinion of February 26, 1921, at page 435, classes Louisiana with the states where the wife has a vested interest, rather than with California.

<sup>89</sup> *Spreckels v. Spreckels*, 116 Cal. 339, 48 Pac. 228 (1897).

<sup>90</sup> *Arnett v. Reade*, see *supra*, note 28.

<sup>91</sup> *Harvey v. Pocock*, 92 Wash. 625, 159 Pac. 771 (1916); *Johnson v. Garner*, 233 Fed. 756 (1916); *Jones v. Frazier*, 201 S. W. 445 (Tex. Civ. App., 1918).

<sup>92</sup> *Smith v. Smith*, see note 6, *supra*.

and a tenancy in common. In *Holyoke v. Jackson*<sup>93</sup> the community is likened to and contrasted with a commercial partnership: It is like a partnership in that some property from one or both forms a common stock which bears the losses and receives the profits and is liable for the common debts; but unlike in that no regard is paid to the proportionate contribution, service, or business fidelity; that each is incapable of disposing of his or her interest; both are powerless to escape the relationship, to vary its terms, or to distribute its assets or profits. In fixity of constitution it resembles a corporation; also it is originated by the state and its powers and liabilities are ordained by statute. *The proprietary interests of the spouses are not merely united but unified; not mixed or blent, but identical.* It is *sui generis* a creature of the statute. Management and disposition may be vested in one or both, but that does not affect the proprietary interests, and the legislature may change such power at will. It is believed by the writer that this statement by the Washington court is a substantially accurate description of the legal concept of the community of husband and wife.

In *LaTourette v. LaTourette*<sup>94</sup> the Arizona court declares that by virtue of the statute giving the whole of the community property to the survivor on the death of either, intestate, the community estate is like an estate by the entirety. This seems to be a mistake. It is like that only in the respect that its existence depends on marriage. It is true under a statute like Idaho's that the deceased's share goes to the survivor, but it goes by inheritance and not by the fact of survivorship simply. The court proceeds:

"In this aspect of the community relationship the husband and wife may be considered as one, owning the property during the existence of the marriage with the unities of time, title, and interest and possession present, and at the death of one the survivor takes all. So, in tenancy by the entirety, each one may be regarded as owning all the property with the unities of person, time, title, interest, and possession with a survivorship. A conveyance of real and personal property to a husband and his wife makes them owners by the entirety at common law. They are not seised as joint tenants *per tout et per my*, but by the entirety *per tout et non per my*. But under the statute also, if the deceased have a child

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<sup>93</sup> 3 Pac. 841 (Wash., 1882).

<sup>94</sup> See note 55, *supra*.



or children, the survivor is entitled to his or her one-half of the property, and the other half passes to the child or children of the deceased. In this latter feature of the statute there is no right of survivorship, and, except that of possession, the unities are lacking, thus resembling a tenancy in common."

The mistake herein made has already been pointed out, namely, that the survivor does not take the deceased's share by mere survivorship. That question how the survivor takes will be squarely faced when such surviving spouse is called upon to pay an inheritance tax, or when the deceased leaves debts but no separate estate. In fact, save for the necessity of marriage, the interests are more like those in joint tenancy where the parties are seized *per tout et per my*, the survivor having a *jus accrescendi* not found in a tenancy by the entirety. It is believed, however, that they are seized *per my et non per tout*, as in tenancies in common. Two limitations upon estates by the entireties,<sup>86</sup> viz., the fact that there is no power to alienate so as to cut off survivorship, and the fact that such survivorship (if it exist) cannot be cut off under execution against the husband, do not necessarily exist in the case of community tenancy, and in fact in several states do not exist.

This insistence that the community arising between husband and wife, including their proprietary interests, is a thing *sui generis* and not a blend of common-law conceptions, is not mere quibbling, and the difference is often of great importance, especially with reference to separate obligations, probate and administration, and inheritance tax. It seems difficult for the courts to divest themselves wholly of the common way of regarding estates. Naturally the courts of the various states know each its own theory better than it knows the theory of the others, but the importance of understanding the theory which obtains in a different jurisdiction, when the decisions therefrom are being cited, seems to be great, particularly where the case is cited for application by analogy or in collateral matters.

The entity theory adopted in Washington seems sound and to lead most nearly to equality between the spouses. What the social effects have been, whether litigation has increased or decreased, whether the social interest in the satisfaction of obligations has

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<sup>86</sup> See 1 TIFFANY, REAL PROPERTY, 2 ed., § 194.

been affected, cannot be accurately gauged at this time. The rights of the husband's creditors and the rights of the wife, so frequently in conflict, seem to find under this view a satisfactory solution, and dependence of the wife is replaced with conjugal interdependence.

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JUDICIAL DISCRETION IN THE LAW OF TORTS. — We need, says Dean Pound, a movement "for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles; for putting the human factor in the central place, and relegating logic to its true position as an instrument."<sup>1</sup> Nowhere is this more true than in that most human department of legal relations — the law of torts. Nowhere is it more true than when we are dealing with the relation between the occupier of land and the category of persons called trespassers — that rather inferior breed of outlaws<sup>2</sup> who have only lately come to be recognized as human beings.<sup>3</sup> Yet in few instances have the courts been more slow to recognize the danger of destroying principles with syllogisms.

A springboard, attached at its base to the property of the New York Central Railroad Company, extended out more than seven feet over the waters of the Harlem River, a public watercourse. A boy, swimming in the river, climbed upon the springboard and stood at its end, prepared to dive. Through lack of ordinary care on the part of the railroad, a pole

<sup>1</sup> Roscoe Pound, "Mechanical Jurisprudence," 8 COL. L. REV. 605, 609.

<sup>2</sup> This statement should not, of course, be taken too strictly. Much talk of the sort has, however, led a court naively to deny that the trespasser is an outlaw. See *Brooks v. Pittsburgh, etc. R. R. Co.*, 158 Ind. 62, 69, 62 N. E. 694, 696 (1902).

<sup>3</sup> For a concise and accurate statement of the law regarding the duty of an occupier to trespassers — which has not changed materially in the quarter-century since the statement was made — see Jeremiah Smith, "Liability of Landowners to Children Entering Without Permission," 11 HARV. L. REV. 349-350.

supporting high-tension electric wires on its property gave way; the falling wires struck the boy and swept him to his death in the waters below. The New York Court of Appeals allowed the proper parties to recover for a negligent killing.<sup>4</sup> Judge Cardozo wrote a brilliantly human opinion. Three judges dissented.

Now here is a case which, if decided in the usual way upon "assumed first principles," would present an opportunity for many of the extreme niceties of judicial logic. Was this board such a part of the railroad's property that it might maintain an action of trespass *quare clausum fregit* against the boy for treading upon it? The better view seems to be the negative — that such encroachments as this springboard upon public property may be treated either as disseisin, so as to give the encroaching owner possession, or as mere trespass; but that the election is with the state.<sup>5</sup> Here is one ground upon which the case might have gone — that the railroad was not so in possession of the property as to constitute the boy a trespasser. But passing over that, — was not the defendant liable on the principle that one who negligently maintains in a dangerous condition premises adjacent to a public highway (such as this water-course) is liable for injuries caused thereby to persons using the highway? This is a principle which seems well fixed in the law,<sup>6</sup> but which in its application leads to many complications.<sup>7</sup> Traced through its mazes, this might provide another ground upon which to rest the case. Then, if we assume the boy to be a trespasser, we must ask whether he was killed by the falling wires negligently maintained as a dangerous condition of the premises,<sup>8</sup> or by the electric current passing through the wires as an active course of conduct. If the latter is true, it leads us into the whole mass of dispute over perceived and unperceived, anticipated and unanticipated trespassers, and the complex deductions from these strict categories.<sup>9</sup> We might even remand the case to determine whether the wires touched the boy after he left the springboard — *i. e.*, whether they struck him when he was not technically a trespasser!

But the majority opinion will have none of this. Judge Cardozo sweeps away all deductive tangles. He cannot see the difference between the relation of this human being to this corporation when he is a technical

<sup>4</sup> *Hynes v. New York Central R. R. Co.*, 131 N. E. 898 (N. Y., 1921). See RECENT CASES, *infra*, p. 94.

<sup>5</sup> *McCourt v. Eckstein*, 22 Wis. 153 (1867); *Butler v. Telephone Co.*, 186 N. Y. 486, 79 N. E. 716 (1906); *Murphy v. Bolger*, 60 Vt. 723 (1888).

<sup>6</sup> *Beck v. Carter*, 68 N. Y. 283 (1877); *Chickering v. Thompson*, 76 N. H. 311, 82 Atl. 839 (1912); *Hutson v. King*, 95 Ga. 271, 22 S. E. 615 (1895).

<sup>7</sup> Thus there is, it seems, no liability when the traveller wanders from the path intentionally or unnecessarily. *Lorenzo v. Wirth*, 170 Mass. 596, 49 N. E. 1010 (1898); *Johnson v. Laundry Co.*, 122 Ky. 369, 92 S. W. 330 (1906). Or when a person approaches the dangerous spot from another direction than from the road. *Dobbins v. Missouri K. & T. Ry. Co.*, 91 Tex. 60, 41 S. W. 62 (1897). Some wooden courts have run up against a logical difficulty in this subdivision, and have refused to allow recovery unless "it be conceded that because of the nearness of this stairway to the sidewalk, the plaintiff might be injured by it without becoming a trespasser on the defendant's property!" *Collins v. Decker*, 120 App. Div. 645, 105 N. Y. Supp. 357, 359 (1907); *Sheehan v. Bailey Building Co.*, 42 Wash. 535, 85 Pac. 44 (1906). Cf. *Beck v. Carter*, note 6, *supra*.

<sup>8</sup> The general rule is that a trespasser takes the risk of the condition of the premises. *Lary v. Cleveland R. Co.*, 78 Ind. 323 (1881).

<sup>9</sup> See note 3, *supra*.

trespasser with his feet upon the springboard, and when he is immersed in the public river immediately below, or is even clutching the board with his hands, or when he is a few inches in space above it, jumping through the air. "Rights and duties in systems of living law," he says, "are not built upon such quicksands."<sup>10</sup>

Now this smacks strongly of the capricious personal brand of justice dispensed by an Oriental monarch, and therein lies its danger. But somewhat of this discretionary element must be injected into our jurisprudence if we are to escape an absolutely mechanical system of law. For no matter how wide or how narrow we make our categories, there will always be borderline cases which fit into more than one of them.<sup>11</sup> It is here that set rules must be abandoned and resort must be had to the fundamental interests that lie behind them. It is in weighing and balancing these interests that the discretionary element must enter. When rules conflict and collide, judges must have regard for "the human conditions they are to govern."

The decision in this case does not establish any new principle in the law of torts. In future citations it will probably be resolved upon either of the first two points mentioned in analyzing it. But it does represent a distinctly new spirit in judicial method—a spirit which will refuse to uphold abstract categories and formal deductions to the detriment of individual and social interests; a spirit which will "relegate logic to its true position as an instrument."

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**EXCISES AS PROPERTY TAXES.**—Many state constitutions provide that all property shall be taxed uniformly in proportion to value.<sup>1</sup> These provisions are often held to prevent even a difference in the rate of taxation between realty and personalty,<sup>2</sup> and certainly do not allow a single article to be selected for a general tax at a higher rate.<sup>3</sup> At the same time, practical considerations make it desirable that property taxes

<sup>10</sup> See *Hynes v. New York Central R. R. Co.*, *supra*, note 4, at p. 899.

<sup>11</sup> Judge Cardozo's opinion concludes: "There are times when there is little trouble in marking off the field of exemption and immunity from that of liability and duty. Here structures and ways are so united and commingled, superimposed upon each other, that the fields are brought together. In such circumstances there is little help in pursuing general maxims to ultimate conclusions. They have been framed *alio intuitu*. They must be reformulated and readapted to meet exceptional conditions. Rules appropriate to spheres which are conceived of as separate and distinct cannot be enforced when the spheres become concentric. There must be readjustment or collision. In one sense, and that a highly technical and artificial one, the diver at the end of the springboard is an intruder on the adjoining lands. In another sense, and one that realists will accept more readily, he is still in public waters in the exercise of public rights. The law must say whether it will subject him to the rule of one field or of the other, of this sphere or of that. We think that considerations of analogy, of convenience, of policy, and of justice, exclude him from the field of the defendant's immunity and exemption and place him in the field of liability and duty." *Hynes v. New York Central R. R. Co.*, *supra*, note 4, at p. 900.

<sup>1</sup> See 1 COOLEY, *TAXATION*, 3 ed., 274; JUDSON, *TAXATION*, 2 ed., § 503, and pp. 769 *et seq.*

<sup>2</sup> *Savannah v. Weed*, 84 Ga. 683, 11 S. E. 235 (1890). See *First National Bank v. Holmes*, 246 Ill. 362, 369, 92 N. E. 893, 895 (1910).

<sup>3</sup> *Thompson v. Kreutzer*, 112 Miss. 165, 72 So. 891 (1916); *State v. Cumberland & Pennsylvania R. R. Co.*, 40 Md. 22 (1873).

should not be universal in scope.<sup>4</sup> The constitutional provisions referred to do not prevent the imposition of excise taxes upon selected classes of persons.<sup>5</sup> It is therefore not surprising to find efforts, more or less unconscious, to effect what is in substance a property tax in the guise of an excise.<sup>6</sup>

A property tax is one imposed periodically upon the property itself. Its true nature is shown by the fact that it can be imposed upon property belonging to non-residents,<sup>7</sup> although mere ownership of property within a sovereign's jurisdiction gives no personal jurisdiction.<sup>8</sup> On the other hand an excise is a personal tax imposed for any act, or exercise of a privilege, or occupation. It would seem to follow that a different rate of taxation could be imposed upon different property merely by making the tax a personal one graduated upon the amount of a certain sort of property owned, as, for example, a tax upon the privilege of ownership. But it is generally agreed that the constitutional provisions apply not only to property taxes which are called such, but also to purported excises whose effect in substance is to tax the property.

A tax on property is necessarily a charge upon the assets of the owner at the time assessment is made, and not a charge upon the assets of any one else at that time. In other words, the effect of an admitted property tax as to a particular individual is that it is certain to be imposed if he owns property when the assessment is made, and certain not to be imposed if he does not then own the property. A personal tax which has a similar effect is clearly in substance a property tax. Thus a tax levied upon the occupation of owning particular kinds of land is unconstitutional.<sup>9</sup> And the same is true of a tax upon the privilege merely of keeping a certain sort of property.<sup>10</sup> Conversely, if the tax is sure to be imposed upon a particular person although the property on which it is claimed

<sup>4</sup> See WELLS, THEORY AND PRACTICE OF TAXATION, 628; NEW YORK COMMISSIONERS TO REVISE TAXES, SECOND REPORT, 9 *et seq.*

<sup>5</sup> State v. Guilbert, 70 Ohio St. 229, 71 N. E. 636 (1904); Salt Lake City v. Christenson Co., 34 Utah, 38, 95 Pac. 523 (1908); Glasgow v. Rowse, 43 Mo. 479 (1869).

<sup>6</sup> The Federal courts follow the decisions of the local courts. Dawson v. Kentucky Distilleries Co., 41 Sup. Ct. 272 (1921); Brown-Forman Co. v. Kentucky, 217 U. S. 563 (1910).

<sup>7</sup> Mills v. Thornton, 26 Ill. 300 (1861); People *ex rel.* Cook v. Duncel, 69 Misc. 361, 125 N. Y. Supp. 385 (1910). See Joseph H. Beale, "Jurisdiction to Tax," 32 HARV. L. REV. 587, 593. In such cases the enforcement of the tax must be *in rem*. Dewey v. Des Moines, 173 U. S. 193 (1899); Matter of Maltbie v. Lopsitz Mills Co., 223 N. Y. 227, 119 N. E. 388 (1918).

<sup>8</sup> Pennoyer v. Neff, 95 U. S. 714 (1877).

<sup>9</sup> Thompson v. Kreutzer, 112 Miss. 165, 72 So. 891 (1916). *Contra*, Producers' Oil Co. v. Stephens, 44 Tex. Civ. App. 327, 99 S. W. 157 (1907). In an early case the United States Supreme Court held that a Federal tax upon the keeping of pleasure carriages was not a "direct" tax. Hylton v. United States, 3 Dall. (U. S.) 171 (1796). The decision might be rested on the ground that at that time it was thought that only taxes on land, and capitation taxes, were "direct." See Hamilton's argument, 8 HAMILTON, WORKS, Lodge ed., 378. But the same court has now held that a Federal tax upon personalty must be apportioned. Pierce v. United States, 232 U. S. 290 (1914). Any decision that a Federal tax does not constitute a "direct" tax must therefore be regarded as an authority that it is not a property tax. On this ground it was held that a Federal tax upon the use of yachts could not be imposed upon one whose use consisted only in ownership. Pierce v. United States, *supra*, reversing United States v. Billings, 190 Fed. 359 (S. D. N. Y. 1911).

<sup>10</sup> Johnston v. Macon, 62 Ga. 645 (1879).

to be laid is no longer his, it is clearly an excise. A transfer or sales tax is therefore, in substance as well as form, an excise tax.<sup>11</sup>

Logically, a tax which does not come within the above classification may or may not be substantially a property tax. The line seems to be drawn by considering a tax as on property when its payment is a prerequisite of making any possible use, but not otherwise. In the borderline cases, it will take the form of taxing either an occupation as such, or a use as such. In operation every tax on an occupation involves taxing some use of property, and often of taxing the only practical use. A tax on the occupation of manufacturing is an excise,<sup>12</sup> but machinery could be used for little else. This result must be sustained; such a tax has always been considered a typical excise. No constitutional provision could ever have been intended to prohibit such a tax. Indeed, many constitutions provide explicitly for a tax upon occupations.<sup>13</sup>

The same principles apply to the taxation of a use as such. Beneficial use may be practically prohibited by a valid excise.<sup>14</sup> Despite judicial statements to the contrary,<sup>15</sup> it seems that even one so fundamental as that of deriving income may be taxed without taxing the property from which the income is derived.<sup>16</sup> This follows from the fact that income from foreign property may be taxed,<sup>17</sup> since it is clear that a sovereign cannot impose a property tax on property beyond the jurisdiction.<sup>18</sup> If, however, the tax statute means an absolute prohibition of use unless the tax is paid, the limit is considered reached. Thus a tax upon the gross

<sup>11</sup> *Thomas v. United States*, 192 U. S. 363 (1903); *People ex rel. Hatch v. Reardon*, 184 N. Y. 431, 77 N. E. 970 (1906), *aff'd* *Hatch v. Reardon*, 204 U. S. 152 (1907); *Kurth v. State*, 86 Tenn. 134, 5 S. W. 593 (1887). But see *Livingston v. Albany*, 41 Ga. 21 (1870).

<sup>12</sup> *Strater Bros. Tobacco Co. v. Commonwealth*, 117 Ky. 604, 78 S. W. 871 (1904); *Spreckles Sugar Refining Co. v. McLain*, 109 Fed. 76 (E. D. Pa., 1901), reversed (on another point) 192 U. S. 397 (1901). There are a great number of cases sustaining, as excises, taxes on the use of property. See *Atlanta National Association v. Stewart*, 109 Ga. 80, 35 S. E. 73 (1900); *Newton v. Atchison*, 31 Kan. 151, 1 Pac. 288 (1883); *Clark v. Titusville*, 184 U. S. 329 (1902). The limits of an occupation may be fixed by the aggregate amount of business done. *Commonwealth v. Hazel*, 155 Ky. 30, 159 S. W. 673 (1913).

<sup>13</sup> See, e.g., *CONSTITUTION, KENTUCKY*, § 181. The occupation must be for profit to be taxable as such. *Tarde v. Benseman*, 31 Tex. 277 (1868).

<sup>14</sup> Driving automobile on public way: *Kane v. State*, 81 N. J. L. 594, 80 Atl. 453 (1911); *Commonwealth v. Boyd*, 188 Mass. 79, 74 N. E. 255 (1905); *Terre Haute v. Kersey*, 159 Ind. 300, 64 N. E. 469 (1902). Keeping dogs: *Longyear v. Buck*, 83 Mich. 236, 47 N. W. 234 (1890); *Mowery v. Salisbury*, 82 N. C. 175 (1880).

<sup>15</sup> See *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 581 (1895); *Opinion of the Justices*, 220 Mass. 613, 624, 108 N. E. 570, 574 (1915).

<sup>16</sup> An income tax is in reality a property tax upon the income, as is shown by the fact that a state can tax the income received from land within its jurisdiction but belonging to non-residents. *Shaffer v. Carter*, 252 U. S. 37 (1920); *Travis v. Yale & Towne Mfg. Co.*, 252 U. S. 60 (1920). But it is clear that its imposition in effect taxes the particular use of deriving income from the property.

<sup>17</sup> See *Maguire v. Trefry*, 253 U. S. 12 (1920). All income tax statutes include income from foreign lands. See 1919, *BARNES, FEDERAL CODE*, § 5514; *BLACK, INCOME TAXES*, 2 ed., pp. 643 *et seq.* Yet these provisions appear never to have been questioned.

<sup>18</sup> See *State Tax on Foreign-held Bonds*, 15 Wall. (U. S.) 300, 319 (1872); *Louisville & Jeffersonville Ferry Co. v. Kentucky*, 188 U. S. 385 (1903); *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194 (1905). See 1 *WHARTON, CONFLICT OF LAWS*, 3 ed., § 80a.

value of the production of mineral lands cannot be sustained as an excise tax.<sup>19</sup> Moreover, calling the tax one upon an occupation cannot change its character if the effect is to produce the result just described.<sup>20</sup>

The same question is raised in a recent Kentucky case, where a tax upon the occupation of removing spirits from bond was held unconstitutional when levied upon an owner.<sup>21</sup> Whiskey while it remains in bond is as little capable of use as unmined minerals; so the decision is in accord with the previous authority. It seems difficult to find a rational distinction between taxation of every speculatively possible use, and of nearly every beneficial use. No court has attempted an explanation. Probably all that can be said is that taxation of the latter is an excise *ex vi termini*, while the former appears to come so close to taxing mere ownership that it can be considered as nothing else.

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DISCRETION IN *QUO WARRANTO* AGAINST A PUBLIC CORPORATION.—*Quo Warranto* is the appropriate mode of inquiry by what right a body of individuals or an alleged corporation<sup>1</sup> exercises the functions and franchises of a municipal or other public corporation;<sup>2</sup> or of testing the right of an individual to hold office in such a corporation.<sup>3</sup> The normal result of a finding that such franchises have been usurped is a judgment of ouster,<sup>4</sup> terminating at once the activities of the *de facto*<sup>5</sup> officer or corporation.<sup>6</sup> Occasionally, however, a municipality technically void has existed so long and under such circumstances that the public good is better served by the uninterrupted user of the usurped franchises

<sup>19</sup> *Large Oil Co. v. Howard*, 63 Okla. 143, 163 Pac. 537 (1917). *Contra*, *Raydure v. Board of Supervisors*, 183 Ky. 84, 99, 209 S. W. 19, 26 (1919). But see *State v. Cumberland & Pennsylvania R. R. Co.*, 40 Md. 22 (1873).

<sup>20</sup> *Thompson v. McLeod*, 112 Miss. 383, 73 So. 193 (1916).

<sup>21</sup> *Craig v. E. H. Taylor, Jr., & Sons*, 232 S. W. 395 (Ky.). For the facts of this case see RECENT CASES, *infra*, p. 94. The United States Supreme Court had previously reached the same result, as a matter of Kentucky law. *Dawson v. Kentucky Distilleries Co.*, 41 Sup. Ct. 272 (1921). If there had been an occupation of attending to the formalities of taking spirits out of bond for owners it would seem to be a valid tax.

<sup>1</sup> That the corporation *de facto* is the proper party defendant: *State v. Leischer*, 117 Wis. 475, 94 N. W. 299 (1903); *State v. Atlantic Highlands*, 50 N. J. L. 457 (1888). *Contra*: *State v. Small*, 131 Mo. App. 470, 109 S. W. 1079 (1908).

<sup>2</sup> *State v. City of Birmingham*, 160 Ala. 196, 48 So. 843 (1909); *State v. Atlantic Highlands*, *supra*; *State v. Bradford*, 32 Vt. 50 (1859). See HIGH, EXTRAORDINARY LEGAL REMEDIES, 3 ed., 641; 2 DILLON, MUNICIPAL CORPORATIONS, 4 ed., § 890; also cases in note 12, *infra*.

<sup>3</sup> *Darley v. Queen*, 12 Cl. & F. 520 (1845); *Comm. v. Allen*, 128 Mass. 308 (1880). Occasionally this is made the method of an indirect attack upon the validity of the municipality itself. *State v. Leischer*, *supra*. But when at the instance of a private relator under the Statute of Anne, it is restricted by the court's power in its sound discretion to refuse to allow the information to be filed. *King v. Trevenen*, 2 B. & Ald. 479 (1819). See also note 9, *infra*.

<sup>4</sup> *State v. Bradford*, *supra*. And see *State v. Woods*, 233 Mo. 357, 135 S. W. 932 (1911), where judgment of ouster issued as of course.

<sup>5</sup> The American doctrine seems to be that a *de jure* municipal corporation can be extinguished only by legislative enactment. See HIGH, EXTRAORDINARY LEGAL REMEDIES, 3 ed., 637; *Cain v. Brown*, 111 Mich. 657, 70 N. W. 337 (1897).

<sup>6</sup> See HIGH, *op. cit.*, 697, 701.



than by the vindication of the bare right of the state. It is therefore held in a recent Massachusetts case<sup>7</sup> that the court may in its sound discretion decline to issue process in *quo warranto* to such a corporation even though at the instance of the Attorney General acting *ex officio*.

The original writ of *quo warranto* and the information which superseded it, being at the common law matters of royal prerogative,<sup>8</sup> were down to the time of the statute of 9 Anne, c. 20<sup>9</sup> unhampered by any discretionary powers in the courts, and this rule has in the case of *ex officio* proceedings by the Attorney General continued in England<sup>10</sup> and is still the weight of authority in this country.<sup>11</sup> Both were and are the machinery of the common law and not of equity,<sup>12</sup> and the bill in equity is not a proper substitute therefor.<sup>13</sup> And yet, to meet a growing recognition that the state has an interest in the continuous operation of the smaller units within itself which play so large a part in direct governmental relations with the individual,<sup>14</sup> as well as an interest in the regulation of the extraordinary powers usually to be exercised only under franchise, there has been a tendency by statute and decision to assimilate *quo warranto* to equitable jurisdiction, at least in so far as the exercise of sound discretion upon balanced interests is a pervading feature of such jurisdiction.

This discretion may conceivably be exercised at either of two stages of the suit: at the preliminary stage of the issuance of process, filing of information, or other substitute for the original writ out of chancery; or at the hearing on pleadings or trial after issue joined. The common example at the first stage has been in cases brought by private relators

<sup>7</sup> Att'y Gen'l v. City of Methuen, 236 Mass. 564, 129 N. E. 662 (1921). For the facts of this case see RECENT CASES, *infra*, p. 92.

<sup>8</sup> See HIGH, *op. cit.*, 554. See also the discussion in Att'y Gen'l v. Sullivan, 163 Mass. 446, 447-449, 40 N. E. 843, 844-845 (1895), which is probably historically accurate although seemingly shaken as authority in Massachusetts by the holding of the principal case.

<sup>9</sup> The statute of 9 ANNE, c. 20 (1710), authorized the filing of informations in the nature of *quo warranto* by an officer of the court at the relation of a private person against any person usurping an office or franchise within a municipality. This privilege is by the terms of the act subject to the leave of the court, which is the first introduction of the element of discretion into *quo warranto* proceedings, except as there was an original discretion in the Attorney General as to the initiation of *ex officio* proceedings, or possibly in the King's attorney as to any rare cases at private relation before the statute. See Darley v. Queen, 12 Cl. & F. 520 (1845). It did not extend to proceedings against a municipality itself, Rex v. Carmarthen, 2 Burr. 869 (1759); any more than against a private corporation, King v. Ogden, 10 B. & C. 230 (1829). And the discretion of the court was exhausted upon allowing the information to be filed. See HIGH, EXTRAORDINARY LEGAL REMEDIES, 3 ed., 560.

<sup>10</sup> King v. Trevenen, 2 B. & Ald. 479 (1819).

<sup>11</sup> See note 17, *infra*.

<sup>12</sup> State v. Alt, 26 Mo. App. 673 (1887); Att'y Gen'l v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371 (1817). And the situation is not altered by the merging of the remedy in the general remedy by action under the Code. People v. Albany, etc. R. R. Co., 57 N. Y. 161 (1874).

<sup>13</sup> See People v. Clark, 70 N. Y. 518 (1877). See also cases in note 14, *infra*.

<sup>14</sup> This policy is also exemplified in abundant authority to the effect that the validity of the organization of a public corporation cannot be attacked collaterally, but only by direct proceedings in *quo warranto*. Bateman v. Florida, etc. Co., 26 Fla. 423, 8 So. 51 (1890) (bill in equity); People v. Powell, 274 Ill. 222, 113 N. E. 614. (1916) (ground of demurrer in mandamus); Nelson v. School District, 181 Iowa, 424, 164 N. W. 874 (1917) (bill in equity).

under the Statute of Anne,<sup>15</sup> and similar American statutes.<sup>16</sup> But as proceedings against a *de facto* municipality were not within the scope of the statute, and as those suits which had to be instituted by the Attorney General in behalf of the sovereign might be commenced as matter of right without leave of court,<sup>17</sup> there has been little opportunity to apply to cases of such corporations the rules of discretion worked out under the statute.<sup>18</sup> There is, however, strong modern authority that lapse of time, coupled with acquiescence or recognition by the state, may at the second stage of a proceeding in *quo warranto* constitute a valid defense even against the state.<sup>19</sup> The most significant statement of the

<sup>15</sup> 9 ANNE, c. 20.

<sup>16</sup> The statute of 9 ANNE, c. 20, was early said to be one of the American common-law statutes. See GALE, LIST OF ENGLISH STATUTES SUPPOSED TO BE APPLICABLE TO THE SEVERAL STATES OF THE UNION. But see *Comm. v. Murray*, 11 S. & R. (Pa.) 73 (1824). And either at common law or by enactment it is quite generally in force in the United States. See 2 DILLON, MUNICIPAL CORPORATIONS, 4 ed., § 888, n. 2.

<sup>17</sup> *King v. Trevenen*, 2 B. & Ald. 479 (1819); *State v. Bryan*, 50 Fla. 293, 39 So. 929 (1905); *State v. St. Louis, etc. Ins. Co.*, 8 Mo. 330 (1843); *Meehan v. Bachelder*, 73 N. H. 113, 59 Atl. 620 (1904); *State v. Seymour*, 67 N. J. L. 482, 51 Atl. 719 (1902). And see *People v. Union El. R. R. Co.*, 269 Ill. 212, 226, 110 N. E. 1, 6 (1915). But see *State v. Leatherman*, 38 Ark. 81 (1881); and also the principal case of *Att'y Gen'l v. City of Methuen*, *supra*.

If the last named case is to be taken as holding that the court may in its sound discretion dispose of an information in *quo warranto* by the Attorney General *ex officio*, at the outset similarly to the procedure under the Statute of Anne in cases of private relators, it must overrule the language at least of a long line of Massachusetts cases holding no leave of court necessary for the filing of such an information. *Goddard v. Smithett*, 3 Gray, 116, 122-123 (1854); *Comm. v. Allen*, 128 Mass. 308 (1880); *Att'y Gen'l v. Sullivan*, 163 Mass. 446, 448, 40 N. E. 843, 844 (1895); *Haupt v. Rogers*, 170 Mass. 71, 48 N. E. 1080 (1898). And if so, it is supported in that position only by language of *State v. Leatherman*, *supra*, out of the many cases cited by the court. All the rest are either cases of private relation, or go on the basis of laches and are determined at the second stage of the suit; and even *State v. Leatherman*, *supra*, is commonly cited as a case of laches. See *State v. City of Des Moines*, 96 Iowa, 521, 65 N. W. 818 (1896); *People v. Long Beach*, 155 Cal. 604, 102 Pac. 664 (1909). Yet the court seems to reject any doctrine of laches running against the state, and the only other interpretation would be a ruling that the court has a general discretion in the second stage of the suit to refuse relief, a doctrine never sounded even in cases of private relation under the statute. See *HIGH, op. cit.*, 560; *People v. Union El. R. R. Co.*, *supra*, 232. The decision, which in respect of citation of authorities is characterized by bulky inaccuracy, is therefore rather unsatisfactory in legal technique although reaching an entirely desirable result.

<sup>18</sup> The Illinois statute requires leave of court for filing any information in the nature of *quo warranto*, the judge to be satisfied of "probable ground" for the proceeding. See ILLINOIS REV. STAT. (HURD), c. 112. This is construed as merely requiring the petition to show a *prima facie* case, and not as authorizing the court to consider the merits at the preliminary stage of the suit. *People v. Union El. R. R. Co.*, *supra*, note 17. But the question of laches may be raised at trial on the merits. See *infra*, note 19.

<sup>19</sup> *State v. Leatherman*, 38 Ark. 81 (1881); *State v. School District No. 108*, 85 Minn. 230, 88 N. W. 751 (1902); *People v. Union El. R. R. Co.*, 269 Ill. 212, 110 N. E. 1 (1915); *State v. Westport*, 116 Mo. 582, 22 S. W. 888 (1893); *State v. Mansfield*, 99 Mo. App. 146, 72 S. W. 471 (1903); *State v. Lincoln St. Ry.*, 80 Neb. 333, 114 N. W. 422 (1907). And see possibly in accord by implication: *People v. Long Beach*, 155 Cal. 604, 102 Pac. 664 (1909). *Contra*: *Comm. v. Allen*, 128 Mass. 308 (1880); *State v. Port of Tillamook*, 62 Ore. 332, 124 Pac. 637 (1912); *State v. Pawtuxet Co.*, 8 R. I. 521 (1887); *State v. Wofford*, 90 Tex. 514, 39 S. W. 921 (1897). Of course cases of laches by private relators are to be distinguished. See, for example, *People v. Keigwin*, 256 Ill. 264, 100 N. E. 160 (1912).

rule is by the Illinois court,<sup>20</sup> where an exception to the principle that no laches can bar the state is said to arise when injury to the public may come from assertion of the right of the state. This must be taken not as conferring unlimited discretionary powers, but as indicating when the question of laches may properly be raised. It evinces, however, a liberal attitude towards that question. The superficial distinction between the "public" and "state" is but a way of indicating the cross-interests<sup>21</sup> of the state which are weighed in this connection. That this is a somewhat different problem from that involved in cases under the statute of 9 Anne, c. 20, appears from comparison of the elements considered respectively in these cases of "laches,"<sup>22</sup> and in those of general discretion to allow suits at private relation.<sup>23</sup> An obvious altering of the balance follows the elimination of the private interests of the relator. The trend seems towards a further inroad upon the prerogative and a widening of the discretionary field,<sup>24</sup> but it will be interesting to see if this newer discretion will itself be gradually crystallized into sub-rules as was, for example, by analogy with the statute of limitations, done with the time element in cases under the Statute of Anne.<sup>25</sup>

WHAT IS ADMISSIBLE EVIDENCE OF VALUE IN EMINENT DOMAIN. — The recent decision of the United States Circuit Court of Appeals for the First Circuit in the *Cape Cod Canal Condemnation Case*<sup>1</sup> contains a far-reaching discussion of several fundamental questions in the law of eminent domain.

It has always been the law that the value of the property to the taker was not the test, and evidence of the value, as distinguished from the utility, of the property in question for any particular purpose is generally held to be inadmissible; but evidence of the utility or availability of the property for any purpose, including the purpose for which the taker may desire it, has almost universally been admitted. The debatable question is whether this special adaptability for use may be shown when the taker is the only person who can put the property to this par-

<sup>20</sup> *People v. Union El. R. R. Co.*, *supra*, at p. 231. And see *State v. Mansfield*, *supra*, at pp. 152-153, which probably states a rule broader than the authorities admit, in saying that the discretion formerly confined to the initiation of *quo warranto* proceedings is now extended to the stage of determination on the merits.

<sup>21</sup> See p. 74, *supra*.

<sup>22</sup> See cases in note 19, *supra*. The facts of *Att'y Gen'l v. City of Methuen* were well within the rule of these cases, several years having elapsed during which the city received various sorts of recognition from the legislature and carried on without objection the functions of government; and, as the case came up on information, plea, and agreed facts, and seems thus to have been treated as before the court upon the merits, and as the decision is grounded upon these cases, it may in course of time find its place in line with them despite the failure to recognize expressly any exception to the rule of *nullum tempus occurrit regi*.

<sup>23</sup> See HIGH, *EXTRAORDINARY LEGAL REMEDIES*, 3 ed., 558-559.

<sup>24</sup> *Cf. Att'y Gen'l v. N. Y., N. H. & H. Ry.*, 197 Mass. 194, 83 N. E. 408 (1908); where the existence of another remedy provided by statute is treated as sufficient ground for declining to exercise in favor of the state the jurisdiction in *quo warranto*.

<sup>25</sup> *Winchelsea Causes*, 4 Burr. 1962 (1766); *King v. Dickinson*, 4 T. R. 282, 284 (1791).

<sup>1</sup> *United States v. Boston, Cape Cod & New York Canal Co.*, 271 Fed. 877 (1st Circ., 1921). For the facts of this case see *RECENT CASES infra*, p. 86.

ticular use. According to the earlier English cases<sup>2</sup> in which this question was discussed and to the general current of American state court authority, this can be done; but the later English decisions,<sup>3</sup> certain recent state court cases<sup>4</sup> in which the question has been more carefully considered, and the present trend of United States Supreme Court opinions<sup>5</sup> are the other way. The present tendency is to hold that the special utility of the property to the taker alone cannot be stated or described; that is, to reject such evidence, unless there is proof of the existence of a market, outside the desires or necessities of the taker, for the property for the particular use in question. And this is now the decision of the United States Circuit Court of Appeals in a case which presented this issue in its simplest form. It can hardly be doubted that this is a sound decision, and one likely to be followed even by those state courts which have so far overlooked the vital distinction between a special adaptability for a particular use to persons other than the taker, and a special adaptability for the sole use of the party invoking the aid of eminent domain.

The various public service commissions in the country have for the past three years been struggling with the question whether in a rate case in which it is sought to determine the value of the company's property by the test of reproduction cost the greatly enhanced unit prices brought about by the war may be used. These commissions have generally decided that reproduction cost based on such prices does not represent the fair value of the property; but most of them allow the evidence to be received "for what it may be worth" (whatever this may mean), and many of them reach their estimates of reproduction cost by striking an average of unit prices during the few years preceding the date of valuation. The case under review lays down as the true rule that the jury "should not consider the evidence of reconstruction cost upon the question of value, unless they were satisfied that a reasonably prudent man would purchase or undertake the construction of the property at such a figure." This decision, if followed by our Public Service Commissions, will save a great deal of evidence and trouble. No one would think of buying in 1921 a water, gas or electric lighting plant at twice what the property actually cost, or twice what it could have been duplicated for in the years immediately preceding the world war. And to fix the rate-base, so far as it depends on the value of the property, on actual or pre-war costs and prices cannot conceivably amount to a taking of property without "just compensation," if there is no market for the property at the higher figures of the present time.

The actual cost, within a reasonable time, of the property taken is always regarded as evidence, though not conclusive evidence, of present

<sup>2</sup> The *Aspatia Water Board Case*, [1904] 1 K. B. 417; *Lucas & Chesterfield Gas & Water Board Case*, [1909] 1 K. B. 16.

<sup>3</sup> See *Sidney v. Northeastern Ry. Co.*, [1914] 3 K. B. 629.

<sup>4</sup> See for instance *Matter of Simmons*, 130 App. Div. 350, 356, 114 N. Y. Supp. 571, 575 (1909), 195 N. Y. 573, 88 N. E. 1132 (1909); *s. c.* 229 U. S. 363 (1913); *Re Public Service Commission*, 92 Misc. 420, 155 N. Y. Supp. 985 (1915); *Yazoo R. R. v. Teissier*, 134 La. 958, 64 So. 866 (1914); *Tanner v. Canal Co.*, 40 Utah, 105, 121 Pac. 584 (1911).

<sup>5</sup> See *New York v. Sage*, 239 U. S. 57, 61 (1915).

value; and until lately there has not been much dispute as to what was meant by the phrase "actual cost." This was generally held to include the cash sums paid for land and construction, the actual and reasonable cost of supervision and other "overhead" expenditures upon the property, and interest during construction. Recently, however, avaricious claimants have attempted to swell, often to the doubling point, the "actual cost" of the property by including such items of expenditure as incidental costs of financing the company. All these expenditures were held by the Circuit Court of Appeals in the *Canal* case to have been improperly admitted in evidence. The court, however, considered that what are sometimes termed "development costs," meaning the expenses incurred in creating the business and revenue of the enterprise, may be considered as an item or factor in the "going value" of the property, provided the enterprise was a profitable one or there was a reasonable probability that it would become so.

It will be seen that the decision under consideration will, if followed by other courts and by Public Service Commissions, tend very much to simplify the processes of property valuation, which were in great danger of becoming too complicated, and of resulting in figures which are neither sensible nor just.

The unanimous decision of the Circuit Court of Appeals in the *Canal* case was not appealed to the United States Supreme Court. It will, therefore, remain as a far-reaching and authoritative discussion of some of the most important questions in the law of valuation.

N. M.

#### PROTECTING A MARRIED WOMAN'S INTEREST IN HOMESTEAD PROPERTY.

—It is a sensible rule of statutory interpretation, formerly adopted perhaps too reluctantly by the courts,<sup>1</sup> that the general purpose of a statute, and not merely its express terms, should be given effect.<sup>2</sup> Especially is this true when a statute is remedial in nature.<sup>3</sup> The extent to which many courts are willing to apply this rule is found in their attitude toward a common provision of the homestead laws, to the effect that a deed conveying homestead property shall be valid only if signed by both husband and wife.<sup>4</sup> It is clear that with such a statute in force a contract executed only by the husband cannot be specifically enforced against an unwilling wife,<sup>5</sup> since this would defeat the plain meaning of the

<sup>1</sup> For an admirable criticism of the failure of the courts to give full effect to the intent of the legislature, see Dean Pound's article, "Common Law and Legislation," 21 HARV. L. REV. 383.

<sup>2</sup> See DWARRIS, TREATISE ON STATUTES, Potter's ed., 202-212; SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, 2 ed., § 240.

<sup>3</sup> *Shea v. Peters*, 230 Mass. 197, 119 N. E. 746 (1918). See BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS, 2 ed., 487. As to the extent that homestead statutes should be liberally construed as being remedial, see WAPLES, HOMESTEAD AND EXEMPTION, 28.

<sup>4</sup> "No conveyance, mortgage, or other instrument affecting the homestead of any married man shall be of any validity, except for taxes, laborers' and mechanics' liens, and the purchase money, unless his wife joins in the execution of such instrument and acknowledges the same." C. & M. ARK. DIGEST, § 5542. See WAPLES, *op. cit.*, 955.

<sup>5</sup> *Mundy v. Shellabarger*, 161 Fed. 503 (8th Circ., 1908). A similar question arises when a wife refuses to release dower. An early case decreed specific performance in

statute. A recent Arkansas case,<sup>6</sup> following the weight of authority,<sup>7</sup> goes further and holds the contract entirely void as against the policy of the statute,<sup>8</sup> so that the husband is not even liable for its breach. There is much authority, however, *contra*,<sup>9</sup> and the arguments against holding the contract void cannot be ignored.

The purpose of the homestead statutes is not charity but rather the protection of the home.<sup>10</sup> Whether rich or poor, the family is protected only if, and to the extent that, it owns homestead property. And since the wife can at all events prevent the homestead from being alienated,<sup>11</sup> the argument is not without weight that the effect of the obligation of the husband to pay damages for the breach of his contract is not unlike that of any other obligation of the husband in its influence on the wife to allow the property to be sold. In any case the alternatives, theoretically at least, are either to dispose of the homestead, getting or retaining less than it is worth, or to lose a like amount<sup>12</sup> from other property of the husband.<sup>13</sup> Obviously the homestead laws do not require that all losing contracts of the husband be held void and on this reasoning there is no basis for a distinction between them. Another argument not entirely unsound is based on the marital right of the husband at common law to determine the family residence.<sup>14</sup> It seems clear that the policy of the homestead law does not infringe upon this fundamental common law right.<sup>15</sup> The result is that by an abandonment of the homestead by the husband,<sup>16</sup> if made in good faith, the wife may be

such a case. *Hall v. Hardy*, 3 Peere Williams, 187 (1733). But it is well settled to-day that such a decree will not be issued. *Peeler v. Levy*, 26 N. J. Eq. 330 (1875); *Reisz's Appeal*, 73 Pa. St. 485 (1873).

<sup>6</sup> *Ferrell v. Wood*, 232 S. W. 577 (1921). For the facts of this case see RECENT CASES, *infra*, p. 88.

<sup>7</sup> *Thimes v. Stumpff*, 33 Kan. 53, 5 Pac. 431 (1885); *Weitzner v. Thingstad*, 55 Minn. 244, 56 N. W. 817 (1893); *Lichty v. Beale*, 75 Neb. 770, 106 N. W. 1018 (1906); *Mundy v. Shellabarger*, 161 Fed. 503 (8th Circ., 1908).

<sup>8</sup> On strict principles of contract the husband is clearly liable in damages. Damages will arise for a breach of a contract to convey land over which the obligor had no power of disposition at the time of the contract. *Carr v. Dooley*, 19 Misc. 553, 43 N. Y. Supp. 399 (1897). Likewise for a failure to procure a release of dower. *Drake v. Baker*, 34 N. J. L. 358 (1871).

<sup>9</sup> *White v. Bates*, 234 Ill. 276, 84 N. E. 906 (1908); *Wainscott v. Haley*, 185 Mo. App. 45, 171 S. W. 983 (1914). See 23 HARV. L. REV. 65; SMYTH, HOMESTEAD AND EXEMPTIONS, § 451.

<sup>10</sup> See WAPLES, HOMESTEAD AND EXEMPTION, 3-5, 36-38.

<sup>11</sup> For a review of the various exemption provisions of the homestead laws, see WAPLES, *op. cit.*, 955.

<sup>12</sup> This assumes that the measure of damages would be the difference between the value of the land and the contract price, which would not be true in all jurisdictions. See 3 SEDGWICK, DAMAGES, 9 ed., §§ 1009-1012.

<sup>13</sup> For example, it may be supposed that the value of the homestead is \$2000 and the husband contracted to sell it for \$1500. The contract may be carried out and \$1500 realized, or the obligation arising from its breach may be satisfied from other property worth \$500. In case of any other obligation of the husband for \$500, the homestead may be sold and after paying this debt, \$1500 will remain, or the debt may again be satisfied from other property worth \$500.

<sup>14</sup> See SCHOULER, DOMESTIC RELATIONS, 5 ed., § 38.

<sup>15</sup> *Brown v. Coon*, 36 Ill. 243 (1864); *Farmers' Building and Loan Assn. v. Jones*, 68 Ark. 76, 56 S. W. 1062 (1900). See THOMPSON, HOMESTEAD AND EXEMPTION LAWS, § 276.

<sup>16</sup> As to what constitutes abandonment of the homestead, see THOMPSON, *op. cit.*, §§ 263-287.

divested of her rights therein, probably by a mere change of residence,<sup>17</sup> but at least by the acquisition of another homestead.<sup>18</sup> A husband might accordingly by such abandonment be enabled to carry out his contract to sell the homestead without doing anything contrary to the policy of the statute.

But looking at actualities rather than theoretical arguments, as the court must in considering the effect of the policy of the statute, it is fully justified in holding the contract void. There is a practical difference between an obligation to pay money arising from the breach of the husband's contract to convey the homestead, and the obligations arising from other losing contracts of the husband. Here the obligation would arise from the wife's refusal to carry out her husband's wishes. And, in such circumstances, the prospect of material loss is by no means the most potent influence impelling her to agree to the conveyance. For not only would she shun the publicity which a damage suit would give such domestic discord, but she would also wish to avoid the reproaches of a disgruntled husband complaining that her stubbornness had turned a seemingly good bargain into a liability for damages.

Nor is the argument that the husband may fulfill his contract by abandoning and then conveying the homestead by any means conclusive. Just what may be the effect, under varying conditions, of abandonment of the homestead by the husband without the wife's consent is not clear on the authorities.<sup>19</sup> But just as the common law placed limits on the husband's right to determine the family residence,<sup>20</sup> so there are obviously cases where the policy of the Homestead Act will not allow a mere purported abandonment in utter disregard of the family's welfare to deprive the wife of her interest.<sup>21</sup> So here again the wife's consent would be essential to the performance of the contract. Moreover it is these cases, where a shiftless and irresponsible husband, or a husband bent on speculation, contemplates not merely an abandonment of the homestead but a virtual abandonment of the family, that constitute the real menace to the policy of the homestead laws. They should, therefore, be of the greatest weight in determining the attitude of the courts on the husband's contracts, and justify holding those contracts void.

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**RIGHTS OF THE TRUSTEE IN BANKRUPTCY UNDER MODERN LIFE INSURANCE POLICIES.** — The disposition of life insurance policies upon the bankruptcy of the insured has long been a source of confusion in the

<sup>17</sup> *Brennan v. Wallace*, 25 Cal. 108 (1864); *Stewart v. Pritchard*, 101 Ark. 101, 141 S. W. 505 (1911).

<sup>18</sup> A recent case apparently holds that a new homestead must be acquired to defeat the wife's right in the former homestead if she does not consent to the abandonment. *Fisher v. Gulf Production Co.*, 231 S. W. 450 (Tex. Civ. App. 1921). And in the following cases where no new homestead had been acquired, it was held that the wife's rights were not lost. *Blumer v. Allbright*, 64 Neb. 249, 89 N. W. 809 (1902); *Collins v. Boyett*, 87 Tenn. 334, 10 S. W. 512 (1889).

<sup>19</sup> See cases cited in notes 17 and 18.

<sup>20</sup> *Powell v. Powell*, 29 Vt. 148 (1856); *Gleason v. Gleason*, 4 Wis. 64 (1855).

<sup>21</sup> *Collins v. Boyett*, 87 Tenn. 334, 10 S. W. 512 (1889). See *WAPLES, HOMESTEAD AND EXEMPTION*, 582.

law.<sup>1</sup> Yet the situation seems *a priori* to present little inherent difficulty. The purpose of bankruptcy proceedings is to administer insolvent estates fairly for the benefit of all interested parties,<sup>2</sup> and to this end bankruptcy law passes all property of the bankrupt to a trustee.<sup>3</sup> In a business sense policies of insurance on the bankrupt's life are assets of his estate (1) when the bankrupt or his estate is the beneficiary,<sup>4</sup> or (2) when the policy has a cash surrender value payable to the bankrupt, or (3) when the policy reserves to the bankrupt a power to change the beneficiary.<sup>5</sup> On its face the Bankruptcy Act seems to pass such policies to the trustee, as property which the bankrupt could have transferred, with a proviso that the bankrupt may retain policies which have a cash surrender value payable to himself upon paying to the trustee the amount of such cash surrender value.<sup>6</sup> Such a disposition would be logical, simple, and just.

But the provisions of the Bankruptcy Act relating to the bankrupt's life insurance policies have been the subject of judicial interpretation. After conflicting decisions in the lower courts,<sup>7</sup> the Supreme Court in *Burlingham v. Crouse*<sup>8</sup> construed the proviso of section 70 a (5). It there

<sup>1</sup> See Samuel Davis, "What are the Rights of the Bankrupt's Trustee to His Life Insurance Policies?" 24 GREEN BAG, 419.

<sup>2</sup> See 1 REMINGTON, BANKRUPTCY, 2 ed., 15.

<sup>3</sup> The general principle of bankruptcy law is that all property of the bankrupt passes to the trustee, subject to his right of disclaimer of any property which he considers onerous. This general principle is subject to some qualifications not germane to the present discussion.

<sup>4</sup> The right to the face value of the policy, though future and contingent, is presently transferable for value. *Grigsby v. Russell*, 222 U. S. 149 (1911). Indeed, in extreme cases the present value of such a right may approach the face value of the policy.

<sup>5</sup> The power to change the beneficiary allows the insured to transfer the right to the face value at will. *First National, etc. v. Security, etc. Co.*, 222 S. W. 832 (Mo., 1920). This may be done by appointing the transferee beneficiary, or by appointing himself beneficiary and transferring that right.

<sup>6</sup> "SEC. 70. TITLE TO PROPERTY.—a The trustee . . . shall . . . be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all . . . (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; . . . (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: *Provided*, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; . . ." 30 STAT. AT L. 565.

Section 70 a (3) may properly be relied on to pass the power to change beneficiaries to the trustee. *Cohen v. Samuels*, 245 U. S. 50 (1917). The peculiar wording of this section renders it meaningless if taken literally, since a power which the bankrupt might have exercised for himself he might also have exercised for another. The intent behind the section is perfectly clear, however, and can be effected by limiting the application of the second part of the section to powers which the bankrupt might have exercised *exclusively* for some other person.

<sup>7</sup> *In re Slingluff*, 106 Fed. 154 (D. Md., 1900); *In re Orear*, 178 Fed. 632 (8th Circ., 1910). *Contra, In re Josephson*, 121 Fed. 142 (S. D. Ga., W. D., 1903); *Gould v. New York Life Ins. Co.*, 132 Fed. 927 (E. D. Ark., W. D., 1904).

<sup>8</sup> 228 U. S. 459 (1913).



held that where a policy payable to the bankrupt's estate had been pledged to the insurer for a loan larger than the cash surrender value the trustee took no interest in the policy. Mr. Justice Day's reasoning was that the proviso was in the nature of additional and exclusive legislation,<sup>9</sup> so that only policies having an actual cash surrender value passed to the trustee, and these only to the extent of the cash surrender value.<sup>10</sup> Two companion cases<sup>11</sup> of *Burlingham v. Crouse* followed this reasoning where the insured bankrupt had died between the filing of the petition and the adjudication in bankruptcy, and held the trustee entitled to the amount of the cash surrender value and the beneficiary entitled to the balance. As an original question the soundness of this reasoning may be doubted,<sup>12</sup> but these cases seemed to establish the rule that the actual cash surrender value at the time of the filing of the petition passed to the trustee.

In *Frederick v. Fidelity Mutual Life Insurance Co.*<sup>13</sup> the Supreme Court has recently held that the trustee could not recover the cash surrender value from the insurer where the insured bankrupt had died after the adjudication in bankruptcy and the insurer had paid the beneficiary the face value of the policy. The opinion stresses the good faith of the insurer and the lack of notice of the bankruptcy. But an adjudication in bankruptcy is generally held a constructive notice to all the world.<sup>14</sup> Moreover, payment by a debtor to the bankrupt or his assignee instead of to the trustee in bankruptcy is no defense, even though in good faith.<sup>15</sup> So, unless this case is a novel exception to these well-established principles, the beneficiary must have had a right to the full face value of the

<sup>9</sup> The proviso was a part of the original Bankruptcy Act of 1898. 30 STAT. AT L. 566. It did not, however, appear in the earlier statutes on bankruptcy. 2 STAT. AT L. 19, 23; 5 STAT. AT L. 440, 442; 14 STAT. AT L. 517, 522.

This reasoning may be in part due to, and in turn has been the cause of, uncertainty whether "payable to himself" is to be taken with "policy" or with "cash surrender value." The latter view is grammatically correct and is in accord with the whole tenor of the proviso and of the Act. But courts have talked almost indifferently about policies payable to the bankrupt and cash surrender values payable to the bankrupt.

<sup>10</sup> The last words of the proviso itself are "otherwise the policy shall pass to the trustee as assets."

<sup>11</sup> *Everett v. Judson*, 228 U. S. 474 (1913); *Andrews v. Partridge*, 228 U. S. 479 (1913).

<sup>12</sup> Certainly the result is an unusual meaning for words which seem unambiguous and wholly consistent with the rest of the Act. There seems to be no historical reason for such a construction. A policy of leniency toward the bankrupt may account for such a strained interpretation, but that is properly a legislative matter to be regulated by exemption statutes which are given full effect by section 6 of the Bankruptcy Act, reinforced by *Holden v. Stratton*, 198 U. S. 202 (1905).

It may be noted that in *Cohen v. Samuels*, 245 U. S. 50 (1917), followed by *Cohn v. Malone*, 248 U. S. 450 (1919), the Court, speaking this time through Mr. Justice McKenna, qualified the reasoning of those former cases and relied on 70a (3) and 70a (5) of the Bankruptcy Act to allow the trustee to reach the policies.

<sup>13</sup> U. S. Sup. Ct., Oct. Term, 1920, no. 547. For the facts of this case, see RECENT CASES, *infra*, p. 84.

<sup>14</sup> *Mueller v. Nugent*, 184 U. S. 1 (1902). See *In re Mertens*, 134 Fed. 101 105 (N. D. N. Y., 1905).

<sup>15</sup> *Palmer v. Jordan*, 163 Mass. 350 (1895). See *Conner v. Long*, 104 U. S. 228, 232 (1881). The reason is that the transfer by law is a complete legal assignment, not like the ordinary assignment of a chose in action, and so cannot be defeated by sale to a bona fide purchaser.

policy at the time of payment. This is inconsistent <sup>16</sup> with the companion cases of *Burlingham v. Crouse*, which gave the beneficiary only the surplus after paying the cash surrender value to the trustee.

This unsatisfactory state of the law will continue until it is seen just what it is that the trustee gets in such a situation. When an ordinary policy of life insurance, payable to a third person beneficiary, with a cash surrender value,<sup>17</sup> and a power in the insured to change the beneficiary,<sup>18</sup> is in force, it is submitted that the insured has a right against the insurer for the cash surrender value, conditional however upon the surrender of the policy, and that the beneficiary has a right against the insurer for the face value of the policy, conditional however upon death of the insured, and also subject to be defeated by a change of beneficiaries. In the nature of things either of these conditional rights is defeated by perfection of the other. The only effect of bankruptcy on this situation is to substitute the trustee for the insured. The trustee may then, subject to the bankrupt's right of redemption, get the cash surrender value, but only by surrendering the policy; or he may change the beneficiary.<sup>19</sup> But unless and until he does one of these acts the conditional right of the original beneficiary remains unchanged and may be perfected at any time by death of the insured. Thereafter the trustee has no more right to the cash surrender value than the beneficiary would

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<sup>16</sup> The policy in the principal case was payable in terms to a third person while those in the other cases were payable to the estate of the insured. But the significant point is to whom the cash surrender value was payable, and this was payable to the insured bankrupt in all these cases. See footnote 17, *infra*. *Cohen v. Samuels*, *supra*, is a square holding that the trustee can reach the cash surrender value where the policy is payable in terms to a third person beneficiary with a power in the insured to change the beneficiary as readily as where the policy is payable to the estate of the insured.

The contest in the principal case was between the trustee and the insurer, while in the other cases it was between the trustee and the beneficiary, but certainly this accident of procedure should not affect the substantive rights of the parties.

<sup>17</sup> When is the cash surrender value payable to the insured? It is clearly so when the insured is also beneficiary or when the policy so provides expressly. But more often there is no express provision as to this point in the policy. The popular understanding is that when a man insures his life and pays the premiums he is himself entitled to the cash surrender value. But it is well settled that in the absence of a power to change the beneficiary the insured cannot by himself surrender the policy and get the cash surrender value, because the beneficiary has a vested interest therein *Mutual Life Ins. Co. v. Allen*, 212 Ill. 134, 72 N. E. 200 (1904); *Ferguson v. Phoenix*, etc. Co., 84 Vt. 350, 79 Atl. 997 (1911). But where there is a power in the insured to change the beneficiary it is submitted that there is no vested right in the beneficiary and so no obstacle to prevent giving effect to the general understanding of the contract. The cash surrender value should be payable to the insured in such a case, but the authorities are divided. *Crice v. Illinois Ins. Co.*, 122 Ky. 572, 92 S. W. 560 (1906); *McKinney v. Fidelity*, etc. Co., 270 Mo. 305, 193 S. W. 564 (1917). *Contra*, *Holder v. Prudential Ins. Co.*, 77 S. C. 299, 57 S. E. 853 (1907); *Roberts v. Northwestern*, etc. Co., 143 Ga. 780, 85 S. E. 1043 (1915).

<sup>18</sup> This power should have no effect upon the right of the beneficiary, except to render it contingent instead of vested, unless and until the power is properly exercised. And this has in general been the ruling of the courts. See *In re Jones*, 249 Fed. 487 (D. Md., 1917). This question is of tremendous practical importance because of its bearing on the application of exemption statutes.

<sup>19</sup> Insurance counsel endeavoring to protect the beneficiary deny that the power to change beneficiaries can be exercised by any one except the insured. But this position seems untenable in view of section 70 a (3) of the Bankruptcy Act and *Cohen v. Samuels*, 245 U. S. 50 (1917).

have to the face value after a surrender of the policy. This, it is submitted, should have been the ground of the decision in *Frederick v. Fidelity Mutual Life Insurance Co.* and should be applied to all related cases.

## RECENT CASES

**BANKRUPTCY — PROPERTY PASSING TO TRUSTEE — RIGHT TO CASH SURRENDER VALUE OF LIFE INSURANCE POLICY** — A bankrupt had a life insurance policy with a cash surrender value, a third person beneficiary, and a power reserved to himself to change the beneficiary. He died after the adjudication in bankruptcy and the defendant insurer paid the full face value of the policy to the beneficiary without notice of the bankruptcy. The plaintiff, trustee in bankruptcy, sues to recover the cash surrender value. *Held*, that the defendant is not liable. *Frederick v. Fidelity Mutual Life Insurance Co.*, U. S. Sup. Ct., Oct. Term, 1920, no. 547.

For a discussion of the principles involved in this case, see NOTES, *supra*, p. 80.

**CONSTITUTIONAL LAW — EVIDENCE — PRIVILEGES UNDER THE FOURTH AND FIFTH AMENDMENTS — USE BY GOVERNMENT OF PAPERS STOLEN BY PRIVATE INDIVIDUAL** — The petitioner's private papers were stolen by detectives engaged by his employer. Evidence of an alleged fraudulent use of the mails was discovered therein, and voluntarily turned over to the Department of Justice, which had no prior knowledge of the theft. Before presentation of the papers to the grand jury, the petitioner filed a petition in the Federal District Court for an order for the return of the papers to him. *Held*, that the government is entitled to retain the papers for use against the petitioner. *Burdeau v. McDowell*, U. S. Sup. Ct., Oct. Term, 1920, No. 646.

The Supreme Court has recently indicated that it will give full effect to the privileges guaranteed by the Fourth and Fifth Amendments. *Silverthorne Lumber Co. v. United States*, 251 U. S. 385; *Gouled v. United States*, U. S. Sup. Ct., Oct. Term, 1920, No. 250. See Osmond K. Fraenkel, "Concerning Searches and Seizures," 34 HARV. L. REV. 361. But the privilege against unreasonable search and seizure has been held applicable only to action by government officers or their authorized agents. *Bacon v. United States*, 97 Fed. 35 (8th Circ.). See *Weeks v. United States*, 232 U. S. 383, 398; *Flagg v. United States*, 233 Fed. 481, 483 (2d. Circ.). The purpose of this Amendment, it is submitted, is to restrain unscrupulous government officers from interfering with domestic tranquillity, rather than to enable Federal offenders to avoid detection and prosecution. See COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 424 *et seq.*; 2 STORY, COMMENTARIES ON THE CONSTITUTION, 5 ed., §§ 1901-2. To safeguard his constitutional rights effectively, the petitioner might well be entitled to a return where any connection, although short of an agency, can be shown between Federal officials and the thief, before the theft. But where, as here, there is no connection, the petitioner must rely upon extra-Constitutional rights. It is submitted that the vague reason given by the dissenting justices, *viz.*, the lessening of respect for law "by resort in its enforcement to means which shock the common man's sense of decency and fair play," is a doubtful basis for such a right. The Fifth Amendment will not be violated by introducing these papers at the trial. *Lyman v. United States*, 241 Fed. 045 (9th Circ.). Petitioner's only remedy is an action for damages against the thief.

**CORPORATIONS — DISSOLUTION — DEVOLUTION OF PROPERTY ON DISSOLUTION.** A voluntary military company was incorporated by the legislature. The company later acquired property by public subscription, fairs, etc. Certain members of the company, alleging that its existence has been terminated, sue to have the property divided among them. The trustees who hold the property demur. *Held*, that the demurrer be sustained. *Clarke v. Armstrong*, 106 S. E. 289 (Ga.).

Questions concerning the devolution of the property of dissolved corporations are not new. Coke declared that the real property of a corporation reverted to the grantor. See CO. LIT. 13 b. But Gray pointed out that the authorities relied upon by Coke in reality supported the doctrine that the land escheated to the lord, which appears to have been the true rule. *Johnson v. Norway*, Winch, 37. See GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 44 51 a. But see *Mott v. Danville Seminary*, 129 Ill. 403, 21 N. E. 927. Cf. *County of Franklin v. Blake*, 283 Ill. 292, 119 N. E. 288. See KALES, ESTATES, FUTURE INTERESTS, ETC. IN ILLINOIS, 2 ed., § 302. There seems, however, little doubt that personalty passed to the state as *bona vacantia*. See *Mayor, etc. of Colchester v. Seaber*, 3 Burr. 1866, 1868, *arg.* But the old technical rules of the common law are no longer important. With regard to business corporations, it is almost universally established, either by legislation or by courts of equity, that, upon dissolution, their property will be held in trust for creditors and stockholders. *Bacon v. Robertson*, 18 How. (U. S.) 480. See 2 KENT, COMM., 12 ed., 307, note b; 29 HARV. L. REV. 780. As to corporations other than business corporations, the law is unsettled. On principle, little or no distinction should be made in disposing of the property of such corporations, and of trusts and unincorporated associations, whose existence is terminated. Principles applicable to trusts should control in all cases. When the purpose for which the property was accumulated is non-charitable, there should be a resulting trust in favor of such contributors as received no consideration for their contributions, regardless of whether or not they are members or trustees. *Coe v. Washington Mills*, 149 Mass. 543, 21 N. E. 966. Cf. *McAlhany v. Murray*, 89 S. C. 440, 71 S. E. 1025; *Mobile Temperance Hall Ass'n v. Holmes*, 189 Ala. 271, 65 So. 1020; *Neptune F. E. & H. Co. v. Board of Education of Mason Co.*, 166 Ky. 1, 178 S. W. 1138; *Tilcomb v. Kennebunk Mutual Fire Insurance Co.*, 79 Me. 315, 9 Atl. 732; *In re Printers' etc. Society*, [1899] 2 Ch. 184, distinguishing *Cunnack v. Edwards*, [1896] 2 Ch. 679. See SCOTT, CASES ON TRUSTS, 380, note, 382, note. Of course this result may be varied by showing that the donor intended some other disposition. *In re Customs, etc. Fund*, [1917] 2 Ch. 18; *In re Andrew's Trust*, [1905] 2 Ch. 48. Where the purpose is charitable, the only choice, in the absence of a valid outright gift over, should be between giving the property to the donor and administering it *cy pres*. The latter is preferable. *Mormon Church v. United States*, 136 U. S. 1; *Sherman v. Richmond Hose Co. No. 2*, 230 N. Y. 462, 130 N. E. 613; *In re Welch Hospital (Nelley) Fund*, [1921] 1 Ch. 655, in effect overruling *In re British Red Cross Balkan Fund*, [1914] 2 Ch. 419; *Smith v. Kerr*, [1902] 1 Ch. 774. *Contra*, *Easterbrooks v. Tillinghast*, 5 Gray (Mass.), 17. Cf. *People v. Braucher*, 258 Ill. 604, 101 N. E. 944. To hold that the property should go to the members is mistakenly to hold that the individual benefit and not the object of the organization is the charitable purpose. But see *Hopkins v. Crossley*, 138 Mich. 561, 101 N. W. 822. Cf. *People v. Braucher*, *supra*. For a discussion of terminable charitable trusts, see GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 41 a, 205 note, 312, 327 a, 603 i. In the principal case, the corporation was undoubtedly charitable. See BISPHAM, PRINCIPLES OF EQUITY, 9 ed., §§ 120, 123. The court was, therefore, right in refusing to recognize the claims of the individual members.

**CRIMINAL LAW—TRIAL—RIGHT OF ACCUSED TO ACT AS HIS OWN COUNSEL.**—The defendant was tried on a charge of criminal conspiracy. After the evidence was all in, he discharged his attorneys and requested permission to make the closing argument. The court denied the request, and the case went to the jury without argument for the defendant. *Held*, that there was no error. *State v. Townley*, 182 N. W. 773 (Minn.).

A person *sui juris* charged with crime may try his own case. *Diets v. State*, 149 Wis. 462, 136 N. W. 166; *Reg. v. Southey*, 4 F. & F. 864; *Reg. v. Yscuado*, 6 Cox C. C. 386. The danger of his making unsworn statements of fact to the jury is not important enough to deny him this right. This danger cannot be greater when he makes only the closing argument, and therefore cannot be a sound basis on which to rest the principal case. But the question remains how far a defendant waives his right by retaining counsel. Originally, in cases where a defendant was allowed counsel as to matters of fact and of law, if counsel conducted the trial as to matters of fact the accused had no right to make the closing argument. *Rex v. Parkins*, 1 C. & P. 548. This was simply a matter of the orderly conduct of the trial. *Rex v. White*, 3 Campb. 98. For the accused might be coached by counsel in examining witnesses, and then address the jury himself. See *Rex v. Parkins*, *supra*, at 549. The English courts have been increasingly lenient, and have even allowed both accused and counsel to address the jury. *Rex v. Pope*, 18 T. L. R. 717; *Reg. v. Doherty*, 16 Cox C. C. 306; *Reg. v. Walkling*, 8 C. & P. 243; *Reg. v. Malings*, 8 C. & P. 242. Cf. *Reg. v. Millhouse*, 15 Cox C. C. 622. But see *Reg. v. Taylor*, 1 F. & F. 535; *Reg. v. Rider*, 8 C. & P. 539; *Reg. v. Boucher*, 8 C. & P. 141; *Queen v. Burrows*, 2 M. & Rob. 124. No technical rules should determine the right of a defendant to discharge his counsel and continue the case in person. The principal case rightly holds it a matter of discretion. But it may be advisable to allow persons accused of political offenses, as was the defendant here, a greater scope than others. See Robert Ferrari, "Political Crime and Criminal Evidence," 3 MINN. L. REV. 365; "The Trial of Political Criminals, Here and Abroad," 66 DIAL, 647.

**EMINENT DOMAIN—VALUATION—WHAT IS ADMISSIBLE EVIDENCE OF VALUE.**—A verdict, in condemnation proceedings by the United States against the Cape Cod Canal, was based, *inter alia*, upon the following evidence, introduced by the owners over the government's exceptions: (1) utility to the government for military or naval purposes; (2) cost of reproduction in 1919 (three to four times the actual cost about five years earlier), introduced without any evidence that there was a market at the enhanced price; (3) opinion of an expert as to the prospective earning capacity of the property during the next twenty to twenty-five years; (4) as elements of actual cost: interest on bonds, payment in stock and bonds, payments to bankers for aid in floating the bonds, payments for services in financing the company and interest on the cost of the plant after its completion. *Held*, that the exceptions be sustained and a new trial granted. *United States v. Boston, Cape Cod and New York Canal Co.*, 271 Fed. 877 (1st Circ.).

For a discussion of the principles involved in this case, see NOTES, *supra*, page 76.

**FIXTURES—REMOVAL—EFFECT OF AGREEMENT ON CHARACTER OF PROPERTY.**—The defendant leased lands to the plaintiff who covenanted that he would erect thereon certain buildings, and would remove them at the expiration of his lease or within three months thereafter. There was no express provision in the lease respecting the ownership of the buildings. The plaintiff failed to remove the buildings within the specified time, and the

defendant refuses to let him go on the land to take the buildings. The plaintiff sues for damages for detinue or conversion. *Held*, that the plaintiff recover. *Cooney v. Miller*, [1921] V. L. R. 254.

It has frequently been held that by agreement made between the owners of realty and personalty before annexation, fixtures remain personal property and may be removed. *Broadus v. Smith*, 121 Ala. 335, 26 So. 34; *Dame v. Dame*, 38 N. H. 429. See EWELL, FIXTURES, 2 ed., 66-68, 150. Another view is that the fixtures become realty, but the original owner has a right of severance. *Trask v. Little*, 182 Mass. 8, 64 N. E. 206. Since by annexation the chattels assume the appearance of realty, and would, in the absence of a contract, be realty, the second view seems preferable. There is all the more reason for reaching this result in the principal case because there was no express provision that the buildings should be personalty. If there was simply a right of severance, there is no reason to extend it beyond the time bargained for. *Smith v. Park*, 31 Minn. 70, 16 N. W. 490. Even if it be said that the fixtures did become personalty by force of an implied contract, they should remain personalty only so long as the contract is operative. *Hughes v. Kershaw*, 42 Colo. 210, 93 Pac. 1116. See *contra*, *Dame v. Dame*, *supra*. On either view, the principal case is wrong.

**FOREIGN CORPORATIONS — SERVICE OF PROCESS — JURISDICTION WHEN CORPORATION IS NOT "DOING BUSINESS" IN THE STATE.** — The defendant, a foreign corporation, had no place of business in New York, and owned no property in the state. It sent its treasurer into the state on several occasions to buy furniture. The treasurer had full power to contract for the defendant. On one of these trips he was served, as agent of the defendant, with a summons for an action growing out of one of the prior purchases. The service was made as provided for by statute. (1909 N. Y. CODE CIV. PRO., § 432.) The defendant moved to quash the service. *Held*, that the motion be denied. *National Furniture Co. v. William Spiegelman & Co.*, 189 N. Y. Supp. 449 (Sup. Ct.).

Under the statute involved here the New York courts for a long time held that whenever an officer of a foreign corporation was personally served within the state, the courts acquired jurisdiction over the corporation for all causes of action. *Sadler v. Boston & Bolivia Rubber Co.*, 140 App. Div. 367, 125 N. Y. Supp. 405, *aff'd* 202 N. Y. 547, 95 N. E. 1139. But it is now recognized that a judgment *in personam* can only be rendered against a foreign corporation when it is "doing business" within the state. See *Riverside, etc. Mills v. Menejee*, 237 U. S. 189; *Dollar Co. v. Canadian C. & F. Co.*, 220 N. Y. 270, 115 N. E. 711; *Pennoyer v. Neff*, 95 U. S. 714. This defendant was not "doing business" within the state. *Good Hope Co. v. Railway Barb Fencing Co.*, 22 Fed. 635 (S. D. N. Y.); *St. Louis Wire-Mill Co. v. Consolidated Barb-Wire Co.*, 32 Fed. 802 (E. D. Mo.). To say, as the court does, that the defendant, for the purposes of this action, was present "doing business," is only to confuse the issue. New phraseology cannot hide the inherent defects of the old doctrine. That doctrine not only denies due process of law, but also conflicts with every accepted theory of jurisdiction. See Austin W. Scott, "Jurisdiction over Nonresidents Doing Business within a State," 32 HARV. L. REV. 871. If it is attempted to support the case on some theory of regulation of transactions carried on in the state, such reasoning would equally apply to nonresident individuals. It is not applied to individuals when they are "doing business," and *a fortiori* would not apply where they are not "doing business." *Flechner v. Farson*, 248 U. S. 289; *Cabanne v. Graf*, 87 Minn. 510, 92 N. W. 461. Unfortunately New York is not the only jurisdiction which gives way to the tendency to make things

easier for its own litigants. *Premo Specialty Mfg. Co. v. Jersey-Creme Co.*, 200 Fed. 352 (9th Circ.); *Colorado Iron-Works v. Sierra Grande Mining Co.*, 15 Colo. 499, 25 Pac. 325; *Fond du Lac Cheese & Butter Co. v. Henningsen Produce Co.*, 141 Wis. 70, 123 N. W. 640.

**FOREIGN EXCHANGE — SALE OF DRAFT — MEASURE OF DAMAGES ON DISHONOR.** — The plaintiff paid the defendant \$92,500 for a draft for 2,000,000 *lire* on the defendant's Genoese correspondent. Thereafter the Bank Commissioner took possession of the defendant's business and ordered the Genoese bank not to pay; these instructions were followed when the draft was later presented. The plaintiff sues to recover the original sum paid. *Held*, that the plaintiff recover only the rate of exchange for 2,000,000 *lire* at the date of dishonor. *American Express Co. v. Cosmopolitan Trust Co.*, 132 N. E. 26 (Mass.).

To recover the original deposit the plaintiff must prove either the right to rescind the contract for failure of consideration or the existence of a trust. There cannot be a trust without a *res*. Where actual money is transferred abroad, there is a *res*. *People ex rel. Zotti v. Flynn*, 135 App. Div. 276, 120 N. Y. Supp. 511. But, in the case of cable transfers and drafts, because of the lack of a *res*, the existence of any trust is generally denied. *Legniti v. Mechanics and Metals Bank*, 230 N. Y. 415, 130 N. E. 597. See *Strohmeyer and Arpe v. Guaranty Trust Co.*, 172 App. Div. 16, 157 N. Y. Supp. 955; *Zechariah Chafee, Jr.*, "Progress of the Law — Bills and Notes," 33 HARV. L. REV. 255, 279; *Austin W. Scott*, "Progress of the Law — Trusts," 33 HARV. L. REV. 688, 689. Therefore the plaintiff advances the theory of rescission because of failure of consideration. See 3 WILLISTON, CONTRACTS, §§ 1375, 1457, 1467. Obviously had this been a simple executory contract by the defendant to furnish *lire* in Genoa, the plaintiff might have rescinded for the defendant's failure to perform. But there is more than a simple contract. The draft is the thing bought, the consideration. Merchants customarily regard the draft as a tangible thing; and, in effect, the transfer of the draft has merged the executory contract. If the draft is dishonored, the plaintiff must sue in damages for the breach of the obligation attached by law to the draft. See *Byles, J. in Suse v. Pompe*, 8 C. B. (N. S.), 538 565.

**HOMESTEAD — PROTECTION OF WIFE'S INTEREST — VALIDITY OF HUSBAND'S CONTRACT TO CONVEY HOMESTEAD.** — A statute provides that a deed conveying homestead property shall be valid only if signed by both husband and wife. (C. & M. ARK. DIGEST, § 5542.) The defendant, without the assent of his wife, contracted to sell the plaintiff his homestead. On the wife's refusal to join in the conveyance, the plaintiff sues for damages. *Held*, that the plaintiff do not recover. *Ferrell v. Wood*, 232 S. W. 577 (Ark.).

For a discussion of the principles involved in this case, see NOTES, *supra*, p. 78.

**HOMICIDE — SELF-DEFENSE — DUTY TO RETREAT FROM PLACE OF BUSINESS.** — The defendant, while about his business of superintending certain excavations, was attacked by the deceased and killed him. The court instructed the jury that if retreat is reasonably safe one must retreat rather than kill. *Held*, that these instructions were erroneous. *Brown v. United States*, U. S. Sup. Ct., Oct. Term, 1920, no. 103.

It is possible that this decision stands for the proposition that there is, in general, no duty to retreat, a proposition difficult to maintain. See *Joseph H. Beale*, "Retreat from a Murderous Assault," 16 HARV. L. REV. 567. More narrowly construed, the decision may be regarded as extending to include a place of business the doctrine that one need not retreat from his dwelling-

house to avoid the necessity of killing in self-defense. There have been prior decisions to the same effect. *Askeu v. State*, 94 Ala. 4, 10 So 657; *Bean v. State*, 25 Tex. Cr. App. 346, 8 S. W. 278. Even in its unextended form the doctrine merits scrutiny. It is a heritage from times of turbulence and strife when retreat from one's castle was necessarily attended with an increase of peril. See Seymour D. Thompson, "Homicide in Self-defense," 14 AM. L. REV. 548, 554. Its justification rested on that fact. *Semayne's Case*, 3 Coke, 185, 186; *State v. Patterson*, 45 Vt. 308. See 1 HALE P. C. 481; Joseph H. Beale, "Homicide in Self-defense," 3 COL. L. REV. 526, 541. That a retreat from one's house to-day increases peril is not axiomatic. It depends in each case upon the facts and a blanket rule is impossible. Accordingly, a blanket rule of law that looks for justification to an assumption that retreat from a dwelling is always attended with increased peril is unsound. Doubtless the complex of sentiment and inadequate analysis in which the rule that "an Englishman's house is his castle" is embedded will preserve it. But even that affords no justification for its extension.

**INTERSTATE COMMERCE — TAXATION — GENERAL LIMITATIONS ON THE TAXING POWER — TAXATION OF BILLS RECEIVABLE DERIVED FROM INTERSTATE COMMERCE.**—A Louisiana statute provides for the taxation of all property having a *situs* in the state, including credits and bills receivable. (1898 LA. ACTS, Act. 170, § 7). The plaintiff is a domestic corporation engaged in buying and selling lumber both within and without the state. An assessment was made upon it by subtracting from the total sum due the company for interstate and intrastate business, the total owed by the company in Louisiana and other states. The plaintiff appeals from judgment rejecting its demand to annul the assessment. *Held*, that the judgment be affirmed. *Krauss Bros. Lumber Co. v. Board of Assessors*, 88 So. 397 (La.).

The extent to which a state may indirectly burden interstate commerce and yet not regulate commerce in the constitutional sense, is a practical, not a technical question. See *Galveston, H. & S. A. Ry. Co. v. Texas*, 210 U. S. 217, 225. A state may tax property, within its boundaries, engaged in interstate commerce, on the basis of its value as a going concern. *W. U. Tel. Co. v. Massachusetts*, 125 U. S. 530. A tax on property in the original packages brought from without the state is valid. *Brown v. Houston*, 114 U. S. 622. Also, a tax on net income of a domestic corporation, partly derived from interstate commerce, is constitutional. *U. S. Glue Co. v. Town of Oak Creek*, 247 U. S. 321. Such taxes, practically, have very little deterrent effect on interstate commerce. On the other hand, to tax gross receipts derived from interstate commerce burdens each transaction in a manner that tends to prohibition. *Phila. & So. S. S. Co. v. Pennsylvania*, 122 U. S. 326; *Galveston, H. & S. A. Ry. Co. v. Texas*, *supra*. No such effect as that would follow the tax in the principal case. Like the net income tax, it bears no ratio to the interstate business done, and has no tendency, practically, to embarrass it. See *U. S. Glue Co. v. Town of Oak Creek*, *supra*, at 328. See Thomas R. Powell, "Indirect Encroachment on Federal Authority by the Taxing Powers of the States," 32 HARV. L. REV. 374, 415. The tax is a legitimate exercise of the state's power to exact indiscriminately a toll from all property within its jurisdiction.

**JOINT TENANCY — SEVERANCE — EFFECT OF NON-ACCEPTANCE OF DEED BEFORE DEATH OF GRANTOR.**—A joint tenant executed a deed of his moiety and delivered it to a third party, to be kept until the grantor's death and then given to the grantee. After the grantor's death, the deed was handed to the grantee, who till then had known nothing of it. The other joint tenant claims



the whole property by right of survivorship. *Held*, that he is entitled to the entire property. *Green v. Skinner*, 197 Pac. 60 (Cal.).

On sound principles, the deed here, duly executed and delivered to the depository, should at once vest a future interest in the grantee. Aside from the question of acceptance, a majority of American jurisdictions so hold. *Bury v. Young*, 98 Cal. 446, 33 Pac. 338; *Brown v. Westerfield*, 47 Neb. 399, 66 N. W. 439. *Contra*, *Stonehill v. Hastings*, 202 N. Y. 115, 94 N. E. 1068. See Harry A. Bigelow, "Conditional Deliveries of Deeds of Land," 26 HARV. L. REV. 565, 576. This would sever the joint tenancy. See *Clerk v. Clerk*, 2 Vern. Ch. 323. See LITT., § 292. Many courts, however, hold that a grantor's power to clothe the grantee with ownership is not effectively exercised until acceptance by the grantee. *Hibberd v. Smith*, 67 Cal. 547, 8 Pac. 46; *Meigs v. Dexter*, 172 Mass. 217, 52 N. E. 75. If so, then here the survivor stepped in at the grantor's death. See CO. LITT., 185 b. *Cf. Bassler v. Rewodlinski*, 130 Wis. 26, 109 N. W. 1032. But whether the grantee should be given the advantages of ownership before acceptance, as is sometimes done by these same courts under the fiction of relation back, must depend not upon logic but upon a balance of the interests involved. See *Baker v. Snively*, 84 Kan. 179, 183, 114 Pac. 370, 372. The courts rightly refuse to apply the fiction to cut off the intervening rights of a bona fide purchaser. *Waldock v. Frisco Lumber Co.*, 176 Pac. 218 (Okla.); *Jackson v. Rowland*, 6 Wend. (N. Y.) 666. But they adopt it when the dispute is between the grantee and an heir or widow of the grantor. *Wells v. Wells*, 132 Wis. 73, 111 N. W. 1111; *Smiley v. Smiley*, 114 Ind. 258, 16 N. E. 585; *Stephens v. Kinchard*, 72 Pa. St. 434. Clearly, no social policy exists to place the right of survivorship higher than the claims of an heir or the right of dower.

JUDGMENTS — OPERATION AS AGAINST THIRD PARTIES. — A "granted" an oil and gas lease to B for six years. A then conveyed the land to the defendant. Later, A started suit against B to annul the lease. The court, not aware that A had conveyed all his interest, dismissed the suit, and, on a counterclaim, extended B's lease a reasonable time to compensate for the interruption to his quiet enjoyment (*Leonard v. Busch-Everett Co.*, 139 La. 1099, 72 So. 749). The six-year term having expired, the defendant leased to the plaintiff, who paid some money down; but being warned off the land by B and learning of the decree extending B's lease, the plaintiff refused to go on with his lease, and sued to recover the money paid. From a judgment for the plaintiff the defendant appeals. *Held*, that the appeal be dismissed. *Standard Oil Co. of La. v. Webb*, 88 So. 808 (La.).

Where a lease purports to "grant," there is an implied covenant for quiet enjoyment. *Headley v. Hoopengartner*, 60 W. Va. 626, 55 S. E. 744. See *Stott v. Rutherford*, 92 U. S. 107, 109. See 1 TIFFANY, LANDLORD AND TENANT, § 79 a; RAWLE, COVENANTS FOR TITLE, 5 ed., §§ 272, 273. This has been held to apply to so-called oil and gas leases. *Knotts v. McGregor*, 47 W. Va. 566, 35 S. E. 899. See THORNTON, OIL AND GAS, 3 ed., §§ 98, 891. It has likewise been held that an action by the lessor against the lessee to recover possession is a breach of the implied covenant. *Levitsky v. Canning*, 33 Cal. 299. *Cf. Hubble v. Cole*, 88 Va. 236, 13 S. E. 441. But see *Callahan v. Goldman*, 216 Mass. 238, 103 N. E. 689. See 1 TIFFANY, LANDLORD AND TENANT, § 79 d (1); RAWLE, COVENANTS FOR TITLE, 5 ed., § 128. Since an oil and gas lease is specifically enforceable, equity might well under proper circumstances extend the term of the lease to compensate for the interruption. But the situation in *Leonard v. Busch-Everett Co.*, *supra*, was not a proper one for such relief. The true owner, the defendant in the principal case, was not joined; the decree was therefore not binding on him. *Dull v. Blackman*, 169 U. S. 243; *Gypsy Oil Co. v. Cover*, 78 Okla. 158, 189 Pac. 540. Further-

more, the party against whom the decree was granted was not the owner of the land. Therefore it is submitted that the whole decree was null and void; that the lease to the present plaintiff was valid; and that he accordingly had no right to recover back the money paid.

**MORTGAGES — PRIORITIES — PRIORITY OF PURCHASE-MONEY MORTGAGE ACQUIRED AT FORECLOSURE SALE OVER EXISTING SECOND MORTGAGE.** — A property owner who had given first and second mortgages purchased the property under a foreclosure of the first mortgage, giving a purchase-money mortgage to the plaintiff, a third person. The plaintiff now seeks to foreclose this mortgage. The second mortgagee claims priority. *Held*, that the plaintiff's mortgage has priority. *Duer v. Jaeger*, 186 N. Y. Supp. 584 (Sup. Ct.).

A purchaser at a foreclosure sale of mortgaged property will ordinarily take free from all junior liens or mortgages. *Schnantz v. Schellhaus*, 37 Ind. 85; *Heinroth v. Frost*, 250 Ill. 102, 95 N. E. 65. But where such purchaser is the mortgagor himself, it is clearly equitable that junior liens be revived against him. *Otter v. Lord Vaux*, 6 De. G., M. & G. 638. When, however, he gives a purchase-money mortgage to a third person who pays off the first mortgage, the new mortgage should have priority over the junior lien. See 26 HARV. L. REV. 261. The reason usually given is that the whole transaction is over in a breath, and the purchase-money mortgage has attached before the junior lien has had time to obtain priority. *Warren Mortgage Co. v. Winters*, 94 Kan. 615, 146 Pac. 1012; *Rees v. Ludington*, 13 Wis. 276. See *Western Tie & Timber Co. v. Campbell*, 113 Ark. 570, 169 S. W. 253. Such reasoning is artificial and savors of the mechanical habits of the mediaeval mind. In reality the situation amounts merely to substitution of one first mortgage for another. See *Protestant Episcopal Church v. E. E. Lowe Co.*, 131 Ga. 666, 63 S. E. 136; *Haywood v. Nooney*, 3 Barb. (N. Y.) 643. At least if the purchase-money mortgage is no greater than the original first mortgage, the junior lien-holder is no worse off than before, and he can urge no equitable grounds upon which he should be promoted to the first place.

**POLICE POWER — INTEREST OF PUBLIC HEALTH — LICENSING ACT DISCRIMINATING AGAINST CHIROPRACTORS.** — Defendant was convicted under a statute prohibiting the practice of drugless healing without a license. The statute provided that a license could be applied for only on the successful completion of a four-year course in a reputable school teaching that system; whereas for the regular medical and surgical license no definite length of study was required. (1917 ILL. LAWS, p. 580; 1917 ILL. REV. STAT., c. 91, §9.) Defendant, a chiropractor, attacks the constitutionality of this statute. *Held*, the statute is unconstitutional. *People v. Love*, 131 N. E. 809 (Ill.).

The legislature has power to make laws to protect the public health, and so especially to regulate the practice of medicine and healing. *Dent v. West Virginia*, 129 U. S. 114. Under this power the legislature may make such regulations of chiropractic as are reasonably related to the public good. *State v. Smith*, 233 Mo. 242, 135 S. W. 465. Possibly it could be prohibited altogether, on the ground that more harm than good will come of treating all diseases solely by manipulations of the vertebræ. Courts should respect legislative judgment in such exercise of the police power. See *Jacobson v. Massachusetts*, 197 U. S. 11; *Powell v. Pennsylvania*, 127 U. S. 678. There is, then, no objection to the statute on the ground of due process. But, as a physician might practice chiropractic under his general license, the question arises whether the legislature is denying equal protection of the laws in requiring fewer years of study for such a license than for a license to practice drugless healing alone. Here again the court should defer to legislative au-

thority if any possible reason can be seen for the distinction. See *Williams v. Arkansas*, 217 U. S. 79. At first blush, it seems highly unreasonable to require more time to be spent in learning less. But the practical operation of the statute is to burden chiropractic when carried on as a separate profession. In view of the fact that when so carried on it may be more dangerous than when used in connection with general medical methods, the statute should be upheld. See *contra*, *State v. Gravett*, 65 Ohio St. 289, 62 N. E. 325.

**PROXIMATE CAUSE — INTERVENING CAUSES — FORESEEABLE FAILURE TO AVOID DANGER.**—The plaintiff's intestate was killed in serving the defendant interstate carrier. He was crushed between the end of a shunted car on which he was working and the defective end of a standing, loaded car, which, as he knew, lacked drawbar and coupler. His job was to stop his car before it reached the other. The drawbar and coupler would have prevented the accident by separating the cars. The Safety Appliance Acts forbid the use of cars without such appliances. (27 STAT. AT L. 531, §§ 2, 8; 32 STAT. AT L. 943, § 1.) Contributory negligence and assumption of risk are made immaterial. (35 STAT. AT L. 69, §§ 3, 4). *Held*, that a judgment denying recovery be affirmed. *Lang v. N. Y. Central R. R. Co.*, U. S. Sup. Ct., Oct. Term, 1920, No. 290.

The majority say the defendant's violation of law was not a proximate cause of the decedent's death. It was clearly a cause. In view of a verdict for the plaintiff in the trial court, as well as the ordinary course of activities in railroad yards, it must be taken that such accidents from collision were risked by the defendant's failure to act. The violation of the statute therefore seems a proximate though passive cause of the decedent's death. *Watts v. Evansville, Mt. C. & N. Ry. Co.*, 129 N. E. 315 (Ind.); *Nelson Creek Coal Co. v. Bransford*, 225 S. W. 1070 (Ky.); *Swaim v. Chicago, R. I. & P. Ry. Co.*, 187 Ia. 466, 174 N. W. 384. *Cf. Sarber v. Indianapolis*, 126 N. E. 330 (Ind.); *Davis v. Mellen*, 182 Pac. 920 (Utah). See Joseph H. Beale, "The Proximate Consequences of an Act," 33 HARV. L. REV. 633, 650-658. The theory of the majority seems to have been that the statutes in question were intended to protect only workers moving or coupling defective cars. This seems an unfortunately narrow construction. This view, however, is the real basis of the judgment. It explains the court's conclusions on causation. The decision seems also to have been influenced by deep rooted convictions on the doctrines of the last clear chance and assumption of risk, which cannot have been consciously regarded in view of the wording of the statute. Similarly, the question of a defendant's negligence is often not sharply distinguished from that of proximate causation. See *Nelson Creek Coal Co. v. Bransford*, *supra*; *Sarber v. Indianapolis*, *supra*.

**QUO WARRANTO — JUDICIAL DISCRETION IN QUO WARRANTO AGAINST MUNICIPAL CORPORATION.**—The City of Methuen, Mass., was chartered in 1917 under an unconstitutional statute. A city government was inaugurated and all the activities of a municipality carried on for two and a half years, during which time several statutes recognized its existence and state and county taxes were assessed upon it as a city. Information in the nature of *Quo Warranto* by the Attorney General in behalf of the commonwealth for a judgment of ouster against the city. *Held*, that the information should be dismissed. *Att'y Gen'l v. City of Methuen*, 236 Mass. 564, 129 N. E. 662.

For a discussion of the principles involved in this case, see NOTES, *supra*, p. 73.

**TAXATION — GENERAL LIMITATIONS ON THE TAXING POWER — FEDERAL AGENCY: TAXATION BY A STATE OF A DEBT OWED BY THE UNITED STATES.** — The relator was assessed for a property tax on a debt due from the United States, an unpaid balance on fully performed war contracts. He contended that this debt is not taxable by the state. *Held*, that the debt is taxable. *People v. Cantor*, 187 N. Y. Supp. 467 (Sup. Ct.).

It may be urged that this obligation ought not to be distinguished, analytically, from other federal contractual obligations which are exempt, under the Constitution, from state taxation. Such taxation of federal credit in the form of government securities has been held unconstitutional as an undue interference with federal functions. *Weston v. The City Council of Charleston*, 2 Pet. (U. S.) 449; *Farmers' Bank v. Minnesota*, 232 U. S. 516. See 27 HARV. L. REV. 769. In the principal case credit is given the government, and the absence of certain paper evidence should be immaterial. The validity of such a tax must depend finally on a balance of the economic and political interests of state and federal governments and their constituencies. The imposition by a state of burdens on the credit of the United States will presumably increase the cost of such credit. Any gain to the state by such a measure should thus cause an equal loss to the United States. Federal taxes will be correspondingly increased. The net loss to the national community will be the expense of the duplicate collection involved. To permit such an imposition might, further, give the states a dangerous power to embarrass federal operations. Cf. *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 316. Whether a given interference by state taxation with federal operations is sufficiently serious to warrant exemption is thus finally a question of degree. As *a priori* politics and political economy are uncertain, it is impossible to be dogmatic in urging that the tax in question is unconstitutional. Cf. *Fidelity & Deposit Co. v. Pennsylvania*, 240 U. S. 319; *Indian Oil Co. v. Oklahoma*, 240 U. S. 522; *In re Skelton L. & Z. Co.'s Gross Production Tax*, 197 Pac. 495 (Okla.).

**TAXATION — PARTICULAR FORMS OF TAXATION — STATE INHERITANCE TAX ON STOCK OF A NON-RESIDENT IN A FOREIGN CORPORATION OWNING REALTY WITHIN THE STATE.** — A New York statute taxes the transfer by will or intestate law of a non-resident decedent's shares in a foreign corporation owning realty in New York, in the proportion which that realty bears to the entire property of the corporation (1909 NEW YORK LAWS, c. 62, § 220 (2); CONSOL. LAWS, c. 60, art. 10.) A non-resident testator left in New York a stock certificate representing shares in a foreign corporation owning realty in New York. His executor resists a tax on the transfer of these shares on the ground that the statute is unconstitutional. *Held*, that the statute is constitutional. *Matter of McMullen*, 114 Misc. 505, 187 N. Y. Supp. 248.

Jurisdiction to impose an inheritance tax depends upon control over some essential element in the transfer of the decedent's property. *Welch v. Treasurer & Receiver General*, 223 Mass. 87, 111 N. E. 774; *Matter of Hull*, 111 App. Div. 322, 97 N. Y. Supp. 701. This principle, already stretched in cases where a decedent's extra-state personalty is taxed at his domicile, must be abandoned altogether to reach the result of the principal case, since the decedent and the corporation were both beyond the control of New York. The presence of corporate realty within the state should be immaterial, for the shareholder not only does not own it, but may in a given instance have no rights whatever against it. *Parker v. Behel Hotel Co.*, 96 Tenn. 252, 34 S. W. 209; *Greenleaf v. Board of Review*, 184 Ill. 226, 56 N. E. 295. For this reason, the fact of such presence has justly and uniformly been held an insufficient basis for taxing transfers of foreign-owned shares in foreign corporations. *Welch v. Treasurer & Receiver General*, *supra*; *Oakman v. Small*, 282 Ill. 360, 118 N. E. 775; *State v. Dunlap*, 28 Idaho, 784, 156 Pac. 1141. See Joseph H. Beale, "Jurisdiction to

Tax," 32 HARV. L. REV. 587, 628. The state cannot reasonably urge that value incidentally imparted to the stock by the state's protection of corporate realty is ground for taxation. Nor did the mere presence of the certificate within the state make its transfer taxable. *Kennedy v. Hodges*, 215 Mass. 112, 102 N. E. 432; *People v. Griffith*, 245 Ill. 532, 92 N. E. 313. But see *People v. Reardon*, 184 N. Y. 431, 77 N. E. 970; *Stern v. Queen*, [1896] 1 Q. B. 211.

**TAXATION — PARTICULAR FORMS OF TAXATION — TAX ON ALL USE AS AN EXCISE TAX.**— A statute provided that every one engaged in the business of owning or storing distilled spirits in bonded warehouses, or removing them therefrom, should pay a license tax for each gallon stored or removed from bond or transferred under bond out of the state. (1920 ACTS OF KENTUCKY, c. 13.) The state constitution provided that "taxes shall be uniform upon all property of the same class subject to taxation." (KENTUCKY CONSTITUTION, § 171.) The plaintiff, owner of a large quantity of whiskey stored in bonded warehouses, sued to enjoin collection of the tax, on the ground of unconstitutionality. Distilled spirits had not been made a special class for property taxation. *Held*, that the statute was unconstitutional. *Craig v. E. H. Taylor, Jr., & Sons*, 232 S. W. 395 (Ky.).

For a discussion of the principles involved in this case, see NOTES, *supra*, p. 70.

**TAXATION — WHERE PROPERTY MAY BE TAXED — EQUITABLE INTEREST OF RESIDENT CESTUI IN FOREIGN TRUST OF INTANGIBLES.**— Resident *cestuis* were taxed in Vermont on their interest in certain intangible property held in trust for them by a Massachusetts trustee. It was conceded that the property was taxable in Massachusetts. *Held*, that the tax was properly levied. *City of St. Albans v. Avery*, 114 Atl. 31 (Vt.).

Although on strict legal theory a tax is not unconstitutional simply because it results in duplicate taxation, that result was one of the considerations which led the Supreme Court to hold that a tax at the domicile of the owner on tangible personalty with an extra-state *situs* violates the due process clause. *Union Refrigerator Co. v. Kentucky*, 199 U. S. 194. But the court has upheld a tax at the domicile of the owner on intangible property having also an extra-state "business *situs*." *Fidelity Trust Co. v. Louisville*, 245 U. S. 54. See 31 HARV. L. REV. 786. One consideration behind this decision is that unless the general rule allowing a tax at the domicile of the creditor is upheld indiscriminately, much intangible property is likely to escape taxation altogether. See *Union Refrigerator Co. v. Kentucky*, *supra*, at 205. In the principal case it is almost certain that the fund will be taxed at the domicile of the creditor-trustee; and the actual decision exposes it to duplicate, or if there is a "business *situs*" in a third state, to triplicate taxation. Decisions in state courts are in accord with the principal case. *Hunt v. Perry*, 165 Mass. 287, 43 N. E. 103; *Wise v. Comm.*, 122 Va. 693, 95 S. E. 632. But whether practical considerations will cause the Supreme Court to grant relief depends upon the question how great the hardship must be before strict legal theory will bend to the economic good. The principal case lies close to the line. The Supreme Court has upheld a tax on the income from similar property. *Maguire v. Tax Commissioner*, 230 Mass. 503, 120 N. E. 162; *aff'd* 253 U. S. 12. But income tax decisions are not authority for other tax cases.

**TORTS — NEGLIGENCE — DUTY OF CARE — LIABILITY OF OCCUPIER OF PREMISES TO TRESPASSER.**— A springboard attached at its base to the property of the defendant railroad, extended out for several feet over the waters of a public river. The plaintiffs' intestate, swimming in the river with

others, climbed upon the springboard, and was standing on its end, about to dive; when through lack of ordinary care on the part of the defendant, a pole supporting high-tension wires over its premises gave way. The wires struck the plaintiffs' intestate and swept him into the river, causing his death. His representatives sued, under a statute, for negligently causing his death. *Held*, that they be allowed to recover. *Hynes v. New York Central R. Co.*, 131 N. E. 898 (N. Y.).

For a discussion of the principles involved in this case, see NOTES, *supra*, p. 68.

**WILLS — PROBATE — LOST AND DESTROYED WILLS.** — A statute provided that no will should be probated as a lost or destroyed will unless its existence at the time of the testator's death or its fraudulent destruction during his lifetime was proved. (1916 CAL. CODE CIV. PROC. § 1339.) Testatrix executed and kept in her possession a will, which was not found at her death. It was known to have existed seventy days before her decease, and her declarations during the last days of her life that she believed it then existed, were accepted in evidence. *Held* that the will be probated as a lost will. *In re Sweetman's Estate*, 195 Pac. 918 (Cal.).

Statutory requirements similar to the one involved are common. See 1907 MONT. REV. CODE, § 7415; 1915 IND. STAT. § 3167; 1920 N. Y. CODE CIV. PROC. § 1865. Unless fraudulent destruction is established, actual existence at the testator's death must be proved. *Estate of Johnson*, 134 Cal. 662, 66 Pac. 847; *Estate of Patterson*, 155 Cal. 626, 102 Pac. 941; *Timon v. Claffy*, 45 Barb. (N. Y.) 438. The proof of such existence varies. Where the will is lost in the hands of a third person, since the testator has had no access to it and no presumption of revocation is raised, the will by presumption continues to exist. *Schultz v. Schultz*, 35 N. Y. 653; *Matter of Cosgrove*, 31 Misc. 422, 65 N. Y. Supp. 570. In the principal case the proof of existence is yet more tenuous. If a will, always in the testator's control, is not found among his papers at death, it is presumed that he destroyed it *animo revocandi*. *Matter of Kennedy*, 167 N. Y. 163, 60 N. E. 442; *Stetson v. Stetson*, 200 Ill. 601, 66 N. E. 262. See 1 JARMAN, WILLS, 6 ed., 152. To rebut this presumption, the testator's declarations are admitted. *In re Steinke's Will*, 95 Wis. 121, 70 N. W. 61; *Miller's Will*, 49 Or. 452, 90 Pac. 1002. See 1 UNDERHILL, LAW OF WILLS, § 277. *Contra*, *In re Colbert's Estate*, 31 Mont. 461, 78 Pac. 971. Then, this presumption being eliminated, by virtue of the presumption of continuing existence, existence at the testator's death is established. See 1916 CAL. CODE CIV. PROC., § 1963, (32). This result is logical, but technical and unsatisfying. Presumptions are apt to shelter rather than combat fraud. To approach a statutory provision, intended to prevent fraud, by so artificial a path of proof, is to fly in the face of its purpose. Far better strip each presumption to its core of reason and let the jury or trial court, weighing these cores as bits of evidence together with other bits of evidence, determine the fact of existence.

**WILLS — REVOCATION — REVOCATION BY MARRIAGE.** — The testator made a will bequeathing property to his fiancée, whom he married two days later. A statute provided that a marriage shall be deemed a revocation of a previous will. (1917 ILL. REV. STAT., c. 39, § 10.) Evidence was introduced of the fact that the will was made in contemplation of the marriage. *Held*, that the will was revoked. *Wood v. Corbin*, 206 Ill. 129, 129 N. E. 553.

In a case where the will showed on its face that it was made in contemplation of marriage, this court reached the opposite result. *Ford v. Greenawall*, 292 Ill. 121, 126 N. E. 555. See 34 HARV. L. REV. 95. By the construction there given to the Illinois statute, its operation is like that of statutes expressly

excepting such wills from revocation by marriage. See 1914 GA. ANN. CODE, § 3923; 1902 MASS. REV. LAWS, c. 135, § 9. That decision might also be thought to imply that the statute simply enacts a presumption that marriage is a revocation. If so the principal case raises the question whether that presumption may be rebutted by evidence *dehors* the will. Such evidence may be regarded as introduced, not to vary the terms of the will, but to show that an apparent revocation was not so intended by the testator. Extrinsic evidence is properly admitted for this purpose. *Managle v. Parker*, 75 N. H. 139, 71 Atl. 637; *Gardner v. Gardner*, 177 Pa. St. 218, 35 Atl. 558. Cf. *Scoggins v. Turner*, 98 N. C. 135. It is similarly admissible to rebut the mere presumption raised by marriage under the law of some jurisdictions. *Miller v. Phillips*, 9 R. I. 141. See *Tyler v. Tyler*, 19 Ill. 151. But if the statute is absolute, the introduction of parol evidence is forbidden by rule of substantive law. *Ingersoll v. Hopkins*, 170 Mass. 401, 49 N. E. 623; *Ellis v. Darden*, 86 Ga. 368, 12 S. E. 652. See 1 JARMAN, WILLS, 6 Am. ed., § 112. If the statute enacts a presumption, the court in the principal case misapplies the parol evidence rule. But if it is absolute, the court is clearly right in refusing to construe it as admitting of further exceptions.

## BOOK REVIEWS

TRAINING FOR THE PUBLIC PROFESSION OF THE LAW. By Alfred Zantlinger Reed. Being Bulletin No. 15 of the Carnegie Foundation for the Advancement of Teaching. New York: Scribner & Son. 1921. pp. xviii, 498.

The reviewer, as one academic writer to another, must say much that is complimentary of this report. It is a "patient, scholarly, and serious effort to trace the development of American legal education and the relation of the law school to the practice of the law."<sup>1</sup> Certainly the tracing of this development as a matter of history is the strong point of the work. Of the eight parts into which the volume is divided, the first seven are devoted to the history of the development of legal education and of the relation of the law school to practice. In this historical matter, and in the statistical tables of the appendix, there is a great fund of information with which future articles, local surveys, and bar association reports may be adorned. This portion of the report will stand as an authoritative source for facts and deductions concerning the history of legal education in the United States.

The efforts of the author at recording history are not, however, the end and aim of his work. Rather is it "to point out certain broad lines along which legal education and methods of admission to the bar must develop if the profession of the law is to fulfill its true function."<sup>2</sup> The relative brevity of Part VIII, we are told, "is not due to a belief in the value of antiquarian research for its own sake. Past events have been related at all only for the purpose of throwing light upon events still to come. . . . A generation of young men, stirred by the recent conflict, will soon assume control. . . . It is for these newcomers, and for the older men who see that this spirit must be reckoned with, that this study has been undertaken."<sup>3</sup> It is, therefore, a careful appraisal of what the author has given us as a guide and inspiration for the future which may very properly be made the subject of this review.

The author seems to recognize three fundamentally important subdivisions of his subject: *First*, What differentiations occur among lawyers? Obviously,

<sup>1</sup> Pp. xvi, xvii.

<sup>2</sup> P. xvii.

<sup>3</sup> Pp. 6, 7.

before you begin to educate men to be lawyers, you must conceive of the finished product, or if there are different sorts of the finished product, they should be known. *Second*, we must know "the nature of the law which is to be taught."<sup>4</sup> *Third*, the educational machinery which has already come into existence to meet the demand for legal education must be known, classified, and weighed. We will attempt to appraise the author's ultimate conclusions regarding the present and the future on these three lines.

"A unitary bar," we are informed, "not only cannot be made to work satisfactorily, but cannot even be made to exist";<sup>5</sup> "the most clearly indefensible of these formulas [which have been too easily accepted by the generation that came into power about 1890] has been the assumption that all lawyers do, and ought to, constitute a single homogeneous body—in common parlance, a 'bar.'"<sup>6</sup> Well, then, what have we got? What are the *de facto* differentiations which exist among lawyers? This is important, because on this may rest that differentiation in legal educational effort on the part of law schools, which, we are told, are "wrangling for possession of a field too large for any of them to cover in its entirety."<sup>7</sup> The author makes no clear answer to the question. He writes of the functional division maintained in France between the *notaires*, *avoués*, and *avocats*, and the different educational qualifications applicable to each. He notes the difference between the English solicitor and the barrister, and the difference in training for each. He fails, we think, to accept the statements of Mr. Justice Riddell, that while in Ontario one may be admitted both as a solicitor and a barrister, yet it is true that a small percentage of those admitted as barristers and solicitors do a large percentage of the barrister work and that a *de facto* functional division is maintained. When he comes to the United States, the author seems bewildered. We do not know whether he finds here a rudimentary functional differentiation among lawyers or not. He says, "It is not even certain that a rigorous functional division of the bar will ever develop."<sup>8</sup> "The principle of a functionally divided bar is something which we may or may not be able eventually to introduce."<sup>9</sup> Then we have this remarkable hint: "The dividing line between the different types of lawyers may be determined by the economic status of the client, rather than by the nature of the professional service rendered."<sup>10</sup> This is merely a circumlocutionary method of saying that lawyers may be divided into those who serve the rich and those who serve the poor. We are told that "differences in training and in social standing are recognized, and we have actually a differentiated profession."<sup>11</sup> In another passage we find inferentially the suggestion that bar examinations might be "adjusted to the training that is practicable for the particular type [of law school]"<sup>12</sup>—that is to say, that the graduates of university law schools teaching national law shall have one type of bar examination, while the graduates of part-time or night law schools emphasizing the local law shall have another. It is also suggested that in the case of "younger applicants for admission to bar associations, the requirements for membership might well be based upon the requirements for graduation already enforced in the more advanced group of law schools."<sup>13</sup> From these passages it might be inferred that Mr. Reed regards lawyers as now divided into two groups: one composed of the socially elect, having a liberal college education and graduates of university law schools teaching the national law, and serving the rich; the other, inferior socially, schooled by the part-time or night law school emphasizing the local law, and

<sup>4</sup> P. 4.<sup>5</sup> P. 418.<sup>6</sup> P. 417.<sup>7</sup> P. 418.<sup>8</sup> P. 419.<sup>9</sup> P. 419.<sup>10</sup> P. 419.<sup>11</sup> P. 64.<sup>12</sup> P. 418. See also p. 435.<sup>13</sup> Quoted from "Partial Summary" of the BULLETIN reviewed. See original BULLETIN, pp. 61, 229.



serving the poor; and that this differentiation would (and possibly should) be promoted by the organization of local bar associations for each class and separate bar examinations for the admission to practice of each class, with presumably a different designation for the members of each. Such an analysis of our present situation and such a program for emphasizing it in the future cannot be too severely condemned. It is superficial. It is false. It is impolitic. It can only end in disaster to the graduates of university law schools and, therefore, disaster to the university law schools themselves. Successful lawyers are quite likely to have some social position, but we venture the assertion that their social position is usually the result of their success in practice. It is a comparatively slight contributing cause to the success itself. Successful lawyers do serve the rich. They are far from leaders of the first rank, however, unless they maintain so independent a position in the community that any interest feels safe in employing them. Witness Mr. Hughes' employment by the miners in the Indianapolis cases. We doubt Mr. Reed's deduction that the strong and successful lawyers of the United States can be separated from the weak and less successful ones on the basis of their law school education. We would not accept, or advise any one else to accept, such a proposition without an actual statistical investigation which would reveal good grounds for making it. Mr. Reed entirely overlooks the fact that the division of lawyers into the strong and successful on the one hand, and the weak and mediocre on the other (which is all he is driving at), is a matter of competition, not possible to determine perhaps until fifteen or twenty years of arduous work at the bar has been accomplished. When that period of competition has passed, the original educational effort of college and law school, while it may leave some marks, fades out very materially. It certainly is no longer controlling and no differentiation can be based upon it. If the differentiation which Mr. Reed suggests now exists, or ever exists sufficiently to become apparent, a contest will ensue between the two groups for mastery. As Mr. Reed himself says: "Anything that looks like a claim on the part of the well-bred to constitute a separate interest in the state provokes violent opposition from a still sensitive democracy."<sup>14</sup> The issue between the groups would not long be in doubt. The lawyers who have social standing, degrees from a college and university law school, and who come forth anointed to serve the rich, will find, as Mr. Reed himself concedes, that "the great majority" of lawyers and politicians belong to the opposing group.<sup>15</sup> Mr. Reed might as well have added "the great majority of judges, as well." The learning of the university law schools would be sneered out of court as mere theory. The social superiority of the university law school graduate would only fan the flames of hatred and opposition. Politicians, judges, and the majority of lawyers controlling bar associations and other organizations would make successful war upon the university law school graduate. The rich would very soon cease to employ a group whose social and educational superiority would merely have earned them the enmity of those who were in power. Indeed the university law school graduate would soon find that the way to success in the law would be to disown his higher education and seek to be associated with the group which produced the politicians, the judges, and the majority of lawyers,—many of them no doubt quite as able as those in the circle of university law school graduates. For one who gives us, as the central idea of his work, the proposition that we cannot have a unitary bar, that "the differentiated profession is something that we already have and could not abolish if we would,"<sup>16</sup> Mr. Reed's conception of what that differentiation is, or what it may or ought to become, and how to achieve it, is not only vague and unconvincing, but positively erroneous and inimical to the group of university law school graduates which he is most anxious to protect. Mr. Reed

<sup>14</sup> P. 419.<sup>15</sup> P. 417.<sup>16</sup> P. 228.

does well the academic work of analyzing and recording the dead past, but when it comes to stating our present condition and blazing the way for the future he is an inadequate, if not positively dangerous, adviser.

The author having failed satisfactorily to enlighten us regarding what kinds of lawyers there are or may be, so that the education of the different kinds may possibly be arranged for, let us see what he does with the fundamental question of what is the law to be taught? Mr. Reed fully recognizes that the law which the lawyer practices is the law which is enforced in a particular jurisdiction, and that we have in the United States forty-nine of these individual law-administering and law-making bodies. Here is one of the most significant and overpowering facts which faces all law teachers and students. It would be impossible to exaggerate the predominance of this fact in legal education. Does Mr. Reed face the fact? Does he impartially and dispassionately consider what this fact means, — what its ramifications are, and the extent to which it enters into every problem of the future, because each year it becomes, if possible, a more overwhelming and significant fact, and one which can be less and less ignored? Not at all. Whenever he meets it he tries to bury it under words of the text which seek only to minimize and explain away its existence. To Mr. Reed it is an unpleasant condition which we had best say as little as possible about, and when we do, to say that which conceals the fact from ourselves. Thus we are told that "This danger that American law might disintegrate into local fragments [as if it had not already so disintegrated!] has, on the whole, been averted by the respect which the lawmakers of each state accord the law of other jurisdictions. In the domain of judge-made law, the decisions of other state courts, or of the Supreme Court of the United States, are more than mere guides. They are treated by the courts as possessing actual authority as precedents, subordinate only to that possessed by a well-established line of decisions in their own states."<sup>17</sup> The last part of Mr. Reed's statement destroys the effect of what he started out to say. When a given state has two hundred and fifty or three hundred volumes of Supreme Court reports and a century of continuous turning out of decisions and a compilation of legislative acts extending over the same period, the "well-established line of decisions" in the particular jurisdiction covers matters relatively so numerous and of such importance that the decisions of other state courts or the decisions of the United States Supreme Court are often not useful for any purpose. Under these circumstances the rule that decisions from other states are more than mere guides has little application if it be in fact true. We doubt whether judges of supreme courts generally would concede that the decisions from other states or from the Supreme Court of the United States were more than mere guides, or that they possessed actual authority as precedents. They would, we think, declare them to be merely guides, to be followed or not, according to whether the bases on which they rested seemed proper. Then Mr. Reed declares that "a body of generalized national law, deduced in a critical spirit from the best practices of the various courts, is being slowly built up by these scholars [referring to the scholars in the university law schools which purport to teach the so-called national law]."<sup>18</sup> It is true that a scholar here and there at the present day, like Williston or Wigmore, is doing work of sufficient magnitude to have some influence for uniformity in jurisdictions which have not agreed with them or to establish a rule of law where it had not yet been declared. We doubt whether the author's statement is true unless he includes among his scholars those who write the articles in encyclopedias of law and compile the digests. The author entirely fails to weigh against these scholarly efforts the overwhelming fact that day after day throughout his practice the lawyer has more and more to

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<sup>17</sup> P. 33.

<sup>18</sup> P. 34.

discard what forty-eight other states are doing and to concentrate on what the law is, or what it ought to be, in the single jurisdiction where he is practising. He has to do this to the same extent that English lawyers have done it in every century since the time of Littleton. He consults Williston or Wigmore or the encyclopedia of law or other up-to-date textbooks, not to find out what any rule of so-called national law may be, but to discover, if possible, through the citations in the footnotes what the law in the jurisdiction in which he practises may be. If that law be a departure from the so-called national law of the university scholar, he may consider the possibility of overturning it, but always it is the situation in the particular jurisdiction that he must deal with. All the facts of its history, the emotional element of the problem as it may appeal to particular judges at that time on the bench in that jurisdiction, are matters which he must weigh and consider, and they cause him to turn his back daily upon anything like the so-called national law of the university law school. The scholarly productions of the national law schools may be "struggling for mastery"<sup>19</sup> over the local law, but it is a feeble struggle. They haven't a chance. They only succeed here and there in spots. The Harvard Law School graduate who has persisted in practice and who appears with a fair degree of frequency before courts of last resort, finds himself making some of his most desperate efforts to establish in the court propositions which would be accepted in the classrooms of the Harvard Law School without debate. The "struggle for mastery" of the national law school comes to an end in this conclusion of Mr. Reed: "Should university law schools or other institutions in which this national law is being cultivated ever be accorded a recognized responsibility for the education and testing of applicants for admission to practise, exercised independently of the judges or of other practitioners, this will mean that the American state has recognized, or in the technical language of jurisprudence has 'received,' scholars' generalized common law in much the same way that their elaborated Roman law became the law of Continental Europe."<sup>20</sup> Well, there isn't a chance that the national law schools will ever be accorded such a right, or that the general common law of the law schools will ever be "received" in the manner suggested. The whole sentence expresses a hope so feeble that it might as well never have been uttered. It is strange indeed that one who is so positive that we have not got, and cannot have, a unitary bar, even in a given locality, is so positive that we have, in some practical sense, or even some possible sense, a *unitary law* for forty-nine sovereign law-administering and law-making jurisdictions. It is strange indeed that a writer who realizes that the law of England to-day is different from the law of any of the states because these states split off from England one hundred and forty years ago, cannot perceive that New York and Illinois, which had a common stem far antedating the Revolution, have no more a common system of law than Massachusetts and England to-day. Indeed, if he looked at the facts as they appear from the statutes and decisions, he would, we believe, find that the law of Massachusetts was nearer to that of England than was the law of Illinois to New York. Mr. Reed refuses to look squarely at the fact that the splitting off from a common stem and a separate legal and judicial history which causes English law to-day to be, for the purposes of legal education at least, a different system from the law of any state, is decade by decade surely causing the systems of law developing and being administered by our different states to become different. How long a time must elapse before Mr. Reed will perceive that the two systems have become different and that legal education must take cognizance of the fact? Mr. Reed notes that formerly the universities in England were interested in the civil or Roman law of the continent, while the Inns of Court sustained their narrow and parochial interest

<sup>19</sup> P. 35.<sup>20</sup> P. 35. See also p. 418.

in the decisions handed down by the courts at Westminster. He knows what happened, for he tells us. The Roman or civil law and the universities which taught it were sidetracked, and their influence in legal education became negligible. Yet Mr. Reed seems incapable of observing that the so-called national law, as distinguished from the law of each one of forty-nine local jurisdictions, is headed toward a position sufficiently like that which the Roman law occupied at the English universities to be significant. If American university law schools hang on too long to the idea of a national law, they will become sidetracked and their influence will decline, while the body of teachers who make it their business to train the student to the greatest possible effectiveness in the law which he as a practitioner must know and use will steadily increase in importance and influence. The failure to grasp so obvious a principle causes us to doubt Mr. Reed's skill in using past events "for the purpose of throwing light on events still to come."

Perhaps the most extraordinary conception of the entire work is that the study of local law must always remain narrow, practical, and inferior, and be carried on by part-time or low-standard schools, while the study of national law or general common law is necessarily associated with university schools which maintain the highest and best educational standards. Mr. Reed thinks that the best argument for the national school is that it deals with the law "as it may become," rather than with the law "as it is."<sup>21</sup> So far as Mr. Reed deals with what has been, or the conditions which now exist, we do not differ with him, but the apparent assumption that this condition of affairs must or should continue is subject to objection. We are amazed at Mr. Reed's inability to perceive that it is the local law school carried on with the same standard of learning and ability which Langdell and his associates brought to their task, rewriting the law of the local jurisdiction as Langdell and his associates rewrote the local English common law, which will produce a legal education that will dominate the law and lawyers in the given jurisdiction. Such a law school may be conducted with case books containing the best judicial opinions to be found at any time in the English-speaking world, provided always that such decisions are relevant and material to the law of the local jurisdiction. It may give the same training in legal reasoning as does the national law school of to-day. It may be far more effectively interested in the law as it ought to be than the national law school of to-day, because it will be working for specific changes in a particular jurisdiction where the law school exists and where it has a direct influence upon lawyers, judges, and legislators. It might even be claimed that it would in time produce greater uniformity, for with our tendency to copy the best near at hand there can be little doubt that a local jurisdiction, fed with the springs of local law schools attaining the present standards of university national law schools, would set the pace for many other American jurisdictions. Such a conception of a new creative movement in legal education finds no place in Mr. Reed's work. This is merely illustrative of the fundamental defect of his efforts. They are sterile with respect to the problems and developments of the future.

The author lays much stress upon his finding that all legal education in this country is now through law schools, and that these may be arranged into different groups depending upon the sort of legal education given and the pre-legal educational requirements demanded. We are developing toward two widely divergent classes of schools,—the university law schools, giving a three years' course and requiring for admission a college degree, or something equivalent, on the one hand, and the part-time or night law schools which only require the minimum acceptable to the bar examiners, on the other. He suggests that in the night or part-time law schools the "local law is emphasized," while the

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<sup>21</sup> P. 291.

university law schools are national schools dealing with the general common law. Here is a clear statement of our present status. What are we to do with it? Merely promote "imitation and perfection of detail"? Oh, no, "We stand now," he says, "on the brink of another creative period."<sup>22</sup> Our second war with England and our Civil War were "followed by periods of original creation in legal education. These in turn were followed by less significant periods devoted mainly to imitation and perfection of detail. It requires no great effort of the imagination to perceive that we stand now on the brink of another creative period." The long historical evolution of legal education as it developed in the United States and the final analysis of the present types of law schools have all been carefully worked out, so that we may intelligently emerge from a period of "imitation and perfection of detail" to "another creative period." What line then is this creative effort to take? What are the general principles in accordance with which this creative effort is to proceed? What advice and direction are given to the "generation of young men stirred by the recent conflict"? We search in vain for any answer to these questions. The only suggestion which we find is that the part-time or night schools be strengthened by lengthening their course to four years and beyond. This is an excellent suggestion, but does it fulfill the promise of a new creative effort? Is this the beacon which is to fire the imagination of the generation of young men stirred by the recent conflict?

ALBERT M. KALES.

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**LE DROIT PÉNAL INTERNATIONAL ET SA MISE EN ŒUVRE EN TEMPS DE PAIX ET EN TEMPS DE GUERRE.** By Maurice Travers. Paris: Librairie de la Société du Recueil Sirey. Vol. 1, 1920, pp. 670; vol. 2, 1921, pp. 684.

The above volumes constitute a part of a comprehensive treatise on the subject of international criminal law. Sections 1-101 develop the general principles which, in the opinion of the author, underlie the subject. The balance of the work, so far as it has appeared, covers the subject of jurisdiction. Sections 102-664 are devoted to a consideration of the question to what extent jurisdiction may be based (1) upon the fact that the act was committed within the territory of a particular state; (2) upon the nature of the act committed; (3) upon the nationality of the injured party; (4) upon the nationality of the offender; (5) upon the mere presence of the offender within the state; (6) upon a combination of two or more of the above grounds. Sections 665-974 deal with the exceptions to the general principles governing jurisdiction. Three appendices follow, discussing, respectively, the question of complementary jurisdiction, based upon connexity, indivisibility or complicity, the effect of territorial annexation and changes of nationality upon the application of criminal law, and the application of criminal law with respect to "industrial, artistic and literary property."

The subject-matter is set forth with great thoroughness in all of its aspects. Much space is given, for example, to such subjects as the jurisdiction of states with respect to crimes committed on vessels of their own nationality in foreign waters and on foreign vessels in domestic waters, the immunity of persons exercising diplomatic or consular functions, crimes committed in countries in which consular jurisdiction still exists, or by members of an invading army or the members of aircraft.

The work is meant to be a practical treatise on the actual French law governing the subject in hand. Being satisfied, however, that the positive law of France is defective, the author takes great pains in developing the theoretical aspects of the subject. In doing so he makes excellent use of the com-

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<sup>22</sup> P. 6.

parative method, availing himself of the law of other countries so far as it throws light upon the matter under discussion. The author has full command also of the general literature on the subject and discusses in detail the arguments advanced by the writers of the different countries with respect to particular matters.

Space is not available for a critical discussion of the author's views concerning the vast number of questions dealt with in the work. Only a few general remarks can be made. The author is a realist who abhors fictions. He accepts the facts as he finds them and strives to fit his theories to the facts, instead of attempting to fit the facts to his theories. He is opposed, therefore, to all endeavors to find a single legal basis for international jurisdiction in criminal matters, be it that of the place where the crime was committed or that of the national law of the offender. The fundamental idea governing the subject being, in the estimation of the author, that of social protection, a single point of contact furnishes obviously a too narrow basis of jurisdiction. The author's position that different points of contact must be chosen to meet the needs of the particular situation is perfectly sound. The author is right also in insisting that each state must determine for itself what is necessary for its own protection. The character of an act as rightful or unlawful must in the nature of things be left to the judgment of each state whose interests are affected. The result may be, of course, that an act may be lawful where done, but unlawful in some other state, but that is unavoidable if the idea of social protection as the sole basis of international jurisdiction in criminal matters is accepted.

The treatise under consideration is a monumental one in every respect. It is indispensable to all interested in this branch of legal learning.

ERNEST G. LORENZEN.

THE NEW CHURCH LAW ON MATRIMONY. By Rev. Joseph J. C. Petrovits. Philadelphia: J. J. McVey. 1921. pp. xvi, 458.

The publication of the new *Codex Juris Canonici*<sup>1</sup> started a new period in the history of the canon law. The old *Glossatores*, *Summistae*, *Tractatistae* and *Commentatores* became in the main obsolete, in so far as they were concerned with the practical interpretation of the laws, and the need of new commentaries was felt immediately by the ecclesiastical courts the world over. The canonists, who, after a long period of relative neglect found themselves at once in a position of high importance, did not lose time in getting to work and in the short period of four years the literature dealing with the new Code has reached the respectable size of about one hundred volumes.

Almost all of them consist of comments on some special point of ecclesiastical law and are written from a practical rather than from a purely scientific point of view. The single fact that almost all this new literature is written in modern languages and not in the customary Latin of the glorious canonical tradition shows that its aim is to provide the clergy, especially parish priests, with practical manuals which it will be easy for them to consult in their daily pastoral work.

Another important characteristic of all this new literature is its uniformity both in spirit and in language. The time when there were within the Catholic clergy opposite schools of canon law, diverging in matters of fundamental importance, is long past, and the strong centralization of power in the Roman Curia has brought with it a remarkable unification in the new canonical tradition. Never was it so true as it is to-day that the Catholic world receives its law from Rome. "*Ex occidente Lex.*"

<sup>1</sup> Rome, May, 1917.

Only a few months after the publication of the code a series of articles dealing with its various parts were published in the *Ecclesiastical Review*,<sup>2</sup> and these have been reprinted in the form of a book.<sup>3</sup> Almost at the same time, the Benedictine Fr. Charles Augustine Bachofen published the first four volumes of a general commentary on the Code.<sup>4</sup> Fr. Bachofen was for nine years professor of canon law at the Benedictine College of St. Anselm in Rome, and had therefore an intimate knowledge of the methods and traditions of the Roman Curia. His comments are remarkable for their conciseness and for their strictly legal character; "the commentary shall not be encumbered with moralizing reflections" warns the author in his preface. The moralizing strain which at a certain period was brought into the canon law "was a disadvantage because it obscured the character of the Church as a public society and made the law appear to be an appendix of the confessional."<sup>5</sup> His work, however, due to its conciseness and perhaps to its rather hurried compilation, is on many points obscure and vague, and its use difficult for those members of the clergy who have not had a good training in ecclesiastical law. The work of the Rev. P. Trudel<sup>6</sup> is nothing more than a simple alphabetical list of topics which may be used as an index to the Code.

In a country like the United States, where the population is composed of persons belonging to all the religions of the world, and where Christians of all denominations live closely together, intermarriages between persons of different faiths are of daily occurrence and give rise to most embarrassing situations in the ecclesiastical courts of American Catholic dioceses. It is not surprising, therefore, that special attention has been paid in this country to the law of marriage and that more than one comment on this section of the Code has already appeared. The first was published by the Very Rev. H. A. Ayrinhac, for more than twenty-five years professor of canon law at the Catholic Seminary of San Francisco.<sup>7</sup> As the author himself says, his book contains "a brief explanation, incomplete and fragmentary" of the Canons concerning the procedure and the casuistry of Catholic marriage; and although very useful for the time being, could not be of permanent value, especially in view of the recent authoritative decisions as to the interpretation of the various Canons rendered by the Commission established in Rome for this exclusive purpose. The need of a more complete and substantial work on the law of marriage has been keenly felt and such a volume has now appeared. It is the work of Rev. Joseph J. C. Petrovits, prepared under the guidance of Mgr. Filippo Bernardini, professor of canon law in the Catholic University of America at Washington; and is a really valuable contribution to the canonical literature of Christian marriage.<sup>8</sup>

Dr. Petrovits' book is divided into fourteen chapters, the first three dealing with general notions and pre-matrimonial transactions; the fourth, fifth, and sixth with matrimonial impediments; the seventh with matrimonial consent; and the eighth with the form of matrimonial celebration. The following three chapters summarize briefly the minor topics of marriage of conscience, time and place of marriage and the effects of marriage. The last three concern the

<sup>2</sup> Philadelphia, October, 1917-August, 1918.

<sup>3</sup> *THE NEW CANON LAW IN ITS PRACTICAL ASPECTS*. Philadelphia: J. J. McVey. 1918.

<sup>4</sup> *A COMMENTARY ON THE NEW CODE OF CANON LAW*. St. Louis: Herder. 1918. Vol. I., Introduction and General Rules; Vol. II., Clergy and Hierarchy; Vols. III. and IV., The Sacraments.

<sup>5</sup> *Ibid.*, p. 56.

<sup>6</sup> *A DICTIONARY OF CANON LAW*. St. Louis: Herder. 1919.

<sup>7</sup> *MARRIAGE LEGISLATION IN THE NEW CODE OF CANON LAW*. New York: Benziger. 1919.

<sup>8</sup> *THE NEW CHURCH LAW ON MATRIMONY*. Reviewed here.

special problems of separation of consorts, validation of marriage and second nuptials. An accurate and most serviceable index and a comprehensive bibliography close the volume. An important feature of the book is the historical survey which in each chapter precedes the analysis of and comments upon the Canons, giving a brief summary of the various opinions on debated questions and the final solution given to them in the new Code. The great canonical works of the post-Tridentine period are quoted frequently, and much more the recent literature of the Roman school, especially Wernz, Gennari and Gasparri.

It may be noticed, however, that the author, as is often the case with those who write extensive works on a special topic, overemphasizes the importance of some questions of detail which to-day have lost almost all their practical value. And above all, it would seem that he is too sanguine in his statement that the subject of matrimony has undergone some fundamental changes as viewed in the light of the new Code.<sup>9</sup> As a matter of fact, the new Code reflects almost entirely the regulations already prescribed by the constitution *Ne temere* and in matters of impediments keeps the fundamental distinction introduced by the constitution *Sapienti consilio*. It will be difficult to find a point of really fundamental importance in which ecclesiastical discipline as to marriage may be said to have been revolutionized by the new Code, unless one is willing to consider as fundamental Canon 1017, which in matter of espousals abrogates the right (*jus ad rem*) which in the past was generally attributed to the parties making an engagement;<sup>10</sup> or Canon 1070, which states that the diriment impediment of disparity of worship obtains only in cases where one party to the marriage is baptized in the Catholic Church,<sup>11</sup> and therefore recognizes as valid a marriage contracted between an unbaptized person and a baptized non-Catholic. No doubt this latter provision is of some practical importance, and as Mgr. Meehan says, "it puts an end to much work and worry for diocesan matrimonial courts in the United States;"<sup>12</sup> but this law is an exception which does not modify at all the really fundamental principle on which is based the assumed jurisdiction of the church over marriages of all baptized persons, even though they be non-Catholics. On this fundamental point the Code has in fact strengthened the Roman tradition that "no law, no custom, can introduce an indiscriminate exemption of heretics, schismatics, apostates, or the excommunicated from canonical impediments,"<sup>13</sup> and in its Canon 1016 has definitely banished the virtually opposite opinion of some great canonists like Schmalzgrueber.

In the same way the principle so dear to the Roman Curia, "*Nihil innovetur quod traditum est*," is fully applied to the fundamental question of the competence of the civil authority with regard to marriage. The dogmatic teaching of the sacramental character of matrimonial contracts does not allow the canonists any freedom on this point, and the new Code condemns impliedly the laws of those countries which recognize as valid the marriage of Christian persons contracted outside the Church and which do not allow marriages contracted only before the Church to have civil effects. "The state transgresses the legitimate limits of its jurisdiction when it imposes a penalty, which results in depriving Christians of the natural civil effects of their valid marriage."<sup>14</sup> But in practice the canon law comes to a compromise and admits that the civil authority is within its rights in requiring the civil registration of marriages validly contracted before the Church, and in imposing a penalty for failure to

<sup>9</sup> THE NEW CHURCH LAW ON MATRIMONY, Preface.

<sup>10</sup> *Ibid.*, p. 37.

<sup>11</sup> *Ibid.*, p. 143.

<sup>12</sup> PAPERS REPRINTED FROM THE ECCLESIASTICAL REVIEW, p. 38.

<sup>13</sup> THE NEW CHURCH LAW ON MATRIMONY, p. 31.

<sup>14</sup> *Ibid.*, p. 32.



comply with its regulation. And according to a great canonist, Cardinal Gasparri, this penalty may be justly extended even to the point "of depriving the guilty ones of the civil effects of the marriage."<sup>15</sup>

The relatively new feature of this epoch-making codification of the Canon law is rather the spirit in which it is made; and this has fundamentally affected the Code as promulgated.<sup>16</sup> The dogmatic and strictly autocratic government of the Church finds in this Code its best expression; in it the last survivals of Gallicanism, Febronianism and Josephism which affected so deeply the whole ecclesiastical legislation during the seventeenth and eighteenth centuries, reviving or shaping anew doctrines which had been formulated by the great Caesarean jurists of the middle ages, are completely swept away. Never before has the Church had the opportunity of doing this without paying a penalty for it. Difficult entanglements with the various governments, concordats with dynasties and nations, and territorial interests in connection with their temporal power, compelled the popes to carry out a policy of continuous compromises, in which many fundamental principles of canon law were sacrificed. The fall of temporal power, and the separation of Church and State, has given back to the Church its freedom in the realm of strictly ecclesiastical legislation, and Rome is making a good use of such freedom, in order to bring about that strong centralization of power which is the logical implication of its assumed divine right and its autocratic constitution.

GEORGE LA PIANA.

#### A SELECTION OF CASES ON THE LAW OF DOMESTIC RELATIONS AND PERSONS.

By Edwin H. Woodruff. 3d edition, revised and enlarged. New York: Baker, Voorhis & Company. 1920. pp. xviii, 753.

This book is a new edition of Professor Woodruff's well-known case book on Domestic Relations. The editor states in his preface<sup>1</sup> that he has omitted or reduced to notes thirty-two cases which appeared in previous editions, while forty-four new cases have been added. Among these new cases which are of interest may be mentioned that of *Thompson v. Thompson*,<sup>2</sup> in which a New Jersey court declined to give credit to a New York decree granting a separation, because the husband, a non-resident of New York, had been served only by publication. Many new notes have also been added by Professor Woodruff.

The most interesting question concerning the book is whether it would not have been better if it had contained fewer topics, and at the same time had given on each topic a greater number of cases. It was the opinion of the late Professor John Chipman Gray, "that a collection of cases should not attempt to cover too much ground, but that the cases should be multiplied on the crucial topics."<sup>3</sup> He further adds: "A single case on a subject has little advantage over a text-book. It is only by presenting a doctrine in many aspects that the best results can be reached."<sup>4</sup> Most teachers using the case system of instruction will probably agree with the foregoing statements. Indeed, the fundamental difference between the case system of instruction and the text-book system is the emphasis placed by the former on the importance of training in legal reasoning as opposed to the acquisition of mere legal information; and training

<sup>15</sup> TRACTATUS CANONICUS DE MATRIMONIO (Paris, 1891), p. 280.

<sup>16</sup> Cf. ULRICH STUTZ, DER GEIST DES CODEX JURIS CANONICI. Stuttgart. 1918.

<sup>1</sup> See p. iii.

<sup>2</sup> 89 N. J. Eq. 70, 103 Atl. 856 (1918); WOODRUFF, CASES ON DOMESTIC RELATIONS, 3d ed., 339.

<sup>3</sup> See 1 GRAY, CASES ON PROPERTY, ed., "Preface to the Second Edition."

<sup>4</sup> *Ibid.*

in legal reasoning is best given by teaching the student to distinguish the differences between several cases bearing on the same or similar points, where the cases require of the student close attention and nice discrimination. If the student on a given point of law merely reads one case which contains a learned disquisition on the various aspects of the law affecting similar cases, he may acquire considerable information, but will get little or no training in applying his information to different states of fact.

Nevertheless, every teacher of Domestic Relations whose course is confined to the ordinary time given to this subject (two hours per week for one half-year) must feel that his time is brief indeed to deal with the many topics which can be included under this title. Professor Jeremiah Smith in his "Cases on Persons" tried to cut the Gordian knot by including in his case book only the topics "Parent and Child," "Infant," and "Husband and Wife." Professor Woodruff, feeling, and perhaps justly, that such a treatment of the subject of Domestic Relations is inadequate, has added the topics of "Marriage," "Divorce and Separation," "Insanity," "Drunkenness," and "Aliens." In a case book of reasonable size, however, the greater the number of topics treated the less the space that can be given to each topic. As a result, while in Smith's "Cases on Persons" we find 202 pages allotted to Infancy,<sup>1</sup> Professor Woodruff assigns only 143 pages to this topic,<sup>2</sup> and this, too, although the average page in his book is ten lines shorter than the average page in the case book of Professor Smith. In consequence of this compression, there is not infrequently in Professor Woodruff's case book only a single case on a given point, and the value of training that comes from contrasting different cases bearing on the same point is lost.

In spite of all this, something is to be said in favor of Professor Woodruff's briefer treatment of each individual topic. Admitting that training in legal reasoning is the chief goal of legal study, is it necessary that every course in a law school should stress the idea of such training, even if obtained at the complete sacrifice of information on essential topics? Is it well to send out the student of law with a thorough training in the law of "Infancy" and "Husband and Wife," while he is wallowing in complete ignorance of the law of "Marriage and Divorce"? Where the course has only a brief time allotted to it, might it not be well to inform the student a little more, even if we train him a little less? This is certainly a debatable question.

Some of the cases in the book seem to contain a slight treatment of the point involved. Thus, instead of the classic and highly disciplinary case of *Zouch v. Parsons*,<sup>3</sup> which decided that an infant can repudiate a feoffment only after attaining his majority, we find the very thin case of *Welch v. Bunce*<sup>4</sup> on the same point. Here we have space gained but quality sacrificed.

The notes in the book are worthy of the highest praise. In preparing these, very little that is of value in the way of collateral reading has escaped the editor's watchful eye. Student and teacher alike will find them of the greatest service. Indeed, no teacher of the subject of Domestic Relations ought to be without Professor Woodruff's case book whether he uses it in the classroom or not, so valuable is the material there collected. Moreover, if a teacher prefers a case book which covers the subject with reasonable completeness but not in too great detail, no better book can be found. The book everywhere bears the marks of scholarly research, of painstaking care, and of a laborious compression of each topic to the end that every essential topic be treated.

RALPH W. GIFFORD.

<sup>1</sup> See SMITH, CASES ON PERSONS, 131-333.

<sup>2</sup> See WOODRUFF, CASES ON DOMESTIC RELATIONS, 3 ed., 483-626.

<sup>3</sup> 3 BURT. 1794 (1765); SMITH, CASES ON PERSONS, 153.

<sup>4</sup> 83 Ind. 382 (1882), WOODRUFF CASES ON DOMESTIC RELATIONS, 494.

THE YEAR BOOKS. By William Craddock Bolland. Cambridge, England: University Press. 1921. pp. xi, 84.

This little volume is so interesting that few readers with scholarly tastes will be able to lay it down before reaching the last page. The author writes from fulness of knowledge, for he is the editor of the Year Book Series of the Selden Society; and in introductions to volumes of that series he has already had occasion to give much of the matter which he has recently used in lectures delivered at the request of the Faculty of Laws of the University of London and which he has here presented to a larger public.

The volume is composed of three lectures. The first explains what the Year Books are, the mediaeval French in which they are written, the manuscripts, and the author's persuasive theory of the purpose for which they were compiled. The second explains the difference between the Plea Rolls and the Year Books, founds upon those differences a strong argument showing that the Year Book manuscripts were in no sense official but were a private and monetary enterprise, and describes the printed editions. The third presents the recently discovered proofs that Justices in Eyre exercised what may well be termed an equitable jurisdiction, and then gives in paraphrase Year Book episodes of which Bereford, C. J., is often the hero.

The author's intention is to induce the reader to examine the Year Books for himself. He has given matter admirably adapted to that end and to the beginner's needs. Doubtless the next step for the ambitious reader is to attack a Year Book for himself, preferably the first volume in the Selden Society's Year Book Series, as that is the volume containing Maitland's introduction to the grammar of the Year Book French. After reading Maitland's introduction and some of the cases as translated and edited by him, the reader will be in a position to appreciate the introductions by Maitland, Turner, and Bolland to other volumes in that series and also the prefaces by Horwood and Pike to Year Books in the Rolls Series, and then to read this little volume again.

Even a person who is not a beginner will be glad to be reminded again of the author's theory,<sup>1</sup> to which allusion has already been made, that the Year Books were meant to aid lawyers in framing their pleadings, and hence were devoted chiefly to reporting the discussions between counsel and judges of the oral pleadings experimentally suggested and finally withdrawn or amended or, so to speak, filed. That is an interesting explanation of the disappointing fact that usually the Year Book stops without letting the reader know the ultimate result of the litigation.

The other point upon which even an expert in the history of law will welcome the author's views is the one regarding the *quasi*-equitable power which in early days was exercised temporarily by Justices in Eyre. It was about ten years ago that the author described this procedure in his introduction to the second volume of the *Eyre of Kent, 6-7 Edward II*, in the Selden Society's Year Book Series; and later his *Select Bills in Eyre, 1292-1333*, published by the Selden Society, gave additional material. The subject was presented in 1913 to the International Congress of Historical Studies by Sir Frederick Pollock, in a paper on "The Transformation of Equity," now accessible in a volume of *Essays in Legal History*, edited by Sir Paul Vinogradoff; but apparently bills in Eyre have not yet found adequate place either in the histories of English law or in the discussions of persons interested in devising ways in which business men and the poor may attain justice without pleadings, without rules of evidence, without delay, and without lawyers. Surely there are many persons who should read the author's brief account<sup>2</sup> of the unsuccessful attempt made by the idealists of long ago.

<sup>1</sup> See pp. 17-21, 26, 35-42.

<sup>2</sup> See pp. 56-59.

There is no doubt at all that the author is right in saying that the Year Books have been too much neglected by both historians and lawyers. He makes a slight mistake, however, in saying that "Even the *Encyclopaedia Britannica* itself, now in its eleventh edition, knows nothing about them, has never heard of them."<sup>3</sup> Whatever may be true of earlier editions, the article on English Law in the tenth edition<sup>4</sup> gives about ten lines to the Year Books; and the passage is repeated almost verbatim in the eleventh edition.<sup>5</sup> The articles in question were written by Maitland; and Maitland would be the first to forgive the failure to recall that brief, though adequate, passage, and to thank the author for showing so skilfully what the Year Books are and how well worth while it is to become acquainted with them.

EUGENE WAMBAUGH.

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**THE PREPARATION OF CONTRACTS AND CONVEYANCES WITH FORMS AND PROBLEMS.** By Henry Winthrop Ballantine. 8vo. pp. vi, 227. New York: The MacMillan Company. 1921.

This little volume, which makes no pretence of being exhaustive, is full of good advice for the lawyer in chamber practice. It contains many practical suggestions and some forms for the preparation of legal documents by law students and lawyers. It covers contracts in general briefly, and then contracts of employment, of building and construction, and for the sale of land (30 pages are devoted to the latter); negotiable instruments; powers of attorney; real estate and chattel mortgages; leases; articles of partnership; organization of corporations, and issue of securities; business trusts; wills; and abstracts of title.

The scheme of each division is to present very briefly the elements of the law, to outline the essential points to be considered in drawing the instrument, to suggest supposititious cases, and finally to give a few simple forms. There are useful references to cases, form books, and articles.

A few chapters deal inadequately with the matter treated. But this must be so necessarily in a book of this design with respect to corporation papers (19 pages) and articles of partnership (8 pages), which perhaps do not belong here at all and are merely given to throw the other matter into proper setting or to give the lawyer a few broad lines on which to proceed. The suggestions actually contained in these short divisions, however, are admirable.

We are particularly impressed with the chapter (30 pages) on Wills. After a short statement of the advantages of making a will, the author deals with the general plan of a will from the point of view of the testator's family and the state of his property. Cautions in regard to the avoidance of the danger of the Rule in Shelley's case; the relative merits of vested or of contingent remainders, follow, *etc.* Mr. Ballantine, for instance, points out the desirability of vested remainders to children in Illinois in preference to contingent remainders in view of the tax on contingent interests at the highest possible rate. He wisely advises the deposit of the will with the executor or the lawyer who is to have charge of it. The legal adviser should have no false modesty in this regard.

The chapter on examination of abstracts of title is too short but contains a useful skeleton of such abstract.

We know of no guide exactly like this useful little volume, which we are glad to commend.

J. W.

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<sup>3</sup> See p. 1.

<sup>4</sup> See vol. 28, p. 249.

<sup>5</sup> See vol. 9, p. 602.

**THE FUNDAMENTAL PRINCIPLES OF TAXATION IN THE LIGHT OF MODERN DEVELOPMENTS.** Being the Newmarch Lectures for 1919. By Sir Josiah Stamp. London: Macmillan & Co. 1921. pp. xi, 201.

These lectures, lately delivered at the University of London, contain a full and satisfactory discussion of the economic, social, and political considerations involved in taxation generally, and especially in the British Income Tax. The subject is treated from the standpoints of the individual, of the state, and of the community. In view of the immense importance to lawyers and legislators of a knowledge of the law of taxation, and of the necessity of an economic basis for such knowledge, this book may be commended to lawyers as a brief but excellent presentation of the subject.

J. H. B.

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**COMPANY LAW OF CANADA.** By Mr. Justice Masten, of the Supreme Court of Ontario, and William Kasper Fraser, of the Toronto Bar. Toronto: Carswell and Company, Limited. Second Edition. 1920. pp. iii, 984.

The text is given of (a) the Dominion Companies Act, (b) certain parts of the Ontario Companies Act, and (c) the Dominion Winding-up Act, and there are notes by the authors giving reference to cases which they deem to be helpful to an understanding of these acts. There are a few, but only a few, references to cases decided in the United States; there are numerous references to English decisions; and the authors state that they have endeavored to refer "to all Canadian cases which may still be law." There is in the notes little or no discussion of principles; the authors undertake merely to set forth the authorities in orderly arrangement. It is a practical handbook, carefully prepared, with an adequate index.

E. H. W.

## BOOKS RECEIVED

- GOVERNMENT CONTROL AND OPERATION OF INDUSTRY IN GREAT BRITAIN AND THE UNITED STATES DURING THE WORLD WAR.** By C. W. Baker. Carnegie Endowment for International Peace. pp. vii, 138. New York: Oxford University Press.
- COMMENTARIES ON ROMAN-DUTCH LAW.** By Simon van Leeuwen. Second Edition. Revised and edited with notes by C. W. Decker. Translation by Sir John S. Kotze. Vol. 1, pp. xlii, 504. London: Sweet and Maxwell, Ltd.
- CASES ON THE LAW OF CONTRACTS.** By Arthur L. Corbin. pp. xxiv, 1514. St. Paul: West Publishing Company.
- TRAITÉ DE DROIT CONSTITUTIONAL.** By Leon Duguit. Second Edition. Vol. 1, pp. xi, 593. Paris: E. de Boccard.
- WAR GOVERNMENT OF THE BRITISH DOMINIONS.** By Arthur Berriedale Keith. A new series, economic and social History of the World War. pp. xvi, 353. Oxford: University Press. (To be reviewed.)
- THE NATURE OF CANADIAN FEDERALISM.** By W. P. M. Kennedy. pp. 31. Toronto: University of Toronto Press.
- LE GOUVERNEMENT DES JUGES.** By Edouard Lambert. pp. 276. Paris: Marcel Giard & Cie. (To be reviewed.)
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- PRIVATE PROPERTY AND RIGHTS IN ENEMY COUNTRIES.** By Paul F. Simonson. pp. xxviii, 436. London: Effingham Wilson.
- TREATIES AND AGREEMENTS WITH AND CONCERNING CHINA.** By John V. A. MacMurray. Vol. 1, pp. xli, 928; vol. 2, pp. 929-1729. New York: Oxford University Press.
- THE NATURE AND SOURCES OF THE LAW.** By John C. Gray. New edition, prepared from author's notes by Roland Gray. pp. xviii, 348. New York: The Macmillan Company.

- CAPITAL CONTROL IN NEW YORK. By Donald C. Baldwin. pp. xxiv, 255. Philadelphia: University of Pennsylvania Press.
- COMMERCIAL LAW CASES. By Harold L. Perrin and Hugh W. Babb. Vol. 1. pp. xxi, 536; vol. 2, pp. xv, 414. New York: George H. Doran.
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- LEADING CASES IN COMMON LAW. By Ernest Cockle and F. Nemhard Hibbert. pp. xxxiv, 991. London: Sweet and Maxwell, Ltd. (To be reviewed.)
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- THE QUESTION OF ABORIGINES IN THE LAW AND PRACTICE OF NATIONS. By Alpheus H. Snow. pp. v, 376. New York: G. P. Putnam's Sons.
- THE AMERICAN PHILOSOPHY OF GOVERNMENT. By Henry A. Snow. pp. iii, 485. New York: G. P. Putnam's Sons.

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## A MINISTRY OF JUSTICE

**T**HE courts are not helped as they could and ought to be in the adaptation of law to justice. The reason they are not helped is because there is no one whose business it is to give warning that help is needed. Time was when the remedial agencies, though inadequate, were at least in our own hands. Fiction and equity were tools which we could apply and fashion for ourselves. The artifice was clumsy, but the clumsiness was in some measure atoned for by the skill of the artificer. Legislation, supplanting fiction and equity, has multiplied a thousand fold the power and capacity of the tool, but has taken the use out of our own hands and put it in the hands of others. The means of rescue are near for the worker in the mine. Little will the means avail unless lines of communication are established between the miner and his rescuer. We must have a courier who will carry the tidings of distress to those who are there to save when signals reach their ears. To-day courts and legislature work in separation and aloofness. The penalty is paid both in the wasted effort of production and in the lowered quality of the product. On the one side, the judges, left to fight against anachronism and injustice by the methods of judge-made law, are distracted by the conflicting promptings of justice and logic, of consistency and mercy, and the output of their labors bears the tokens of the strain. On the other side, the legislature, informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterested or systematic



advice as to the workings of one rule or another, patches the fabric here and there, and mends often when it would mend. Legislature and courts move on in proud and silent isolation. Some agency must be found to mediate between them.

This task of mediation is that of a ministry of justice. The duty must be cast on some man or group of men to watch the law in action, observe the manner of its functioning, and report the changes needed when function is deranged. The thought is not a new one. Among our own scholars, it has been developed by Dean Pound with fertility and power.<sup>1</sup> Others before him, as he reminds us, had seen the need, and urged it. Bentham made provision for such a ministry in his draft of a Constitutional Code.<sup>2</sup> Lord Westbury renewed the plea.<sup>3</sup> Only recently, Lord Haldane has brought it to the fore again.<sup>4</sup> "There is no functionary at present who can properly be called a minister responsible for the subject of Justice."<sup>5</sup> "We are impressed by the representations made by men of great experience, such as the President of the Incorporated Law Society, as to the difficulty of getting the attention of the government to legal reform, and as to the want of contact between those who are responsible for the administration of the work of the Commercial Courts and the mercantile community, and by the evidence adduced that the latter are, in consequence and progressively, withdrawing their disputes from the jurisdiction of the Courts."<sup>6</sup> In countries of continental Europe, the project has passed into the realm of settled practice. Apart from these precedents and without thought of them, the need of such a ministry, of some one to observe and classify and criticize and report, has been driven home to me with steadily growing force through my own work in an appellate court. I have seen a body of judges applying a system of case law, with powers of innovation cabined and confined. The main lines are fixed by precedents. New lines may, indeed, be run, new courses followed, when precedents are lacking. Even then, distance and direction are guided by mingled considerations of

<sup>1</sup> Pound, "Juristic Problems of National Progress," 22 AM. J. OF SOCIOLOGY, 721, 729, 731 (May, 1917); Pound, "Anachronisms in Law," 3 J. AM. JUDICATURE SOC., 142, 146 (February, 1920).

<sup>2</sup> WORKS, IX, 597-612.

<sup>3</sup> 1 NASH, LIFE OF LORD WESTBURY, 191, quoted by Pound, *supra*.

<sup>4</sup> Report of Lord Haldane's Committee on the Machinery of Government (1918).

<sup>5</sup> *Ibid.*, p. 63.

<sup>6</sup> *Ibid.*, p. 64.

logic and analogy and history and tradition which moderate and temper the promptings of policy and justice. I say this, not to criticize, but merely to describe. I have seen another body, a legislature, free from these restraints, its powers of innovation adequate to any need, preoccupied, however, with many issues more clamorous than those of courts, viewing with hasty and partial glimpses the things that should be viewed both steadily and whole. I have contrasted the quick response whenever the interest affected by a ruling untoward in results had some accredited representative, especially some public officer, through whom its needs were rendered vocal. A case involving, let us say, the construction of the Workmen's Compensation Law, exhibits a defect in the statutory scheme. We find the Attorney General at once before the legislature with the request for an amendment. We cannot make a decision construing the tax law or otherwise affecting the finances of the state without inviting like results. That is because in these departments of the law, there is a public officer whose duty prompts him to criticism and action. Seeing these things, I have marveled and lamented that the great fields of private law, where justice is distributed between man and man, should be left without a caretaker. A word would bring relief. There is nobody to speak it.

For there are times when deliverance, if we are to have it — at least, if we are to have it with reasonable speed — must come to us, not from within, but from without. Those who know best the nature of the judicial process, know best how easy it is to arrive at an impasse. Some judge, a century or more ago, struck out upon a path. The course seemed to be directed by logic and analogy. No milestone of public policy or justice gave warning at the moment that the course was wrong, or that danger lay ahead. Logic and analogy beckoned another judge still farther. Even yet there was no hint of opposing or deflecting forces. Perhaps the forces were not in being. At all events, they were not felt. The path went deeper and deeper into the forest. Gradually there were rumblings and stirrings of hesitation and distrust, anxious glances were directed to the right and to the left, but the starting point was far behind, and there was no other path in sight.

Thus, again and again, the processes of judge-made law bring judges to a stand that they would be glad to abandon if an outlet could be gained. It is too late to retrace their steps. At all events,

whether really too late or not, so many judges think it is that the result is the same as if it were. Distinctions may, indeed, supply for a brief distance an avenue of escape. The point is at length reached when their power is exhausted. All the usual devices of competitive analogies have finally been employed without avail. The ugly or antiquated or unjust rule is there. It will not budge unless uprooted. Execration is abundant, but execration, if followed by submission, is devoid of motive power. There is need of a fresh start; and nothing short of a statute, unless it be the erosive work of years, will supply the missing energy. But the evil of injustice and anachronism is not limited to cases where the judicial process, unaided, is incompetent to gain the mastery. Mastery, even when attained, is the outcome of a constant struggle in which logic and symmetry are sacrificed at times to equity and justice. The gain may justify the sacrifice; yet it is not gain without deduction. There is an attendant loss of that certainty which is itself a social asset. There is a loss too of simplicity and directness, an increasing aspect of unreality, of something artificial and fictitious, when judges mask a change of substance, or gloss over its importance, by the suggestion of a consistency that is merely verbal and scholastic. Even when these evils are surmounted, a struggle, of which the outcome is long doubtful, is still the price of triumph. The result is to subject the courts and the judicial process to a strain as needless as it is wearing. The machinery is driven to the breaking point; yet we permit ourselves to be surprised that at times there is a break. Is it not an extraordinary omission that no one is charged with the duty to watch machinery or output, and to notify the master of the works when there is need of replacement or repair?

In all this, I have no thought to paint the failings of our law in lurid colors of detraction. I have little doubt that its body is for the most part sound and pure. Not even its most zealous advocate, however, will assert that it is perfect. I do not seek to paralyze the inward forces, the "indwelling and creative" energies,<sup>7</sup> that make for its development and growth. My wish is rather to release them, to give them room and outlet for healthy and unhampered action. The statute that will do this, first in one field and then in others, is something different from a code, though, as statute follows statute, the material may be given from which in time, a

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<sup>7</sup> 2 *BRUCE, STUDIES IN HISTORY AND JURISPRUDENCE*, 609.

code will come. Codification is, in the main, restatement. What we need, when we have gone astray, is change. Codification is a slow and toilsome process, which, if hurried, is destructive. What we need is some relief that will not wait upon the lagging years. Indeed, a code, if completed, would not dispense with mediation between legislature and judges, for code is followed by commentary and commentary by revision, and thus the task is never done. "As in other sciences, so in politics, it is impossible that all things should be precisely set down in writing; for enactments must be universal, but actions are concerned with particulars."<sup>8</sup> Something less ambitious, in any event, is the requirement of the hour. Legislation is needed, not to repress the forces through which judge-made law develops, but to stimulate and free them. Often a dozen lines or less will be enough for our deliverance. The rule that is to emancipate is not to imprison in particulars. It is to speak the language of general principles, which, once declared, will be developed and expanded as analogy and custom and utility and justice, when weighed by judges in the balance, may prescribe the mode of application and the limits of extension. The judicial process is to be set in motion again, but with a new point of departure, a new impetus and direction. In breaking one set of shackles, we are not to substitute another. We are to set the judges free.

I have spoken in generalities, but instances will leap to view. There are fields, known to us all, where the workers in the law are hampered by rules that are outworn and unjust. How many judges, if they felt free to change the ancient rule, would be ready to hold to-day that a contract under seal may not be modified or discharged by another and later agreement resting in parol?<sup>9</sup> How many would hold that a deed, if it is to be the subject of escrow, must be delivered to a third person, and not to the grantee?<sup>10</sup> How many would hold that a surety is released, irrespective of resulting damage, if by agreement between principal and creditor the time of payment of the debt is extended for a single day?<sup>11</sup> How many would hold that a release of one joint tortfeasor is a release also of the others? How many would not prefer, instead

<sup>8</sup> ARISTOTLE, *POLITICS*, Bk. II (Jowett's translation).

<sup>9</sup> 3 WILLISTON, *CONTRACTS*, §§ 1834-1837; *Harris v. Shorall*, 230 N. Y. 343 (1921).

<sup>10</sup> *Blewitt v. Boorum*, 142 N. Y. 357, 37 N. E. 119 (1894).

<sup>11</sup> *N. Y. Life Ins. Co. v. Casey*, 178 N. Y. 381, 70 N. E. 916 (1904).

of drawing some unreal distinction between releases under seal and covenants not to sue,<sup>12</sup> to extirpate, root and branch, a rule which is to-day an incumbrance and a snare? How long would Pinnel's case<sup>13</sup> survive if its antiquity were not supposed to command the tribute of respect? How long would Dumpor's case<sup>14</sup> maintain a ghostly and disquieting existence in the ancient byways of the law?

I have chosen extreme illustrations as most likely to command assent. I do not say that judges are without competence to effect some changes of that kind themselves. The inquiry, if pursued, would bring us into a field of controversy which it is unnecessary to enter. Whatever the limit of power, the fact stares us in the face that changes are not made. But short of these extreme illustrations are others, less glaring and insistent, where speedy change is hopeless unless effected from without. Sometimes the inroads upon justice are subtle and insidious. A spirit or a tendency, revealing itself in a multitude of little things, is the evil to be remedied. No one of its manifestations is enough, when viewed alone, to spur the conscience to revolt. The mischief is the work of a long series of encroachments. Examples are many in the law of practice and procedure.<sup>15</sup> At other times, the rule, though wrong, has become the cornerstone of past transactions. Men have accepted it as law, and have acted on the faith of it. At least, the possibility that some have done so, makes change unjust, if it were practicable, without saving vested rights. Illustrations again may be found in many fields. A rule for the construction of wills established a presumption that a gift to issue is to be divided, not *per stirpes*, but *per capita*.<sup>16</sup> The courts denounced and distinguished, but were unwilling to abandon.<sup>17</sup> In New York, a statute has at last

<sup>12</sup> *Gilbert v. Finch*, 173 N. Y. 455, 66 N. E. 133 (1903); *Walsh v. N. Y. Central R. R. Co.*, 204 N. Y. 58, 97 N. E. 408 (1912); *cf.* 21 COLUMBIA L. REV. 491.

<sup>13</sup> 5 Coke, 117; *cf.* *Jaffray v. Davis*, 124 N. Y. 164, 167, 26 N. E. 351 (1891); *Frye v. Hubbell*, 74 N. H. 358, 68 Atl. 325 (1907); 1 WILLISTON, CONTRACTS, § 121; ANSON, CONTRACTS, Corbin's ed., p. 137; Ferson, "The Rule in *Foakes v. Beer*," 31 YALE L. J. 15.

<sup>14</sup> 2 Coke, 119.

<sup>15</sup> In jurisdictions where procedure is governed by rules of court, recommendations of the ministry affecting the subject-matter of the rules may be submitted to the judges.

<sup>16</sup> I state the law in New York and in many other jurisdictions. There are jurisdictions where the rule is different.

<sup>17</sup> *Petry v. Petry*, 186 App. Div. 738, 175 N. Y. Supp. 30 (1919), 227 N. Y. 621, 125 N. E. 924 (1919); *Matter of Durant*, 231 N. Y. 41, 131 N. E. 562 (1921).

released us from our bonds,<sup>18</sup> and we face the future unashamed. Still more common are the cases where the evil is less obvious, where there is room for difference of opinion, where some of the judges believe that the existing rules are right, at all events where there is no such shock to conscience that precedents will be abandoned, and what was right declared as wrong. At such times there is need of the detached observer, the skilful and impartial critic, who will view the field in its entirety, and not, as judges view it, in isolated sections, who will watch the rule in its working, and not, as judges watch it, in its making, and who viewing and watching and classifying and comparing, will be ready, under the responsibility of office, with warning and suggestion.

I note at random, as they occur to me, some of the fields of law where the seeds of change, if sown, may be fruitful of results. Doubtless better instances can be chosen. My purpose is, not advocacy of one change or another, but the emphasis of illustration that is concrete and specific.

It is a rule in some jurisdictions that if A sends to B an order for goods, which C, as the successor to B's business, takes it on himself to fill, no action at the suit of C will lie either for the price or for the value, if A in accepting the goods and keeping them believed that they had been furnished to him by B, and this though C has acted without fraudulent intent.<sup>19</sup> I do not say that this is the rule everywhere. There are jurisdictions where the question is still an open one. Let me assume, however, a jurisdiction where the rule, as I have stated it, prevails, or even one where, because the question is unsettled, there is a chance that it may prevail. A field would seem to be open for the declaration by the lawmakers of a rule less in accord, perhaps, with the demands of a "jurisprudence of conceptions,"<sup>20</sup> but more in accord with those of morality and justice. Many will prefer to turn to the principle laid down in the French Code Civil:

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<sup>18</sup> Decedent's Estate Law, § 47a; L. 1921, c. 379.

<sup>19</sup> Boulton v. Jones, 2 H. & N. 564 (1857); 1 WILLISTON, CONTRACTS, § 80: cf. Boston Ice Co. v. Potter, 123 Mass. 28 (1877); Kelly Asphalt Co. v. Barber Asphalt Paving Co., 211 N. Y. 68, 71, 105 N. E. 88 (1914).

<sup>20</sup> Pound, "Mechanical Jurisprudence," 8 COLUMBIA L. REV. 605, 608, 610; Hynes v. N. Y. Central R. R. Co., 231 N. Y. 229, 235, 131 N. E. 898 (1921).

"L'erreur n'est une cause de nullité de la convention que lorsqu'elle tombe sur la substance même de la chose qui en est l'objet. Elle n'est point une cause de nullité, lorsqu'elle ne tombe que sur la personne avec laquelle on a intention de contracter, à moins que la considération de cette personne ne soit la cause principale de la convention."<sup>21</sup>

Much may be said for the view that in the absence of bad faith, there should be a remedy in quasi contract.<sup>22</sup>

It is a rule which has grown up in many jurisdictions and has become "a common ritual"<sup>23</sup> that municipal corporations are liable for the torts of employees if incidental to the performance or non-performance of corporate or proprietary duties, but not if incidental to the performance or non-performance of duties public or governmental. The dividing line is hard to draw.

"Building a drawbridge, maintaining a health department, or a charitable institution, confining and punishing criminals, assaults by policemen, operating an elevator in a city hall, driving an ambulance, sweeping and cleaning streets, have been held governmental acts. Sweeping and cleaning streets, street lighting, operating electric light plants, or water works, maintaining prisons, have been held private functions."<sup>24</sup>

The line of demarcation, though it were plainer, has at best a dubious correspondence with any dividing line of justice. The distinction has been questioned by the Supreme Court of the United States.<sup>25</sup> It has been rejected recently in Ohio.<sup>26</sup> In many jurisdictions, however, as, for example in New York, it is supported by precedent so inveterate that the chance of abandonment is small. I do not know how it would fare at the hands of a ministry of justice. Perhaps such a ministry would go farther, and would wipe out, not merely the exemption of municipalities, but the broader exemption of the state.<sup>27</sup> At least there is a field for inquiry, if not for action.

It is a rule of law that the driver of an automobile or other vehicle who fails to look or listen for trains when about to cross a railroad, is guilty of contributory negligence, in default, at least,

<sup>21</sup> Code Civil, Art. 1110.

<sup>22</sup> ANSON, CONTRACTS (Corbin's edition), 31; KEENER, QUASI CONTRACTS, 358-360.

<sup>23</sup> 34 HARV. L. REV. 66.

<sup>24</sup> *Ibid.*, 67.

<sup>25</sup> *Workman v. The Mayor*, 179 U. S. 552, 574 (1900).

<sup>26</sup> *Fowler v. City of Cleveland*, 100 Ohio St. 158, 126 N. E. 72 (1919).

<sup>27</sup> *Smith v. State*, 227 N. Y. 405, 125 N. E. 841 (1920).

of special circumstances excusing the omission. I find no fault with that rule. It is reasonable and just. But the courts have in some jurisdictions gone farther. They have held that the same duty that rests upon the driver, rests also upon the passenger.<sup>28</sup> The friend whom I invite to ride with me in my car, and who occupies the rear seat beside me, while the car is in the care of my chauffeur, is charged with active vigilance to watch for tracks and trains, and is without a remedy if in the exuberance of jest or anecdote or reminiscence, he relies upon the vigilance of the driver to carry him in safety. I find it hard to imagine a rule more completely unrelated to the realities of life. Men situated as the guest in the case I have supposed, do not act in the way that this rule expects and requires them to act. In the first place, they would in almost every case make the situation worse if they did; they would add bewilderment and confusion by contributing multitude of counsel. In the second place, they rightly feel that, except in rare emergencies of danger known to them, but unknown to the driver, it is not their business to do anything. The law in charging them with such a duty has shaped its rules in disregard of the common standards of conduct, the every-day beliefs and practices, of the average man and woman whose behavior it assumes to regulate. We must take a fresh start. We must erect a standard of conduct that realists can accept as just. Other fields of the law of negligence may be resurveyed with equal profit. The law that defines or seeks to define the distinction between general and special employers is beset with distinctions so delicate that chaos is the consequence. No lawyer can say with assurance in any given situation when one employment ends and the other begins. The wrong choice of defendants is often made, with instances, all too many, in which justice has miscarried.

Illustrations yet more obvious are at hand in the law of evidence. Some of its rules are so unwieldy that many of the simplest things

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<sup>28</sup> *Read v. N. Y. C. & H. R. R. Co.*, 123 App. Div. 228, 107 N. Y. Supp. 1068 (1908); 5 C. 165 App. Div. 910, 150 N. Y. Supp. 1108 (1914), *aff'd*, 219 N. Y. 660, 114 N. E. 1081 (1916); *Noakes v. N. Y. C. & H. R. R. Co.*, 121 App. Div. 716, 106 N. Y. Supp. 522 (1907), 195 N. Y. 543, 88 N. E. 1126 (1909). For the true rule see *Weidlich v. N. Y., N. H., & H. R. R.*, 93 Conn. 438, 106 Atl. 323 (1919); 31 *YALE L. J.* 101.



of life, transactions so common as the sale and delivery of merchandise, are often the most difficult to prove. Witnesses speaking of their own knowledge must follow the subject-matter of the sale from its dispatch to its arrival. I have been told by members of the bar that claims of undoubted validity are often abandoned, if contested, because the withdrawal of the necessary witnesses from the activities of business involves an expense and disarrangement out of proportion to the gain. The difficulty would be lessened if entries in books of account were admissible as *prima facie* evidence upon proof that they were made in the usual course of business. Such a presumption would harmonize in the main with the teachings of experience. Certainly it would in certain lines of business, as, *e. g.*, that of banking, where irregularity of accounts is unquestionably the rare exception. Even the books of a bank are not admissible at present without wearisome preliminaries.<sup>29</sup> In England, the subject has for many years been regulated by statute.<sup>30</sup> Something should be done in our own country to mitigate the hardship. "The dead hand of the common-law rule . . . should no longer be applied to such cases as we have here."<sup>31</sup>

We are sometimes slow, I fear, while absorbed in the practice of our profession, to find inequity and hardship in rules that laymen view with indignation and surprise. One can understand why this is so. We learned the rules in youth when we were students in the law schools. We have seen them reiterated and applied as truths that are fundamental and almost axiomatic. We have sometimes even won our cases by invoking them. We end by accepting them without question as part of the existing order. They no longer have the vividness and shock of revelation and discovery. There is need of conscious effort, of introspective moods and moments, before their moral quality addresses itself to us with the same force as it does to others. This is at least one reason why the bar has at times been backward in the task of furthering reform. A recent study of the Carnegie Foundation for the Advancement of Teaching deals with the subject of training for the public profession of the law.<sup>32</sup> Dr. Pritchett says in his preface :<sup>33</sup>

<sup>29</sup> *Ocean Bank v. Carll*, 55 N. Y. 440 (1874); *Bates v. Preble*, 151 U. S. 149 (1894).

<sup>30</sup> 42 & 43 VICT. C. 11; STEPHEN, *DIGEST OF THE LAW OF EVIDENCE*, Art. 36.

<sup>31</sup> *Rosen v. United States*, 245 U. S. 467 (1918).

<sup>32</sup> Bulletin No. 15, Carnegie Foundation.

<sup>33</sup> *Ibid.*, p. xvii.

"There is a widespread impression in the public mind that the members of the legal profession have not, through their organizations, contributed either to the betterment of legal education or to the improvement of justice to that extent which society has the right to expect."

The Centennial Memorial Volume of Indiana University contains a paper by the Dean of the Harvard Law School on the Future of Legal Education.<sup>24</sup>

"So long as the leaders of the bar," he says,<sup>25</sup> "do nothing to make the materials of our legal tradition available for the needs of the twentieth century, and our legislative lawmakers, more zealous than well instructed in the work they have to do, continue to justify the words of the chronicler — 'the more they spake of law the more they did unlaw' — so long the public will seek refuge in specious projects of reforming the outward machinery of our legal order in the vain hope of curing its inward spirit."

Such reproaches are not uncommon. We do not need to consider either their justification or their causes. Enough for us that they exist. Our duty is to devise the agencies and stimulate the forces that will make them impossible hereafter.

What, then, is the remedy? Surely not to leave to fitful chance the things that method and system and science should order and adjust. Responsibility must be centered somewhere. The only doubt, it seems to me, is where. The attorneys-general, the law officers of the states, are overwhelmed with other duties. They hold their places by a tenure that has little continuity, or permanence. Many are able lawyers, but a task so delicate exacts the scholar and philosopher, and scholarship and philosophy find precarious and doubtful nurture in the contentions of the bar. Even those qualities, however, are inadequate unless reinforced by others. There must go with them experience of life and knowledge of affairs. No one man is likely to combine in himself attainments so diverse. We shall reach the best results if we lodge power in a group, where there may be interchange of views, and where different types of thought and training will have a chance to have their say. I do not forget, of course, the work that is done by Bar Associations, state and national, as well as local, and other voluntary bodies. The work has not risen to the needs of the occasion. Much of it has been

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<sup>24</sup> Pound, "The Future of Legal Education," 259.

<sup>25</sup> *Ibid.*, 268.

critical rather than constructive. Even when constructive, it has been desultory and sporadic. No attempt has been made to cover with systematic and comprehensive vision the entire field of law. Discharge of such a task requires an expenditure of time and energy, a single-hearted consecration, not reasonably to be expected of men in active practice. It exacts, too, a scholarship and a habit of research not often to be found in those immersed in varied duties. Even if these objections were inadequate, the task ought not to be left to a number of voluntary committees, working at cross purposes. Recommendations would come with much greater authority, would command more general acquiescence on the part of legislative bodies, if those who made them were charged with the responsibilities of office. A single committee should be organized as a ministry of justice. Certain at least it is that we must come to some official agency unless the agencies that are voluntary give proof of their capacity and will to watch and warn and purge—unless the bar awakes to its opportunity and power.

How the committee should be constituted, is, of course, not of the essence of the project. My own notion is that the ministers should be not less than five in number. There should be representatives, not less than two, perhaps even as many as three, of the faculties of law or political science in institutes of learning. Hardly elsewhere shall we find the scholarship on which the ministry must be able to draw if its work is to stand the test. There should be, if possible, a representative of the bench; and there should be a representative or representatives of the bar.

Such a board would not only observe for itself the workings of the law as administered day by day. It would enlighten itself constantly through all available sources of guidance and instruction; through consultation with scholars; through study of the law reviews, the journals of social science, the publications of the learned generally; and through investigation of remedies and methods in other jurisdictions, foreign and domestic. A project was sketched not long ago by Professor John Bassett Moore, now judge of the International Court, for an Institute of Jurisprudence.<sup>36</sup> It was to do for law what the Rockefeller Institute is doing for medicine. Such an institute, if founded, would be at the service of the min-

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<sup>36</sup> Report of Dean of Columbia University Law School for 1916.

isters. The Commonwealth Fund has established a Committee for Legal Research which is initiating studies in branches of jurisprudence where reform may be desirable. The results of its labors will be available for guidance. Professors in the universities are pointing the way daily to changes that will help. Professor Borchard of Yale by a series of articles on the Declaratory Judgment<sup>37</sup> gave the impetus to a movement which has brought us in many states a reform long waited for by the law.<sup>38</sup> Dean Stone of Columbia has disclosed inconsistencies and weaknesses in decisions that deal with the requirement of mutuality of remedy in cases of specific performance.<sup>39</sup> Professor Chafee in a recent article<sup>40</sup> has emphasized the need of reform in the remedy of interpleader. In the field of conflict of laws, Professor Lorenzen has shown disorder to the point of chaos in the rules that are supposed to regulate the validity and effect of contracts.<sup>41</sup> The archaic law of arbitration, amended not long ago in New York through the efforts of the Chamber of Commerce,<sup>42</sup> remains in its archaic state in many other jurisdictions, despite requests for change. A ministry of justice will be in a position to gather these and like recommendations together, and report where change is needed. Reforms that now get themselves made by chance or after long and vexatious agitation, will have the assurance of considerate and speedy hearing. Scattered and uncoördinated forces will have a rallying point and focus. System and method will be substituted for favor and caprice. Doubtless, there will be need to guard against the twin dangers of overzeal on the one hand and of inertia on the other — of the attempt to do too much and of the willingness to do too little. In the end, of course, the recommendations of the ministry will be recommendations and nothing more. The public will be informed of them. The bar and others interested will debate them. The legislature may reject them. But at least the lines of communication will be open. The long silence will be broken. The spaces between the planets will at last be bridged.

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<sup>37</sup> 28 YALE L. J. 1.

<sup>38</sup> 34 HARV. L. REV. 697.

<sup>39</sup> The "Mutuality" Rule in New York, 16 COLUMBIA L. REV. 443.

<sup>40</sup> "Modernizing Interpleader," 30 YALE L. J. 814.

<sup>41</sup> 30 YALE L. J. 565, 655; 31 *id.*, 53.

<sup>42</sup> *Matter of Berkovitz*, 230 N. Y. 261, 130 N. E. 288 (1921).

The time is ripe for betterment. 'Le droit a ses époques,' says Pascal in words which Professor Hazeltine has recently recalled to us. The law has "its epochs of ebb and flow."<sup>43</sup> One of the flood seasons is upon us. Men are insisting, as perhaps never before, that law shall be made true to its ideal of justice. Let us gather up the driftwood, and leave the waters pure.

*Benjamin N. Cardozo.*

NEW YORK CITY.

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<sup>43</sup> H. D. Hazeltine, 1 CAMBRIDGE L. J. 1.

## JUDICIAL REVIEW OF ADMINISTRATIVE ACTION BY THE FEDERAL SUPREME COURT

**I**S there a definite body of administrative law concerning judicial review, in the Supreme Court of the United States, consisting of rules, principles, and standards readily to be ascertained, or is there only a developing body of general ideas, in a stage analogous to the early development of equity out of the common law? The phenomenal growth of executive justice in this country, during the second half of the preceding century, with the probability of a still greater growth in the near future, makes it desirable to ascertain to what extent the findings of these administrative bodies will be scrutinized by the courts, and particularly by the Federal Supreme Court. Executive justice has its defects, just as all social and legal institutions have; and the problem is to what extent can judicial justice, by way of review, correct those defects, either by a determination *de novo*, or by making the findings of the administrative officers conclusive? For it must not be supposed that judicial justice *per se* is the panacea for all administrative or executive ills; judicial justice also has its defects, and often a policy of non-review will secure a maximum of justice. The problem must be solved by a proper balancing of the various interests involved, individual or social. It was largely because of the defects of judicial justice, adhering to traditional rules of evidence and reasoning on old common-law analogies, that executive justice, with its more flexible applications of law to concrete cases and its greater responsiveness to the popular will, came in during the past two decades, and threatens to occupy more and more of the field of judicial justice.

In analyzing the decisions of the Federal Supreme Court with reference to the degree of judicial control over executive or administrative agencies, the conventional classification used by the Supreme Court will be followed, namely, (1) Questions of Procedure; (2) Questions of Jurisdiction; (3) Questions of Discretion; (4) Questions of Fact; (5) Questions of Law; (6) Questions of Mixed Law

and Fact. After it has been shown that this mode of treatment leads to inconsistent results, so far as establishing a general rule is concerned, it will be pointed out that what the Court is really doing, consciously or unconsciously, and what it should do, is balancing the various individual and social interests involved. For the problem is far too deep to be solved by stating that a particular case involves a question of fact or one of law, or one of mixed law and fact, and that therefore the court in reviewing it will reach a certain result. Such an approach is faulty, and leads to a falsely mechanical handling of the case.

## I

### QUESTIONS OF PROCEDURE

Since the Fifth and Fourteenth Amendments to the Federal Constitution provide, among other matters, that no person shall be deprived of life, liberty, or property without due process of law, the procedure of administrative agencies must satisfy this constitutional guaranty. With certain exceptions, this procedure must include notice and hearing to the party whose rights and liabilities are to be affected, an opportunity to introduce evidence in his behalf, and to examine the evidence of the adverse party.

It is well settled that it is not essential for due process of law that one have a hearing in a court of justice; an administrative hearing is sufficient.<sup>1</sup> Moreover, a single hearing, whether in a court or before an administrative official, meets the requirement of due process, the right of a hearing on appeal is not essential.<sup>2</sup> No special notice to the parties interested is required, where a statute fixes the time and place of meeting of any board or tribunal; the statute itself is sufficient notice.<sup>3</sup> Hence, it is not necessarily violative of due process if no hearing or notice is expressly provided. But while a statute may not in terms make any provision for a review of the proceedings of a particular administrative body, it

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<sup>1</sup> *Den. ex dem. Murray v. Hoboken Land & Improv. Co.*, 18 How. (U S) 272 (1855); *Davidson v. New Orleans*, 96 U. S. 97 (1877); *Ex parte Wall* 107 U. S. 265 (1882); *Dreyer v. Illinois*, 187 U. S. 71 (1902); *Hurtado v. California*, 110 U. S. 5-6 (1884).

<sup>2</sup> *McKane v. Durston*, 153 U. S. 684 (1894); *Andrews v. Swartz*, 156 U. S. 272 (1894); *Pittsburgh, C. C. & St. L. Ry. v. Backus*, 154 U. S. 421 (1894).

<sup>3</sup> *Reetz v. Michigan*, 188 U. S. 505, 509 (1903).

does not follow that such proceedings are beyond investigation in the courts; through proceedings by way of injunction, certiorari, or mandamus, the party aggrieved may have his hearing and obtain relief.<sup>4</sup>

Where summary action is required by the nature of the subject matter, no hearing before the particular board or official is necessary. This is true particularly in matters of taxation and revenue,<sup>5</sup> and questions arising under the "police power."<sup>6</sup> Here again, however, the litigant does eventually have his hearing in court, either in suing for the recovery of the tax or in a suit against the official who may have acted illegally. Where summary action without hearing would not be justified, there must be a hearing in the first instance before the administrative body. This is true in the admission, exclusion, and deportation of aliens,<sup>7</sup> the findings of public utility commissions,<sup>8</sup> the determinations of the federal land department,<sup>9</sup> the exclusion of matter from the mails<sup>10</sup> — to mention no others — in none of which findings is there the same requirement of summary action as in matters of taxation, public health, etc.

In certain matters, no hearing in the sense of examining the evidence of the adverse litigant and offering rebutting evidence, is ever given, either before administrative officials or the courts. This is the case in judicial review of the findings of military boards; no matter how arbitrary the procedure before the board itself, no relief will be given in the courts.<sup>11</sup> Only if the tribunal has acted

<sup>4</sup> *Clement Natl. Bank v. Vermont*, 231 U. S. 120 (1913); *Hagar v. Reclamation Dist.*, 111 U. S. 701 (1884).

<sup>5</sup> *Murray v. Hoboken Land & Improv. Co.*, 18 How. (U. S.) 272 (1855); *Springer v. United States*, 102 U. S. 586 (1880).

<sup>6</sup> *North Amer. Cold Storage Co. v. Chicago*, 211 U. S. 306 (1908); *Hutchinson v. Valdosta*, 227 U. S. 303 (1913); *Lawton v. Steele*, 152 U. S. 133 (1894).

<sup>7</sup> *Japanese Immigrant Case*, 189 U. S. 86 (1903); *Zakonaite v. Wolf*, 226 U. S. 272 (1912); *Turner v. Williams*, 194 U. S. 279 (1904); *Kwock Jan Fat v. White*, 253 U. S. 454 (1920); *Fong Yue Ting v. United States*, 149 U. S. 698 (1893).

<sup>8</sup> *United States v. B. & O. Southwestern Ry.*, 226 U. S. 14 (1912) (*dictum*). See further, *Chicago, M. & St. P. Ry. v. Minnesota*, 134 U. S. 418 (1890); *Oregon R. R. & N. Co. v. Fairchild*, 224 U. S. 510, 526 (1912).

<sup>9</sup> *Garfield v. Goldsby*, 211 U. S. 249 (1908). Cf. *Fairbanks v. United States*, 223 U. S. 215 (1912).

<sup>10</sup> *Smith v. Hitchcock*, 226 U. S. 53 (1912).

<sup>11</sup> *Reaves v. Ainsworth*, 219 U. S. 296 (1911); *Johnson v. Sayre*, 158 U. S. 109 (1895); *Mullan v. United States*, 212 U. S. 516 (1909). As to division of opinion in the state courts in reviewing acts of boards of state militia, see *Smith v. Hoffman*, 166 N. Y. 462, 60 N. E. 187 (1901).



without jurisdiction can relief be given.<sup>12</sup> So also in the determinations of so-called "political" questions, by the President or Secretary of State, no hearing in the sense above used is given; as, for instance, whether a state has a republican form of government;<sup>13</sup> whether a certain treaty is in force;<sup>14</sup> whether the government of a foreign state is *de jure* or *de facto*;<sup>15</sup> and whether certain territory belongs to the government of the United States.<sup>16</sup> Likewise, in the removal of officials under the general power of removal by the President, no hearing in the sense of re-examination of the facts will be given.<sup>17</sup> So also where a statute provides for a mode of review, either administrative in its nature or by a particular court, the Supreme Court will not hear the case until that mode has first been followed.<sup>18</sup> Nor will the policy, wisdom, justice, or fairness of a state statute be subject to review or criticism by the Federal Supreme Court;<sup>19</sup> and the knowledge, negligence, methods, or motives of the legislature will not be inquired into in determining the validity of a statute that has been passed in due form.<sup>20</sup>

In the majority of cases as to the necessity of a hearing, the requirement seems to be that it must be oral. In the case of *Chicago, Milwaukee and St. Paul Railway Company v. Minnesota*,<sup>21</sup> Mr. Justice Blatchford said:

"No hearing is provided for, no summons or notice to the company, before the commission has found what it is to find and declared what it

<sup>12</sup> *Dynes v. Hoover*, 20 How. (U. S.) 65 (1857); *Smith v. Whitney*, 126 U. S. 167 (1886).

<sup>13</sup> *Taylor v. Beckham*, 178 U. S. 548 (1900); *Texas v. White*, 7 Wall. (U. S.) 700 (1868); *Luther v. Borden*, 7 How. (U. S.) 1 (1849); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U. S. 118 (1912).

<sup>14</sup> *Charlton v. Kelly*, 229 U. S. 447 (1913); *Terlinden v. Ames*, 184 U. S. 270 (1902).

<sup>15</sup> *Oetjen v. Central Leather Co.*, 246 U. S. 297 (1918); *Underhill v. Hernandez*, 168 U. S. 250 (1897); *Amer. Banana Co. v. United Fruit Co.*, 213 U. S. 347 (1909).

<sup>16</sup> *Jones v. United States*, 137 U. S. 212 (1890); *Williams v. Suffolk Ins. Co.*, 13 Pet. (U. S.) 415 (1839).

<sup>17</sup> *Shurtleff v. United States*, 189 U. S. 311 (1903); *Reagan v. United States*, 182 U. S. 419 (1901).

<sup>18</sup> *Mellon Co. v. McCafferty*, 239 U. S. 134 (1915); *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210 (1908); *Johnson v. Wells Fargo & Co.*, 239 U. S. 234 (1915).

<sup>19</sup> *Hunter v. Pittsburgh*, 207 U. S. 161 (1907).

<sup>20</sup> *Calder v. Michigan ex rel. Ellis*, 218 U. S. 591 (1910).

<sup>21</sup> 134 U. S. 418, 457 (1890).

is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law."

On the other hand, there are some cases holding that no oral hearing is necessary. In *Smith v. Hitchcock*<sup>22</sup> the party contesting the right of the Postmaster General to execute an order putting his periodicals in another class, left printed briefs, without having an oral hearing before the post-office officials. The hearing was held adequate by the Supreme Court, Mr. Justice Holmes saying:<sup>23</sup>

"Beyond offering the printed brief the plaintiff's representatives showed no desire to be heard. This is not a case in which even by manner or indirection the plaintiffs were prevented from offering material evidence. . . ."

It would appear, therefore, that at least in property rights, if the party does not ask for an oral hearing, but does have opportunity to present all material evidence, such hearing is sufficient. If, on the other hand, he does request an oral hearing and it is denied, even though opportunity be given him to present written evidence, the Supreme Court will be likely to hold this an invalid hearing. On principle, it would seem that in certain cases, especially where human liberty is involved, the oral hearing is intrinsically more just while, on the other hand, where rights of property are concerned, not infrequently the submission of written evidence and printed argument may result equally well in obtaining justice.

If a hearing, in immigration proceedings at least, has been found unfair, the Supreme Court will order the District Court to try the case on its merits.<sup>24</sup> If the officials erred in construing a statute, the proper disposition of the case will be to order the person detained to be discharged.<sup>25</sup> And should the immigrant appeal to the courts before exhausting his administrative remedies, the Supreme Court will dismiss the complaint; but in case of appeal from the inspector to the Secretary, new evidence, briefs, etc., can be submitted.<sup>26</sup> Where, as in rate regulation, the commission erroneously refused to

<sup>22</sup> 226 U. S. 53 (1912).

<sup>23</sup> *Ibid.*, 61.

<sup>24</sup> *Chin Yow v. United States*, 208 U. S. 8, 13 (1908). Mr. Justice Holmes said in this case: "The courts must deal with the matter somehow, and there seems to be no way so convenient as a trial of the merits before the judge. . . ."

<sup>25</sup> *Gegiow v. Uhl*, 239 U. S. 3 (1915).

<sup>26</sup> *United States v. Sing Tuck*, 194 U. S. 161 (1904).

assume jurisdiction of the case, obviously the remedy must be to remand the case to the commission.<sup>27</sup> In the event that the evidence on which the commission based its findings is not substantial, a question of law arises, and the case will be disposed of by the court.<sup>28</sup> If the commission refused to take into consideration "facts and circumstances that ought to have been considered," the recent decision in *Ohio Valley Water Co. v. Ben Avon Borough*<sup>29</sup> requires that the case be sent back to the court having jurisdiction in the first instance, and an investigation *de novo* undertaken. It is submitted that the general principle as to disposition of cases, if the hearing has been inadequate, should be to remand all cases where there is no clear question of law involved and where the subject matter is unusually complex, or where there is no evidence of bias, prejudice, or arbitrary action; but where the case is not of an intricate nature, or where there has been arbitrary action, the courts should have power to dispose of the whole matter, in the interest of economy of time and money.

## II

### QUESTIONS OF JURISDICTION

As the authority of administrative bodies depends largely on statutes, their action in any proceeding must appear to be within the scope of the authority thus conferred. Consequently administrative determinations of jurisdiction must be examined, on judicial review. No commission can be the final arbiter of its own jurisdiction; just as no corporation can conclusively determine whether its act is or is not *ultra vires*. Hence a judicial review of an administrative determination of jurisdiction and the exercise of powers thereunder must always be permitted to the party affected. In *Noble v. Union River Logging Railroad Company*<sup>30</sup> the Supreme Court said:

"In every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity."

<sup>27</sup> *I. C. C. v. Humboldt S. S. Co.*, 224 U. S. 474 (1912).

<sup>28</sup> *I. C. C. v. Louis. & Nash. R. R.*, 227 U. S. 88 (1913).

<sup>29</sup> 253 U. S. 287 (1920).

<sup>30</sup> 147 U. S. 165, 173 (1893).

In a case where the determination of fact has failed to show that the administrative body had jurisdiction, the acts of that body are void; and such invalidity may be shown in any collateral proceeding. So in *Little v. Barreme*<sup>31</sup> the officer who had acted under a regulation issued by the President in excess of his authority was not protected under it; and in *Francis v. Francis*<sup>32</sup> it was held that the President was acting outside his jurisdiction in inserting in a certain land patent words restricting the power of alienation. And in *Dynes v. Hoover*<sup>33</sup> it was held that the determination of a naval court martial regarding jurisdiction was reviewable by the court. In *American Magnetic School of Healing v. McAnnulty*<sup>34</sup> the jurisdictional determination of the Postmaster General was held subject to review; and in the case of *Gegiow v. Uhl*<sup>35</sup> a jurisdictional error of immigration officials was reviewed. In *Interstate Commerce Commission v. Humboldt S. S. Co.*<sup>36</sup> the commission was compelled by mandamus to take jurisdiction of a case where it had erroneously ruled that it had no jurisdiction. Many of the erroneous determinations of jurisdiction arise from misconstruction of a statute or from mistakes of law; and it is doubtful whether a hard and fast line can be drawn between mistakes of law and mistakes of jurisdiction.

With reference to determinations of jurisdiction in the federal land office, an unusual distinction has been adopted. In *Noble v. Union River Logging Co.* the Supreme Court, speaking through Mr. Justice Brown, said:<sup>37</sup>

"There is, however, another class of facts which are termed *quasi* jurisdictional, which are necessary to be alleged and proved in order to set the machinery of the law in motion, but which, when properly alleged and established to the satisfaction of the court, cannot be attacked collaterally. . . . This distinction has been taken in a large number of cases in this court, in which the validity of land patents has been attacked collaterally. . . ."

So, in that case, it was held that the Secretary of the Interior and the Commissioner of the General Land Office might be enjoined from revoking the approval of the plaintiff's maps for a right of way

<sup>31</sup> 2 Cranch (U. S.) 170 (1804).

<sup>32</sup> 20 How. (U. S.) 65 (1857).

<sup>33</sup> 239 U. S. 3 (1915).

<sup>37</sup> 147 U. S. 165, 173, 174 (1893).

<sup>32</sup> 203 U. S. 233 (1906).

<sup>34</sup> 187 U. S. 94 (1902).

<sup>35</sup> 224 U. S. 474 (1912).

over the public lands, even though the plaintiff secured the approval fraudulently. The Court said that the uniform rule had been that an act granting rights of way over public lands was a grant *in praesenti*, so that a revocation of that grant, in a collateral proceeding, was taking property without due process of law; and a direct proceeding must be brought to annul the grant. In *French v. Fyan*<sup>38</sup> it was held that the action of the Secretary of the Interior in identifying swamp lands, making lists thereof, and issuing patents therefor,<sup>39</sup> could not be impeached in an action at law by showing that the lands which the patent conveyed were not in fact swamp lands, although his jurisdiction extended only to lands of that class.<sup>40</sup> So also in *Burke v. Southern Pacific R. R. Co.*<sup>41</sup> it was held that claimants of mineral rights in lands which had been patented, who asserted that the government was deceived as to the non-mineral character of the land held by the patentees, could not maintain a collateral attack upon the patent.

Hence it would appear that after the determination by the Federal Land Department of so-called "quasi-jurisdictional" matters the Supreme Court will not review them collaterally. But since even these matters can be reviewed in a direct proceeding, it is a safe generalization that erroneous determinations as to jurisdiction are reviewable by the Supreme Court.

### III

#### QUESTIONS OF DISCRETION

As the legislative branch of the government cannot lay down specific rules on certain subjects, but must leave to the administrative or executive officials discretion in the recognition and enforcement of personal and property rights, we need to examine the extent of judicial review of administrative discretion. In *Martin v. Mott*<sup>42</sup> it appeared that the President had been given discretion to call forth the militia when the United States should be invaded

<sup>38</sup> 93 U. S. 169 (1876).

<sup>39</sup> See also *United States v. Schurz*, 102 U. S. 378 (1880).

<sup>40</sup> Where, however, there is a mistake of law as to whether certain lands were within the jurisdiction of the Land Department, then the patent is rendered void on its face. *Louisiana v. Garfield*, 211 U. S. 70, 77 (1908).

<sup>41</sup> 234 U. S. 669, 692 (1914).

<sup>42</sup> 12 Wheat. (U. S.) 19 (1827).

or in imminent danger of invasion, and it was held by the Supreme Court, Mr. Justice Story delivering the opinion, that whenever a statute gave a discretionary power to the President, to be exercised by him upon his own opinion of certain facts, he must be the sole and exclusive judge of the existence of those facts. In *International Contracting Co. v. Lamont*<sup>43</sup> the Supreme Court refused to review the discretion of the Secretary of War in his refusal to sign a certain contract with the complainant, Mr. Justice White saying the act was not ministerial, for the obligation was neither peremptory nor plainly defined. In *Kendall v. United States*<sup>44</sup> the Postmaster General was ordered by mandamus to credit certain government contractors with sums of money which Congress had ordered to be paid, on the ground that the act was merely ministerial and not discretionary. But in *Decatur v. Paulding*<sup>45</sup> the Court refused to review the discretionary action of the Secretary of the Navy in refusing a pension to the widow of a naval officer. Likewise in *Dunlap v. Black*<sup>46</sup> the court refused to mandamus the Commissioner of Pensions on the ground that his refusal to issue the pension was based on a discretionary power. In *United States ex rel. McBride v. Schurz*<sup>47</sup> a mandamus issued to the Secretary of the Interior, because his refusal was not discretionary. In *Butterworth v. Hoe*<sup>48</sup> the Commissioner of Patents had decided in favor of one of the patentees, but the Secretary of the Interior without authority had denied the claim. It was held that the Commissioner of Patents might be compelled to issue the patent, since it was a purely ministerial act. The principle that there can be no judicial review on matters of discretion is well established, and the citations need not be multiplied. The important question is, what is the criterion for ascertaining when there has been an exercise of a given discretionary power? In *Noble v. Union River Logging Co.*<sup>49</sup> the Supreme Court said that if under any view of the facts that could be taken the act was *ultra vires*, then the administrative official acted beyond the scope of his authority and beyond his discretion. This statement can at best serve only as a concise summary, not as a rule. Somewhere in the discretionary power given to an administrative official

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<sup>43</sup> 155 U. S. 303 (1894).

<sup>44</sup> 12 Pet. (U. S.) 497 (1840).

<sup>45</sup> 102 U. S. 378 (1880).

<sup>46</sup> 147 U. S. 165, 171-172 (1893).

<sup>47</sup> 12 Pet. (U. S.) 523 (1838).

<sup>48</sup> 128 U. S. 40 (1888).

<sup>49</sup> 112 U. S. 50 (1884).

there must be a standard to govern his action. If this standard is not expressly stated in the statute under which the official acts, it must be determined from its purpose; that is, the general object it is seeking to accomplish and the circumstances which called it forth.<sup>50</sup> It would be impossible for any state legislature or for Congress to issue detailed orders covering all conceivable cases; the leaving to administrative officials of discretionary power to fill in details will not necessarily lead to injustice. Unless there has been an arbitrary exercise of discretion, through bias, fraud, or discrimination, judicial review of administrative discretion should be confined within narrow limits.

Moreover, in matters of discretion no judicial review will be granted where an official adopted a different ruling from that of his predecessor. In *Greenmeyer v. Coate*<sup>51</sup> the former Secretary of the Interior, Mr. Bliss, had decided for the complainant in a certain homestead entry, but before the patent was executed Secretary Hitchcock, who succeeded Mr. Bliss, reversed the finding of his predecessor. The Supreme Court held that the decision of the predecessor did not bind the successor in office. Nor will judicial review be given in case the same incumbent of the administrative office changes his ruling with respect to the same party, where both rulings are clearly within the official's discretion.<sup>52</sup> It cannot be maintained that a doctrine analogous to estoppel or *res judicata* applies, for if it did there would be no exercise of discretion, and the statute would fail of its purpose.

#### IV

#### QUESTIONS OF FACT

Since boards of administration or executive offices are created to determine matters of fact, examination must be made to ascertain how far there will be judicial review of these determinations

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<sup>50</sup> *Buttfield v. Stranahan*, 192 U. S. 470 (1904); *United States v. Grimaud*, 220 U. S. 506 (1911); *Mutual Film Corp. v. Indus. Comm. of Ohio*, 236 U. S. 230 (1915).

<sup>51</sup> 212 U. S. 434 (1909).

<sup>52</sup> *National Life Ins. Co. of U. S. A. v. National Life Ins. Co.*, 209 U. S. 317 (1908). So also in *Pearson v. Williams*, 202 U. S. 281 (1906), on newly discovered evidence, the former decision of the immigration officials permitting the immigrants to enter the country was reversed, and they were ordered deported. See also *Brougham v. Blanton Mfg. Co.*, 249 U. S. 405 (1919).

In the admission and exclusion of aliens, the findings of the administrative officials will be held conclusive and binding on the Supreme Court, provided there has been a fair hearing and no error of law has been committed. This is also true when it is a question of deportation.<sup>53</sup> In *United States v. Ju Toy*<sup>54</sup> the Supreme Court decided that even an American citizen might have his rights to enter the country conclusively determined by the immigration officials. But in *Kwock Jan Fat v. White*<sup>55</sup> the Supreme Court appeared to be abandoning the *Ju Toy* case, under the claim that the evidence was not sufficient. Mr. Justice Clarke, in the latter case, speaking for the court, said:

"It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."

This, it is submitted, is a sound position; for where allegations of citizenship are made by the immigrant which make out a *prima facie* case, no administrative board should be permitted to determine that fact conclusively. But where there is no question of American citizenship, it is submitted that the doctrine of conclusive finality is sound. It may be justified on several grounds, from the standpoint of American policy: (1) That having the power to exclude entirely, by admitting the alien the government is conferring a privilege or bounty and not recognizing a legal right; (2) That to crowd our courts with litigation concerning aliens, by a judicial review of the findings of fact made by immigration officials, often unduly postpones the claims of American citizens to court recognition of their personal and property rights; (3) That the immigration laws themselves provide for review within the administration, and it is difficult to see why a review in a court on mere questions of fact should have more virtue.

Likewise the findings of the Postmaster General are held conclusive on matters of fact within his jurisdiction, provided a fair

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<sup>53</sup> *Ekiu v. United States*, 142 U. S. 660 (1892); *Zakonaite v. Wolf*, 226 U. S. 272 (1912); *Fong Yue Ting v. United States*, 140 U. S. 608 (1893); *United States v. Zucker*, 161 U. S. 475, 481 (1896); *Turner v. Williams*, 194 U. S. 279 (1904); *Chin Yow v. United States*, 208 U. S. 8 (1908); *Tang Tun v. Edsell*, 223 U. S. 673 (1912); *Low Wah Suey v. Backus*, 225 U. S. 460 (1912).

<sup>54</sup> 198 U. S. 253, 263 (1905).

<sup>55</sup> 253 U. S. 454, 464 (1920).



hearing has been had and no mistake of law has occurred, and the Supreme Court will not review his action. In *Public- Clearing House v. Coyne*<sup>56</sup> the Postmaster General had excluded from the mails certain letters and advertisements on the ground that they were fraudulent methods of securing money from the public. The Supreme Court, after examining the evidence on which the Postmaster General based his decision, upheld the findings. Mr. Justice Brown, in delivering the opinion, said:

"We think it within the power of Congress to entrust him with the power of seizing and detaining letters upon evidence satisfactory to himself, and that his action will not be reviewed by the court in doubtful cases."

In this case the Supreme Court intimated something of the more remote reason behind its attitude toward the findings of fact by the Post Office Department. It said the postal service was not a necessary part of the civil government in the sense in which the protection of life, liberty, and property, the defense against insurrection and foreign invasion, and the administration of public justice are. On the contrary, the Post Office is a public function assumed and established by Congress for the general welfare, and the returns serve as revenue to the government, so that the Post Office Department operates as a popular and efficient method of taxation. Here, two ideas seem to be involved: (1) That a privilege is being conferred on those making use of the mails; (2) That the carrying of the mails results in an indirect form of taxation. In both privilege and taxation it has been seen that the Supreme Court will give but little review. Hence, if there has been a fair hearing, and no clear mistake in the application of law or construction of the statute, the findings of fact in the Post Office Department are generally held conclusive.

In the case of regulation of rates by public utility commissions, including the Interstate Commerce Commission, we find a somewhat closer review given to findings of fact. Even before the case of *Ohio Valley Water Co. v. Ben Avon Borough*,<sup>57</sup> which took the

<sup>56</sup> 194 U. S. 497, 509, 510 (1904). But the mere opinion that there is a fraudulent scheme being carried on through the mails is not such a determination of fact as will be conclusively binding on judicial review. *Magnetic School of Healing v. McAnnulty*, 187 U. S. 94 (1902).

<sup>57</sup> 253 U. S. 287 (1920).

position that on judicial review the court should examine the evidence *de novo*, the courts reviewed the findings of rate regulation bodies with close scrutiny. In *Interstate Commerce Commission v. Louisville and Nashville R. R. Co.*<sup>58</sup> the Supreme Court, while admitting that generally on questions of fact the finding of the commission would be binding, qualified the assertion with the requirement that there must be "substantial" evidence; and in other cases<sup>59</sup> the court says it will examine the evidence to ascertain whether or not the commissions were unreasonable in reaching their decisions on the facts. The cases show that the Supreme Court will look minutely into the whole record, more so, apparently, than it will in findings of fact made by the Postmaster General and immigration officials. But the mere fact that the commission gave too much weight to some parts of the evidence, or too little to other parts of it, has not, ordinarily, led the Supreme Court to upset the findings of fact, for,<sup>60</sup> as said by the court, this would make the commission, consisting of expert and experienced public officers, a mere instrument for the purpose of taking testimony to be submitted to the courts for action. The *Ohio Valley Water Company* case, *supra*, completely abandons this position, and gives to the rate regulation bodies not even the weight of findings by a jury. This, it is submitted, is an erroneous principle, and must be greatly qualified in the future. In the light of this decision, it is doubtful whether the position of the Supreme Court will still be maintained, as laid down in *Interstate Commerce Commission v. Illinois Central Railway Co.*,<sup>61</sup> that the determinations of fact made by the Commission will not be set aside merely because the court entertains a different conception of the correct principle of rate-making. Our whole doctrine of judicial review of findings made by rate regulation bodies is thrown into uncertainty by the *Ohio Valley Water Company* case, and what the effects will be can only be conjectured. Nevertheless, it is undoubtedly true that, as compared with the review of determinations of fact made by other administrative bodies, even

<sup>58</sup> 227 U. S. 88 (1913).

<sup>59</sup> *Los Angeles Switching Case*, 234 U. S. 294 (1914); *B. & O. Ry. v. Pittcairn Coal Co.*, 215 U. S. 481 (1910); *I. C. C. v. D. L. & W. Ry. Co.*, 220 U. S. 235 (1911); *I. C. C. v. Union Pacific R. R.*, 222 U. S. 541 (1912); *Atchison, Topeka & Santa Fe Ry. v. United States*, 232 U. S. 199 (1914).

<sup>60</sup> *Illinois Cent. R. R. v. I. C. C.*, 206 U. S. 441 (1907).

<sup>61</sup> *I. C. C. v. Illinois Cent. R. R.*, 215 U. S. 452 (1910).

before this case, the closer scrutiny was given to public utility commissions. In attempting to explain this difference, it may be pertinent to cite a part of the opinion in *Texas and Pacific Railway v. Interstate Commerce Commission*.<sup>62</sup>

"Commerce, in its largest sense, must be deemed to be one of the most important subjects of legislation, and an intention to promote and facilitate it and not to hamper or destroy it, is naturally to be attributed to Congress. The very terms of the statute, that charges must be *reasonable*, that discrimination must not be *unjust*, and that preference or advantage to any particular person, firm, corporation, or locality must not be *undue* or *unreasonable*, necessarily imply that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act."

In this opinion the Supreme Court takes the position that a statesman-like attitude, and not a strict lawyer-like view, should be adopted in reviewing the findings of rate regulation bodies; that these bodies deal with important interests of commerce and property, of great value, bearing most intimately on the welfare of the nation at large. In the further course of its opinion, the court states that this type of legislation is experimental, and of its nature new and strange, and that such interpretation should be given it as best comports with the genius of our institutions. This attitude of the court, adopted some two decades ago, has more or less influenced the court ever since.

In determinations of fact made by officials in the Federal Land Office, a very limited scope of review is given. In *Johnson v. Drew*<sup>63</sup> an action of ejectment was brought to recover land granted under a patent. The defense was that at the time of issuing the patent the land was a part of Fort Brooke Military Reservation in the actual occupancy of the defendant, and therefore was not unoccupied and unappropriated land such as the statute required. It was actually found, however, that the land was public land, so that no question of jurisdiction was raised. But the Supreme Court said that the rule with respect to occupancy, undoubtedly was that the determinations by the Land Office were conclusive. Mr. Justice Brewer

<sup>62</sup> 162 U. S. 197, 219 (1896).

<sup>63</sup> 171 U. S. 93 (1898).

(who usually wrote the opinions in land cases when he was on the bench) said:<sup>64</sup>

"If there is any one thing respecting the administration of the public lands which must be considered as settled by repeated adjudications of this court, it is that the decision of the land department upon mere questions of fact is, in the absence of fraud or deceit, conclusive, and such questions cannot thereafter be relitigated in the courts. . . ."

So also regarding the character of the land itself, a finding that it is swamp, saline, or mineral land is held to be conclusive.<sup>65</sup> Likewise in matters of determination of boundary<sup>66</sup> and of the amount or number of acres in the grant<sup>67</sup> the decisions of the Land Office are final. And if the office had valid jurisdiction, the fact that there was fraud in issuing the patent does not permit collateral attack.<sup>68</sup>

In land cases in the Supreme Court it is noticeable that the opinions holding the facts to be conclusive occasionally cite post-office cases reaching similar results, and *vice versa*. In the review of the findings of no other administrative departments is there recognition of such a rule. May this mutual citation not be due to the fact that in both sorts of cases we are dealing with questions of privilege conferred on individuals, and not with legal rights? In the administration of public lands the general rule has been to give something for nothing, or something great for something small. The well-known example was the homestead law, where the settler secured his one hundred and sixty acres of land for \$1.25 per acre. Likewise there was the Reclamation Law, under which the price of an irrigated farm unit with water rights was fixed at its proportionate share (according to acreage) of the cost of the government irrigation works by which it was watered, a price payable on long-time credit without interest. Here are almost gratuitous dealings by the government with its citizens, and it may be that the Supreme Court, in examining the findings of the Land Office on such matters takes this fact perhaps unconsciously into consideration. Moreover, it should not be forgotten that there is within the administrative

<sup>64</sup> 171 U. S. 99

<sup>65</sup> *Johnson v. Towsley*, 13 Wall. (U. S.) 72 (1871); *Wright v. Roseberry*, 121 U. S. 488 (1887); *Heath v. Wallace*, 138 U. S. 573 (1891); *McCormick v. Hayes*, 159 U. S. 332 (1895); *Burfenning v. Chicago, St. P., etc. Ry.*, 163 U. S. 321 (1896).

<sup>66</sup> *Gardner v. Bonestell*, 180 U. S. 362 (1901).

<sup>67</sup> *Smelting Co. v. Kemp*, 104 U. S. 636 (1881).

<sup>68</sup> *Noble v. Union River Logging Co.*, 147 U. S. 165 (1893).

system itself opportunity for review of these findings of fact, by officials who are especially trained in land law and are conversant with local conditions. Hence only limited judicial review will be granted by the Supreme Court in these determinations of fact.

In the findings of fact made by customs officials, though the disposition of property belonging to American citizens may be involved, the tendency is not to review the conclusions, provided the officials have not exceeded their jurisdiction. In *Hilton v. Merrill*<sup>69</sup> the owner of imported goods brought an action to recover a sum alleged to have been levied in excess of their true value. The goods had been appraised according to the statutory requirement, which provided that the appraisement should be final. Appeal to the Secretary of the Treasury confirmed the decision of the collector, and the Supreme Court refused to examine evidence to the contrary, saying:<sup>70</sup>

"In the absence of fraud, the decision of the customs officers is final and conclusive, and their appraisement, in contemplation of law, becomes, for the purpose of calculating and assessing the duties due to the United States, the true dutiable value of the importation."

Also in the earlier case of *Bartlett v. Kane*<sup>71</sup> the Supreme Court denied any review of the appraisement, although it was of the opinion that the method of chemical analysis employed to ascertain the value was not a safe guide and was inferior to the method of ascertaining the cost price in the markets of production.<sup>72</sup>

The Supreme Court puts its doctrine of non-review of the findings of fact by customs officials on the broad ground of convenience. In the *Merrill* case the opinion stated:<sup>73</sup>

"If, in every suit brought to recover duties paid under protest, the jury were allowed to review the appraisement made by the customs officers, the result would be great uncertainty and inequality in the collection of duties on imports. It is quite possible that no two juries would agree upon the value of different invoices of the same goods."

And in the *Kane* case similar language was employed.<sup>74</sup>

Generally, therefore, when matters of revenue are involved, the conclusiveness of determinations of fact is recognized and no judi-

<sup>69</sup> 110 U. S. 97 (1884).

<sup>70</sup> *Ibid.*, 105.

<sup>71</sup> 16 How. (U. S.) 263 (1853).

<sup>72</sup> *Accord*: Rankin v. Hoyt, 4 How. (U. S.) 327 (1846).

<sup>73</sup> 110 U. S. 97, 104 (1884).

<sup>74</sup> 16 How. (U. S.) 263, 272 (1853).

cial review will be undertaken. Historical usage and the necessities of government are, it is submitted, the controlling reasons in the minds of the Supreme Court for this attitude. Coupled with these reasons is the further one that the statutes give to the importer opportunity for administrative review by the Secretary of the Treasury, and it is difficult to see why a review, by trained experts, conscious of their responsibility and the nature of the interests involved, should not be as efficacious as court review.

This tendency to leave to administrative bodies the conclusive determination of questions of fact is apparently a sound principle. It can be justified on several grounds: (1) The modern situation requires more speedy administration of justice than can be secured in the courts; (2) The increase in litigation and growth of population during the last century have crowded the calendars of our courts; (3) The new demands made on administration by a crowded urban community often require summary action and informal procedure; (4) New demands are being made on courts, which were formerly handled either by the family, as in the reformation and correction of children, or by the legislature, as in questions of divorce; and lastly, (5) Archaic procedure in the courts, imbued with the idea that the common-law procedure is perfection and of the essence of the jural order, has prevented the development of speedy, inexpensive justice. With proper safeguards, there is no sound reason why administrative officials may not conclusively determine questions of fact.

## V

### QUESTIONS OF LAW

Because administrative bodies have to apply statutes and court decisions to the subject matter over which they have jurisdiction, the judicial review of so-called questions of law must be examined. In the opinions of the Supreme Court we find much language to the effect that errors of law by administrative officers will be reviewed. But the incorrectness of this broad generalization will be apparent from an inductive study of the cases. The methods of review on questions of law must vary with the varying character of the administrative body.

In examining orders issued by rate regulation bodies we find the Supreme Court giving close scrutiny to questions of law. In

*Texas and Pacific Railway v. Interstate Commerce Commission*<sup>76</sup> the complaint was that the railroad charged less for certain traffic billed through from foreign ports than for traffic originating in New York and New Orleans for transportation into the interior of the country. The commission refused to consider the competition existing between the railways and the ocean steamship lines between Liverpool and San Francisco by way of the Isthmus of Panama and Cape Horn. An order was consequently made requiring the railway to desist from the lower charge, on the ground that it was discriminatory. But the Supreme Court reversed this order, on the ground that it was a mistaken application of law, saying:<sup>76</sup>

"We have . . . to deal only with a question of law, and that is, what is the true construction, in respect to the matters involved in the present controversy, of the act to regulate commerce? If the construction put upon the act by the commission was right, then the order was lawful; otherwise, it was not."

The Supreme Court in this case required that the decision of the question of law by the commission must be "right," that is, a decision approved by the Supreme Court.<sup>77</sup> Likewise, if an order was rendered without any evidence whatever to support it, the question involves not an issue of fact, but one of law, which the Supreme Court will decide.<sup>78</sup> Moreover, if it is a question whether a carrier has held itself out to carry certain products, a question of law is involved, and is reviewable by the court.<sup>79</sup> While the sufficiency of evidence is a matter for the commission to decide, yet the legal effect of it is a question of law, to be reviewed by the court.<sup>80</sup> In none of the decisions on rate regulation where a question of law is involved do we find the test that the decision on a question of law will be upheld, "unless clearly erroneous," or unless

<sup>76</sup> 162 U. S. 197 (1896). Compare the method of reviewing a question of law in the Federal Land Department, as stated in *West v. Hitchcock*, 205 U. S. 80, 85 (1907): "If the Secretary had authority to pass on the relator's right to select land, his jurisdiction did not depend upon his decision being right."

<sup>77</sup> 162 U. S. 197, 210 (1896).

<sup>78</sup> *C. N. O. & T. P. Ry. v. I. C. C.*, 162 U. S. 184 (1896); *I. C. C. v. Alabama Midland Ry.*, 168 U. S. 144 (1897).

<sup>79</sup> *Florida East Coast Ry. v. United States*, 234 U. S. 167 (1914).

<sup>80</sup> *United States v. Pennsylvania R. R. Co.*, 242 U. S. 208 (1916).

<sup>81</sup> *I. C. C. v. Louisville & Nash. R. R.*, 227 U. S. 88 (1913).

"clearly and palpably incorrect." Here again, as in questions of fact decided by such commissions, one must remember the novelty of the mode of regulation and the vast interests involved; consequently there results a close scrutiny of decisions of law.

In the review of questions of law decided by the Land Office, on the other hand, we find a more liberal view. Only where there has been a clearly erroneous construction of a statute, or "common law" decision, will the Supreme Court review it. In *Burfonning v. Chicago, St. Paul, Minn. and Omaha Railway*<sup>81</sup> the plaintiff brought an action to recover possession of lands which his grantor had obtained as a patent from the Federal Government for services rendered during the Civil War. The lands were within the corporate limits of the city of Minneapolis at the time the patent was validated, and according to United States Revised Statutes<sup>82</sup> such lands were excluded from pre-emption and homestead. The plaintiff contended that the decision of the Federal Land Office that the land was public land subject to patent should be conclusive. But the Supreme Court denied this contention, saying this was a clear case of misconstruction, giving rise to a question of law which the court must review; but it intimated that if the decision was not clearly erroneous no review would be given. So in the case of *Weyerhaeuser v. Hoyt*<sup>83</sup> the Supreme Court refused to review a doubtful question of law, and virtually recognized the rulings of the Land Office in refusing to follow a former decision of the Supreme Court.<sup>84</sup> In the case of *Louisiana v. Garfield*<sup>85</sup> the Supreme Court held that where the Land Office had uniformly and for years construed the act in a certain manner, the court would not construe it otherwise; even though, were it an original question, it might disagree with the construction of the office.

As compared, therefore, with questions of law decided by rate regulation bodies, those decided by the Land Office are given less extensive judicial review. Besides the reasons already given for this difference of treatment, others may be found in the facts that in the Land Office a unique body of land law is developing, and

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<sup>81</sup> 163 U. S. 321 (1896).

<sup>82</sup> Sections 2258 and 2289.

<sup>83</sup> 219 U. S. 380 (1911).

<sup>84</sup> In *Sjoli v. Dreschel*, 199 U. S. 565 (1905).

<sup>85</sup> 211 U. S. 70 (1908).



the office itself is a peculiar kind of judicial organization. In *United States v. Minor*<sup>86</sup> definite language is employed to that effect:

"It has been often said by this court that the land officers are a special tribunal of a *quasi* judicial character. . . . There was nothing wanting to make such a proceeding [hearing, cross-examination, and re-hearing] in the highest sense, a judicial one, and to give to its final judgment or decree all the respect, the verity, the *conclusiveness*, which belong to such a final decree between the parties."

In organization and procedure,<sup>87</sup> as well as in the nature of the subject matter, there is a close analogy to regular courts. There is a right of appeal and review. Process issues to secure witnesses. Representation by counsel and cross-examination are permitted. There is a departmental bar to which attorneys are formally admitted. There are *ex parte* proceedings, and opportunities for contest, in many ways identical with an ordinary lawsuit. Affidavits for instituting applications or contests, like declarations or bills in lawsuits, are drawn up and filed. Judgment may be given by default. Hearings take place before the land register or receiver, similar to those before a master in chancery. Parties may make motions for rehearing. If it be objected that analogous procedure occurs before rate commissions, it may be answered that this is not entirely true, as appears from the Supreme Court's treatment of the Land Office. It looks primarily at the nature of the proceedings, saying that a judicial inquiry, such as occurs in the Land Office, investigates, declares, and enforces liabilities as they stand on present or past facts; legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to those subject to its power.

In questions of law decided by customs officials the Supreme Court will not review the decision unless the result is a clear overstepping

<sup>86</sup> 114 U. S. 233, 242, 243 (1885).

<sup>87</sup> Cf. the language of the Supreme Court with reference to the proceedings before the Virginia State Corporation Commission in *Prentiss v. Atlantic Coast Line Ry.*, 211 U. S. 210, 226 (1908); "But we think it equally plain that the proceedings drawn in question here are legislative in their nature. . . . The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind. . . ." Then follows a citation of many other cases adopting the same view. See also Laurence Curtis, 2d, "Judicial Review of Commission Rate Regulation," 34 HARV. L. REV. 862.

of jurisdiction. In the case of *In re Fassett*<sup>88</sup> the collector had decided that a yacht was an imported article under the customs act, and when the owner libeled the vessel, the question was whether the decision of the officer might be reviewed. It was held it might be, since this was clearly an erroneous construction of the act. Again, in *De Lima v. Bidwell*<sup>89</sup> the question was whether sugars from Porto Rico, which territory had been ceded to the United States, were imported within the meaning of the Customs Act. It was held that the finding of the collector was not conclusive on this question of the construction of the tariff act, as under the doctrine of *Woodruff v. Parham*<sup>90</sup> they were not imported at all. In case the statute provides a remedy without appeal to the courts, that remedy must be followed, even though it be exclusive.<sup>91</sup> In *Schoenfeld v. Hendricks*<sup>92</sup> it was held that an action could not be maintained against the collector, either at common law or under the statutes, to recover duties alleged to have been exacted upon an importation of merchandise, the remedy given through the board of appraisers being exclusive. In such cases no judicial review whatever was given. The only remedy was an appeal to the Secretary of the Treasury, who was the sole judge whether a refund should be made to the aggrieved party. Such cases went to a great length in disallowing judicial review, and later legislation has restored the right of bringing suit against the collector. Only the necessities of government and historical usage seem to have justified such practice of non-review.

In reviewing errors of law made by the Postmaster General, the Supreme Court in the case of *American School of Magnetic Healing v. McAnnulty*, *supra*, stated that if any view of the facts could render certain mail lawful, a decision by the Postmaster General that it was unlawful would present a question of law reviewable by the Court. In that case, therefore, the mere fact that the Postmaster General was of the opinion that practising the art of healing by means of psychology was fraudulent, was an error of law, for this

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<sup>88</sup> 142 U. S. 479 (1892).

<sup>89</sup> 182 U. S. 1 (1901).

<sup>90</sup> 8 Wall. (U. S.) 123 (1868).

<sup>91</sup> *Cary v. Curtis*, 3 How. (U. S.) 236 (1845); *Arnson v. Murphy*, 109 U. S. 238 (1883); *Barney v. Watson*, 92 U. S. 449 (1875).

<sup>92</sup> 152 U. S. 691 (1894).

could not be said to be the case on every view of the facts; reasonable persons might differ on that question. Whether the close scrutiny by the court of questions of law decided by this administrative official has any relation to the fact that there is no administrative review of his findings, is only conjectural; but it is at least arguable that this fact has some bearing on the attitude taken by the Supreme Court in the extent to which it will review his decisions. If the question of law decided is doubtful, however, the Supreme Court will not review it.<sup>93</sup>

In *Gonzales v. Williams*<sup>94</sup> the Supreme Court reviewed a so-called question of law decided by immigration officials. Miss Gonzales was a native of Porto Rico who was denied entrance to the United States on the ground that she was an alien, and likely to become a public charge. Before appealing to the Secretary of the Treasury she sued out a writ of *habeas corpus*, contending that under the various treaties between this country and Spain, and the proclamations by the government of the United States, she was not an alien. The immigration officials construed the word "alien" in the federal statute to mean a person not an American citizen; but the Supreme Court held this to be an erroneous construction, saying that the word "alien" meant a person who owed allegiance to some foreign power. Under this holding Miss Gonzales was permitted to enter the United States.<sup>95</sup> If the evidence does not support the conclusions of fact, a question of law arises and the court will review the findings.<sup>96</sup> No criterion other than those already mentioned seems to have been laid down to determine when a question of law is presented on which review will be given.<sup>97</sup>

<sup>93</sup> *Bates & Guild Co. v. Payne*, 194 U. S. 106 (1904).

<sup>94</sup> 192 U. S. 1 (1904).

<sup>95</sup> See for a similar case, *Gegiow v. Uhl*, 239 U. S. 3 (1915).

<sup>96</sup> *Zakonaite v. Wolf*, 226 U. S. 272 (1912).

<sup>97</sup> How far the Supreme Court will follow long-recognized constructions of statutes by administrative officials is difficult to say. There are decisions which vary with the character of the executive body involved. In *United States v. Philbrick*, 120 U. S. 52, 59 (1887), the Supreme Court recognized the long-established practice of the Secretary of the Navy; so also in *McMichael v. Murphy*, 197 U. S. 304 (1905); *Hawley v. Diller*, 178 U. S. 488 (1900), a long-recognized construction of the Land Department was followed by the court. Long practice and usage, with implied acquiescence on the part of Congress, the court considered in *United States v. Midwest Oil Co.*, 236 U. S. 459 (1915), as giving to the President authority to exercise certain powers over the public lands of the United States, apart from any grant by the Constitution or

As to the general principle governing judicial review to correct errors of law, it is submitted that, with improvement in the personnel of administrative bodies, decisions of law should come to be reviewed only if palpably erroneous. It is true that judicial justice has many advantages over executive justice. There is the trained legal mind of the judge, which often stands out for law against popular excitement and clamor; there are checks on the judge through criticism from the bar and through the publication of judicial decisions. But executive justice may possess similar safeguards and advantages. These advantages are becoming more and more common, as trained lawyers, and often judges, are chosen to fill administrative positions, while their decisions, especially in the field of regulation of public utilities, are frequently published, affording opportunity for study and criticism by the public, as well as by the legal expert. With such a personnel filling administrative offices, more authority should certainly be given to the decisions of the administrative agency than to the findings of an untrained jury; but this position has, confessedly, not yet been generally reached in the field of administrative law. With such safeguards as have been suggested, executive justice, with its simpler procedure and freedom from traditional rules of evidence, ought to be more efficacious than judicial justice in settling the affairs of a busy world.

## VI

### QUESTIONS OF MIXED LAW AND FACT

Because the determination of fact and the application of law to fact frequently confront the administrative officials together, it will be necessary to examine the scope of judicial review over what may be called questions of mixed law and fact. Whether the

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Congress. In *Bates & Guild Co. v. Payne*, 194 U. S. 106 (1904), the Supreme Court recognized and approved the practice of the Post-Office Department in refusing to follow a former construction of the post-office officials of sixteen years' duration. On the other hand, in *United States v. Healey*, 160 U. S. 136, 145 (1895), the court said that where the practice of the administrative body in construing a statute was not uniform, the court deemed it its duty to give the true interpretation to the act, without reference to the practice of the department. And in *Fairbank v. United States*, 181 U. S. 283, 308 (1901), it was said that where the meaning of the statute was clear, contemporary executive construction would not be consulted by the Supreme Court. In general, it may be said that long construction is entitled to great weight in the courts, and should be adopted unless clearly erroneous.

cases themselves can be so classified, on principle, is doubtful. To designate a particular case as one of "mixed law and fact" may be a useful mask to hide a multitude of difficult problems of the balancing of interests, so that as a shorthand expression the phrase serves a purpose in judicial review, and must be reckoned with.

This method of treating a case as one of "mixed law and fact" is well stated in *Bates and Guild Co. v. Payne*,<sup>98</sup> where the Supreme Court, upholding the Postmaster General in ignoring a practice of sixteen years as to classification of periodicals, said:

"Where there is a mixed question of law and fact, and the court cannot so separate it as to show clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive. . . . The consequence of a different rule would be that the court might be flooded by appeals of this kind to review the decision of the Postmaster General in every individual instance."

The court further stated that while a comparison of the complainant's periodical with the statutory requirements might raise only a question of law, nevertheless the action of the Postmaster General may have been guided by extraneous information; hence it was not possible to separate the question of law from the question of fact.

A similar doctrine as to mixed law and fact was laid down in the case of *Marquez v. Frisbie*,<sup>99</sup> a case involving a patent for land. The bill prayed that the defendants be declared to hold the land in trust for the plaintiff and to convey the legal title. It appeared plaintiff had been in possession for fourteen years, and that the Commissioner of the General Land Office had ruled that the lands were subject to pre-emption under the general land laws, but that the Secretary of the Interior had reversed that finding, and issued an order authorizing the defendants to enter the lands. The Supreme Court, in reviewing the determination of the federal administrative officials, found that the plaintiff never had the title, as no patent had yet been issued, and therefore it denied relief, saying it was not clear, as a matter of law, that the department had given land belonging to one party to another.<sup>100</sup>

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<sup>98</sup> 194 U. S. 106, 108, 109 (1904).

<sup>99</sup> 101 U. S. 473 (1879).

<sup>100</sup> See also *Ross v. Day*, 232 U. S. 110, 117 (1914); *Ross v. Stewart*, 227 U. S. 535 (1913); *Whitcomb v. White*, 214 U. S. 15, 16 (1909).

As intimated in the *Payne* case, *supra*, this doctrine regarding mixed law and fact, with consequent disallowance of judicial review, is useful for the division of labor between the administrative bodies and the courts, and disposes of many cases. While the result attained is undoubtedly desirable, it seems unnecessary to create a distinct category of mixed law and fact, separate from those of law and of fact; for no logical process can so analyze all the various matters involved in the cases. Men's minds are complex, and recognition must be given to many sub-conscious impulses and feelings. What the courts are really doing in adopting a policy of non-review where so-called questions of "mixed law and fact" are involved, is according a greater respect to the findings of administrative bodies, seeing in them the determinations of experienced men of affairs, who are guided by that superior knowledge which comes from actual contact with an actual situation, and who know better than others what should be done under given circumstances. In other words, here at least the courts are attempting to give to the findings of administrative bodies the respect paid to those of a jury when it returns a general verdict.

## VII

### SUMMARY AND CONCLUSION

Since the present tendency in the Supreme Court is more and more to limit the scope of judicial review of administrative action, it seems probable, barring a few sporadic exceptions, that the future policy of the court will be to permit it on two grounds only: (1) Where there has been an improper procedure, violating those principles of fairness and justice which satisfy the minimum of due process of law; and (2) Where the administrative official has acted beyond the sphere of his jurisdiction. Why special virtue or sanctity should attach to judicial review in other than the above cases is difficult to see. In this connection the dissenting opinion in *Chicago, Milwaukee, and St. Paul Railway Company v. Minnesota*,<sup>101</sup> is pertinent:

"It is complained that the decisions of the board are final and without appeal. So are the decisions of the courts in matters within their jurisdiction. There must be a final tribunal somewhere for deciding every

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<sup>101</sup> 134 U. S. 418, 465 (1890).

question in the world. Injustice may take place in all tribunals. All human institutions are imperfect — courts as well as commissions and legislatures."

That the above position is being adopted in England is indicated by Mr. Dicey in his article "Development of Administrative Law in England,"<sup>102</sup> where he says:

"There remain two checks upon the abuse of judicial or quasi-judicial powers by a government department. In the first place, every department in the exercise of any power possessed by it must conform precisely to the language of any statute by which the power is given to the department, and if any department fails to observe this rule the courts of justice may treat its action as a nullity. This is the effect of *Board of Education v. Rice* (1911, A. C. 179, 80 L. J. K. B. 796). In the second place, a government department must exercise any power which it possesses, and above all any judicial power, in the spirit of judicial fairness and equity, though it is not bound to adopt the rules appropriate to the procedure of the law courts. This duty of compliance with the rules of fair dealing is insisted upon by the House of Lords in *Local Government Board v. Arlidge* (1915, A. C. 120, 84 L. J. K. B. 72)."

Perhaps the doctrine of judicial review held by the Supreme Court has not yet gone so far as Mr. Dicey believes that of the British courts has gone. In actual fact the present situation regarding judicial review of administrative action may be summarized as follows:

1. The conclusiveness of administrative findings must be conditioned on a procedure which is consistent with due process of law. Being a standard of conduct and not a mechanical rule, a detailed definition ought not to be attempted. But an essential element is that somewhere along the line a hearing of some kind must have been given before a party's rights or liabilities are affected. This hearing must include opportunity to present evidence and to inspect that of the opponent.

2. Where the nature of the subject matter is such that summary action is indispensable, no hearing before the administrative body itself, in the first instance, is necessary. But a hearing must in some cases, and usually does in others, follow in the court or in some higher administrative body, as statutes may provide.

3. In cases where there is a hearing in the first instance before the

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<sup>102</sup> 31 L. QUART. REV. 148, 151.

administrative body, no violation of due process occurs simply because that hearing is made final, whether on a question of fact or of law.

4. It must always appear that the particular administrative body acted within the scope of the power delegated, and its findings are subject to challenge because of fraud or bias.

5. The extent of judicial review will often depend on the nature of the interests dealt with by the administrative body. When the government is dispensing a bounty, when it is admitting aliens, a proper balancing of the interests involved leads the Supreme Court to give greater liberty to the executive officials; when vested rights, or personal liberty are involved, a more rigid control is kept over executive officers. This results in having rules of one kind for the exercise of the police power, of another for taxation, of another for aliens, and of still another for the operation of various kinds of public businesses.

The balancing of interests must be the dominant principle behind the judicial review of executive justice. With the continual extension of government activity and the growing complexity of interests; with the increase in population and its concentration in large urban centers, involving of necessity a desire for more speedy justice, administered by men more conversant with the *de facto* social and economic conditions of local communities, court review of administrative action must be limited more and more, if the government is to be left free to carry out its proper and necessary functions, and if much of our social legislation is to succeed. Mere improvement in judicial procedure, though of inestimable benefit, cannot eradicate judicial habits of thought on the part of the bench, trained in the view that the common law is the embodiment of natural law and reason, and that the rules of evidence as worked out by the past are part of the order of nature. While some of this conservatism is undoubtedly necessary and proper, it must yield before new needs and changes of environment. If justice can be secured through executive officials, there is no reason why judicial review should enhance it by any intrinsic merit of its own. As Mr. Dicey says: "The management of business, in short, is not the same thing as the conduct of a trial. The two things must in many respects be governed by totally different rules."

*E. F. Albertsworth.*



NAVIGABLE WATERS OF THE UNITED STATES—  
STATE AND NATIONAL CONTROL

THE *Des Plaines River Cases*<sup>1</sup> involved two suits to enjoin a riparian owner, on that river, from damming it. The State of Illinois first brought suit in the courts of that State, which decided that the river was not a "navigable stream"; that the riparian owner, a power company, had the right to dam it; and that the suit must, consequently, be dismissed. A writ of error to review this was dismissed by the Supreme Court of the United States as lacking jurisdiction. The United States Government then brought suit in the federal court to enjoin the same structure. This court decided that the stream was "a navigable water of the United States"; that the company had no right to dam it; and that a perpetual injunction should be granted. This decision was affirmed by the Supreme Court of the United States.

The Des Plaines is the north fork of the Illinois River, flowing south from Wisconsin, eleven miles west of Lake Michigan, with which, in a state of nature, it was connected by Portage Lake and the Chicago River. It was the most famous and the most used of the waterways between the Great Lakes and the Mississippi in the Fur Trade period, 1675-1832. The Blackhawk War, in 1832, and the inrush of immigration, drove away the fur-bearing animals and the fur trade. In 1848 the river was displaced by the parallel Illinois and Michigan Canal, now abandoned, which took the water from the river. In 1900 the river was replenished and greatly augmented by the great Chicago Sanitary and Ship Canal, two hundred feet in width and twenty in depth taking water from Lake Michigan and discharging into the Des Plaines.

The decision of the United States Supreme Court that the ancient use of the stream by the methods of primitive navigation established a public right which is not lost by non-user has far-reaching effect. Two modern tendencies were at grips with one

<sup>1</sup> *Economy Light & Power Co. v. United States*, 41 Sup. Ct. Rep. 409 (1921); S. C., 256 Fed. 792 (1919); *Illinois v. Economy Light & Power Co.*, 241 Ill. 290, 89 N. E. 76 (1909); S. C., 234 U. S. 497 (1914).

another. A vast new development of water power has resulted from the electric transmission of power. Opposed to this has been a development, almost as rapid, of shallow-craft navigation, aided by barge navigation, the naptha and gasoline launch, and the tunnel boat (U. S. Patent No. 733010, issued July 2, 1902). These inventions make practicable the use of shallow streams to an extent even greater than prevailed before the invention of the steamboat.

The meaning of the decision is that wherever navigation was in fact practised upon any of the headwater tributaries of our great rivers, the public right of navigation inheres, and is protected by the Act of Congress of March 3, 1899, against any unauthorized interruption by the rapidly growing water-power development.

Navigability of waters and title to the lands submerged by them are closely related subjects. This relation causes much confusion in the decisions. In the State Court, about two-thirds of the long opinion handed down in the *Des Plaines River Case* is devoted to title and contracts concerning title; navigability is subordinated in importance and is presently found not to exist. In the federal courts all question of title is excluded from the opinions; navigability alone is dealt with, is found to exist, and is protected by injunction.

In general it may be said that the tendency in the federal courts has been to protect the public right of navigation, while that of the courts of Illinois and of some other states has been to protect the riparian owners in exploiting the water power and other resources of the rivers, and hence to restrict the right of navigation. In the *Des Plaines River Cases* these conflicting tendencies led to a direct conflict of decisions.

Using these cases as illustrations, it is intended to discuss herein some of the principal questions involved.

## I NAVIGABLE WATERS OF THE UNITED STATES — DEFINITIONS — CONFLICTING STANDARDS AND TESTS OF NAVIGABILITY.

By Act of Congress in 1920<sup>2</sup> it was provided that

“‘Navigable waters’ means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regu-

<sup>2</sup> 41 STAT. AT L., c. 285, p. 1063, § 3 (June 10, 1920) (italics are mine). For the previous judicial definition see *The Daniel Ball*, 10 Wall. (U. S.) 557 (1870). Itali-

late commerce with foreign nations and among the several States, and which either in their natural or improved condition, notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids; together with such other parts of streams as shall have been authorized by Congress for improvement by the United States, or shall have been recommended to Congress for such improvement after investigation under its authority."

In the earlier adjudications by the state and federal courts, a great diversity of opinion as to the proper tests for navigability is to be seen. The Illinois court, while vacillating in its expressions upon the subject, has exemplified the tendency to apply the doctrine of *stare decisis* to a determination, for whatever reason, that a given river is navigable or unnavigable. At an early date the tide-water test was adopted, and the Mississippi, Ohio, and other rivers uninfluenced by tides were held to be non-navigable.<sup>8</sup> In a number of cases the tide-water test has been tacitly disregarded but no new

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cized portions of the definition in the 1920 Act, as printed above, are new. They indicate points of difference between the state court and the federal courts in the *Des Plaines* cases. (a) The state courts gave controlling influence to interruptions occupying less than two miles of channel; (b) they disregarded the ten reports of the United States engineers recommending improvement of the river; and (c) they also disregarded two Acts of Congress authorizing surveys for improvement. The federal courts gave controlling influence to the character of the streams as a whole, and decided in harmony with those recommendations and Acts.

\* (The citations of authorities generally herein are illustrative and not intended to be exhaustive). *Middleton v. Pritchard*, 4 Ill. (3 Scam.) 510 (1842) (Mississippi River); *Ensminger v. People ex rel.*, etc., 47 Ill. 384 (1868) (Ohio River); *City of Chicago v. McGinn*, 51 Ill. 266 (1869); *Braxton v. Bressler*, 64 Ill. 488 (1872) (Rock River); *Houck v. Yates*, 82 Ill. 179 (1876) (Mississippi River); *Trustees v. Schroll*, 120 Ill. 509, 12 N. E. 243 (1887) (Meredosia Lake); *St. Louis Bridge Co. v. East St. Louis*, 121 Ill. 238, 12 N. E. 723 (1887) (Mississippi River); *Canal Trustees v. Haven*, 10 Ill. 548 (1849). These cases involved mainly questions of title to the bed and banks.

In the first of the series, *Middleton v. Pritchard*, 4 Ill. (3 Scam.) 510 (1842), the court *arguendo* recognize that the decision relates only to title and imply that the Mississippi is navigable in fact, though not applying that phrase to it. They say (pp. 521, 522): "We would not however wish to be understood as limiting the rights of navigators, to the bare privilege of floating upon the water, in the use of the *public easement*; but understand it to include the right to land, and fasten to the shore, as the exigencies of the navigation may require; and this is a burthen upon the owner of land, which he must bear as part of the *public easement*," citing *People v. Canal Appraisers*, 13 Wend. (N. Y.) 355 (1835), and 3 KENT, COMM. 425.

test formally substituted.<sup>4</sup> And in another series of cases the new test of navigability in fact is expressly laid down.<sup>5</sup>

The conflict between the Illinois standard and the federal standard prior to the statute quoted above is illustrated by Rock River, an interstate stream some two hundred miles long, held navigable by the federal court<sup>6</sup> and, as to the upper and shallower parts, by the Wisconsin court,<sup>7</sup> but held not navigable in law, though conceded to be navigable in fact, by the courts of Illinois.<sup>8</sup> And this, in substance, continued to be the Illinois position even with the federal decision *contra* before the court.<sup>9</sup>

In Texas, the Land Law<sup>10</sup> of 1837 enacted that all streams of the average width of thirty feet shall be considered navigable, within the meaning of the act, so far as they maintain that average width, and the court has recognized the validity of this declaration.<sup>11</sup> In Virginia it is held that the legislature may, by a statute declaring a stream navigable, impose upon the public the burden of caring for it as a highway.<sup>12</sup> And in North Carolina a stream

<sup>4</sup> *Illinois River Packet Co. v. Peoria Bridge Assn.*, 38 Ill. 467 (1865) (Illinois River); *Chicago & Pacific R. R. Co. v. Stein*, 75 Ill. 41-45 (1874); *City of Chicago v. Law*, 144 Ill. 569-576, 33 N. E. 855 (1893) (Chicago River in all three). These cases involved the rightfulness or wrongfulness of bridges, and the powers of a city.

<sup>5</sup> *People v. St. Louis*, 10 Ill. (5 Gilm.) 351 (1848) (Mississippi River); *Joliet & Chicago R. R. Co. v. Healy*, 94 Ill. 416 (1880), affirmed in 116 U. S. 191 (1886) (Healy Slough held not a stream); *Ligare v. Chicago M. & N. R. R. Co.*, 139 Ill. 46, 28 N. E. 934 (1891); s. c., 166 Ill. 249, 46 N. E. 803 (1897) (Ogden Slip held not a stream); *People v. Board of Supervisors*, 122 Ill. App. 40 (1905) (Rock River treated as though not navigable); *Schulte v. Warren*, 218 Ill. 108, 75 N. E. 783 (1905) judgment below that it is navigable reversed on other grounds (Clear Lake and Mud Lake, arms of Illinois River, held navigable; tide-water test expressly rejected). In *Hubbard v. Bell*, 54 Ill. 110 (1870), there is a *dictum* that there was no right to float logs on a stream not otherwise navigable, rejecting the rafting standard adopted in *Maine*, *Brown v. Chadbourne*, 31 Me. 9 (1849), and *Michigan*, *Moore v. Sanborne*, 2 Mich. 519 (1853), which is the federal rule, and the law in many of the states. (That the opinion is a *dictum* is apparent from the record, consisting of a bill calling for answer under oath, a sworn answer, no replication and no proofs. Such a bill should be dismissed without reference to questions of substantive law. 1 DANIELL, CH. PR., 5 ed., \*834.)

<sup>6</sup> *United States v. City of Moline*, 82 Fed. 592 (1897).

<sup>7</sup> *Cobb v. Smith*, 16 Wis. 661 (1863); *In re Horicon Drainage Dist.*, 136 Wis. 227, 116 N. W. 12 (1908).

<sup>8</sup> *Braxon v. Bressler*, 64 Ill. 488 (1872).

<sup>9</sup> In *People v. Board of Supervisors*, 122 Ill. App. 40 (1905).

<sup>10</sup> § 42 (Hart. Dig., art. 1878).

<sup>11</sup> *Horton v. Pace*, 9 Tex. 81 (1852), cited in 1 FARNHAM, WATER AND WATER-COURSES, § 24.

<sup>12</sup> *Harrison v. Holland*, 3 Gratt. (Va.) 247 (1846).

navigable in fact for a recurring period or season of each year will be adjudged navigable when the legislature has by statute declared it so.<sup>13</sup> On the other hand, it seems that in Indiana the courts resent a legislative declaration of navigability as an interference with judicial functions.<sup>14</sup> And, seemingly for similar reasons, the court of Illinois, in deciding that the Des Plaines River was not navigable, disregarded two statutes passed by the legislature of that state, in 1839 and in 1907, declaring it navigable, and another, passed in 1889, providing for the removal of obstructions from its bed.<sup>15</sup> In these decisions the state courts seem often to overlook the doctrine that a navigable stream is a highway, and that the establishment of highways, by dedication or otherwise, is a legislative function; but they give full weight to the principle that ascertainment of the existence of a highway, by proof of user, is a judicial function. The Federal Court recognizes the legislative nature of the questions in ruling in the last *Des Plaines Case* that abandonment of a stream once used is a matter for Congress.

In addition to the variety of conflicting tests and the disputed question of the power of a legislature to declare navigability there are other points of serious divergence. It is generally held that neither perennial navigability,<sup>16</sup> nor power to travel against the current,<sup>17</sup> nor present use,<sup>18</sup> nor freedom from removable obstructions,<sup>19</sup> nor

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<sup>13</sup> *State v. Dibble*, 49 N. C. (4 Jones L.) 107 (1856); *Davis v. Jenkins*, 50 N. C. (5 Jones L.) 290 (1858).

<sup>14</sup> *Martin v. Bliss*, 5 Blackf. (Ind.) 35 (1838); *Depew v. Wabash & E. Canal*, 5 Ind. 9 (1854); *Neaderhouser v. State*, 28 Ind. 257 (1867); *Ross v. Faust*, 54 Ind. 471 (1876). The following extracts picture the attitude of these courts: "Nature is competent, we should imagine, to make a navigable river without the help of the legislature" *Martin v. Bliss*, 5 Blackf. 35 (1838); "and we . . . can determine the fact whether she has succeeded or not, in a given case, with as much accuracy as a deputy surveyor" *Ross v. Faust*, 54 Ind. 471, 476 (1876).

<sup>15</sup> ILL. L. 1839, Feb. 28, p. 208; ILL. L. 1907, Dec. 6, Adj. Sess., p. 32; ILL. L. 1889, May 29, pp. 125, 133.

<sup>16</sup> *Cummins v. Spruance*, 4 Harr. (Del.) 315 (1845).

<sup>17</sup> *Sigler v. State*, 7 Baxt. (Tenn.) 493 (1874); *Ten Eyck v. Warwick*, 75 Hun, 562, 27 N. Y. Supp. 536 (1894); *Farmers' Co-operative Mfg. Co. v. Albemarle, etc. R. R. Co.*, 117 N. C. 579, 23 S. E. 43 (1895); *Grant v. Gordon*, cited in L. R. 2 A. C. 872 (1877).

<sup>18</sup> *Hickok v. Hine*, 23 Ohio St. 523 (1872); *Jones v. Johnson*, 6 Tex. Civ. App. 262 (1894).

<sup>19</sup> *State Reservation at Niagara Falls*, 37 Hun (N. Y.) 537, 547 (1885), *aff'd*, 102 N. Y. 734, 7 N. E. 916 (1886).

pecuniary profit resulting from the use,<sup>20</sup> is necessary in order to have navigability. No decision holding that any one of these elements is separately essential has been found. And yet opinions are frequent which rely upon the absence of one or more of them in holding a particular stream not navigable. Just how much use or capacity for use must exist, just when the difficulties become sufficient to destroy the fact and the right of navigation, are necessarily questions admitting wide differences of opinion. In view of the public right as well as property rights dependent upon these decisions, and the consequent need for certainty, the desirability of a uniform federal standard is apparent.

Still another difficulty is the question raised by artificial improvements. In the cases we are considering, the State of Illinois maintained that, when a river has been permanently improved by the Federal Government, by a state, or by a municipality, and has been artificially increased in volume, it is to be judged thenceforward by its altered and improved condition. It averred that the Des Plaines River, long before the defendant bought its riparian property, had been so altered and improved, and that in its present condition it was navigable. The defendant demurred, and the state courts denied the State's proposition. In the federal courts, since the stream was found to have been navigable in a state of nature, no decision on the effect of improvements was necessary. But upon principle the State's proposition seems correct. And in many cases it is implied. Mr. Justice Hughes has said of the Ohio River as altered by improvements:<sup>21</sup>

"Its bed may vary and its banks may change but the Federal power remains paramount over the stream. . . . The public right of navigation follows the stream."

In the *Wheeling Bridge Case*<sup>22</sup> the findings were specific that the bridge did not interfere with that navigation which was possible in the natural condition of the river, by sails and oars, but that it did interfere with the steamboat navigation which used the river in its improved condition. And in *United States v. Chandler-Dunbar Co.*<sup>23</sup> the court, (dealing with the Sault Ste. Marie), found that

<sup>20</sup> *Lamprey v. State*, 52 Minn. 181, 53 N. W. 1139 (1893); *Atty. Gen. v. Woods*, 108 Mass. 436 (1871).

<sup>21</sup> *Philadelphia Co. v. Stimson*, 223 U. S. 605, 634 (1912).

<sup>22</sup> 13 How. (U. S.) 518 (1851).

<sup>23</sup> 229 U. S. 53, 66 (1912).

"the stretch of water called the falls and rapids of the river is about 3,000 feet long. . . . The fall in the rapids is about 18 feet. This turbulent water, substantially unnavigable without the artificial aid of canals, constitutes both a tremendous obstacle to navigation and an equally great source of water power, if devoted to commercial purposes."

But the stream as a whole is decided to be a navigable water of the United States; and the dams originally authorized by state legislation are held to be subject to control and modification. In this the stream is judged by its improved condition.<sup>24</sup>

In refusing to allow the contention of the State of Illinois on this point, the state court said:<sup>25</sup>

"To hold that the State can by artificial means make a stream navigable which in a state of nature was not navigable, and thereby deprive riparian owners of their property rights in the bed of the stream, is simply to hold that private property may be taken or damaged for public use without compensation."

The reply to this is complete. The State by its agency the Sanitary District of Chicago had altered this stream under a statute providing complete indemnification and remedies to riparian owners,<sup>26</sup> had completed the same January 17, 1900, and had compensated the owners of this tract several years before the present riparian owner bought in (which was October 30, 1906). It was under no obligation to compensate the new owner over again. The new owner took the property in its changed condition and did not acquire the right to the claim for damages done to the former owner.<sup>27</sup> This portion

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<sup>24</sup> The same view is also taken by necessary implication as to the Ohio in *Gibson v. United States*, 166 U. S. 269 (1897); as to the Monongahela in *Union Bridge Co. v. United States*, 204 U. S. 364 (1907); *Monongahela Bridge Co. v. United States*, 216 U. S. 177, 193 (1910); and as to the Mississippi in the reach of St. Anthony Falls in *St. Anthony Falls Water Power Co. v. St. Paul Water Commrs.*, 168 U. S. 349 (1897), and as to the Chicago River in *Escanaba Co. v. Chicago*, 107 U. S. 678 (1882), and *West Chicago St. R. R. Co. v. Chicago*, 201 U. S. 506, 522 (1906). Upon this question state courts have differed. *Illinois v. New*, 280 Ill. 393, 400, 117 N. E. 597 (1917), denies the proposition. The Wisconsin court affirms it. *Mendota Club v. Anderson*, 101 Wis. 479, 78 N. W. 185 (1899); *Smith v. Youmans*, 96 Wis. 103, 70 N. W. 1115 (1897). Such differences indicate the need of a uniform national standard which shall be determinable on appeal by the Supreme Court of the United States.

<sup>25</sup> 241 Ill. 290, 325, 89 N. E. 760 (1909).

<sup>26</sup> ILL. L. 1889, May 29; 2 STARR & CURTISS, ILL. ANN. STAT., Ch. 42, §§ 16-19.

<sup>27</sup> *C. & A. R. R. Co. v. Maher*, 91 Ill. 312 (1878); *Philadelphia Co. v. Stimson*, 223 U. S. 605, 627 (1912).

of the opinion illustrates the tendency of the state court first to reach a decision in accordance with its general attitude and then to decide all other points in such a way as to make its decision on what it conceives the main point effective.

Coming to the standard which has been adopted in the federal courts, we find that even rafting has been there considered a type of navigation.<sup>28</sup> Several acts of Congress<sup>29</sup> provide for the protection of rafts and require raft-spans in bridges for their safe passage. *A fortiori*, rafting is treated as navigation under the Acts of Congress of 1796 and 1804 which dealt with frontier streams and creeks over which rafting, and fur-trading carried on in batteaux, barges, canoes, and similar craft, were the only known forms of navigation.<sup>30</sup> That the lumbering and rafting standard, as held to in the United States Supreme Court and in the courts of Wisconsin, Michigan, and Minnesota, is also British law, is apparent from the case of *Grant v. Gordon*.<sup>31</sup> But the lumbering and rafting

<sup>28</sup> *United States v. Bellingham Bay Boom Co.*, 176 U. S. 211 (1900); *Pound v. Turck*, 95 U. S. 459 (1877); *United States v. Burns*, 54 Fed. 351 (1893); *United States v. Marthinson*, 58 Fed. 765 (1893).

<sup>29</sup> Act of March 3, 1873, ch. 278, 17 STAT. AT L. 606; U. S. REV. STAT., § 5254; and of July 5, 1884, ch. 289, § 8, 6 FED. STAT. ANN., 795; and of March 23, 1906, 34 STAT. AT L. 84, ch. 1130, § 4.

<sup>30</sup> Act of May 18, 1796, § 9 (1 STAT. AT L., ch. 29, pp. 464-468); "all navigable rivers within the territory to be disposed of by virtue of this act, shall be deemed to be, and remain public highways."

Streams sustaining rafting and shallow draft boating are held navigable in the authorities noted and many others: *Morgan v. King*, 35 N. Y. 454 (1866); *Brown v. Chadbourne*, 31 Me. 9 (1849); *Moore v. Sanborne*, 2 Mich. 519 (1853); *Bucki v. Cone*, 25 Fla. 1, 6 So. 160 (1889); *Goodwill v. Bossier Parish Police Jury*, 38 La. Ann. 752 (1886) (*Mack's Bayou*); *Thompson v. Androscoggin River Imp. Co.*, 54 N. H. 545 (1874); *Boardman v. Scott*, 102 Ga. 404, 30 S. E. 982 (1897); *Hickok v. Hine*, 23 Ohio St. 523 (1872) (*Grand River*) (*Catawba and Johns Rivers: low water, 8 to 12 inches*), *Avery, J.; Burke Co. v. Catawba Lumber Co.*, 116 N. C. 731, 21 S. E. 941 (1895) (*Tar River*), *Avery, J.; Farmers' Co-op. Mfg. Co. v. Albemarle, etc. R. R. Co.*, 117 N. C. 579, 23 S. E. 43 (1895); *American River Water Co. v. Amsden*, 6 Cal. 443 (1856) (*Creole Creek*); *Hallock v. Suitor*, 37 Ore. 9, 6 Pac. 384 (1900); *Keator Lumber Co. v. St. Croix Boom Corp.*, 72 Wis. 62, 38 N. W. 529 (1888); *Castner v. Dr. Franklin*, 1 Minn. 73 (1852) (*Noluchuky River*); *Stuart v. Clark*, 2 Swan. (Tenn.) 9 (1852) (*Powell River, Cooper, J.*); *Holbert v. Edens*, 5 Lea (Tenn.) 204 (1880); *Southern R. R. v. Ferguson*, 105 Tenn. 552, 59 S. W. 343 (1900); *Barclay R. R. & Coal Co. v. Ingham*, 36 Pa. St. 194 (1860); *Atty. Gen. v. Woods*, 108 Mass. 436 (1871); *French v. Connecticut River Lumber Co.*, 145 Mass. 261, 14 N. E. 113 (1887).

<sup>31</sup> *Mor. Dic.* 12, 822, cited in *L. R. 2 A. C. 872* (1877), and 1 FARNHAM, *WATERS AND WATERCOURSES*, 121.



standard has been expressly rejected in Illinois.<sup>32</sup> And the effects of the tide-water test, which was brushed aside in the federal courts by the *Genesee Chief*,<sup>33</sup> lingers on in Illinois, though the words of the test have there been tacitly abandoned. There is thus a broad chasm between the Illinois standard of navigability and that accepted by the federal courts.

## II. STATE DOMINION, OWNERSHIP AND CONTROL OF WATERS — SUBJECTS CONTRASTED WITH NAVIGATION

The sovereignty and dominion of a state and the obligation of its laws extend over all the waters within its boundaries, subject to modification by paramount laws of the United States.<sup>34</sup> The shores and beds of navigable waters in the original states were not granted to the national government, but were reserved to the states. And upon the admission of new states to the Union the beds of navigable rivers within their boundaries passed to the states, so that they have the same rights, sovereignty, and jurisdiction over the shores and beds as have the original states. The status of this land is determined by the law of each state.<sup>35</sup>

The state has dominion of the water while flowing in the navigable rivers,<sup>36</sup> but holds it in trust for the whole people for their common benefit, through the paramount right of navigation; and, subject thereto, it holds the flow in trust for the riparian owners and other owners who may have acquired special interests in the streams.<sup>37</sup>

Where the state retains title to the bed of the stream, it holds it not as a private proprietor but as sovereign, in trust to protect

<sup>32</sup> *Hubbard v. Bell*, 54 Ill. 110 (1870).

<sup>33</sup> 12 How. (U. S.) 443 (1851).

<sup>34</sup> *People v. Welch*, 141 N. Y. 266, 36 N. E. 328 (1894).

<sup>35</sup> *Pollard v. Hagan*, 3 How. (U. S.) 212 (1845) (followed ever since); *Shively v. Bowlby*, 152 U. S. 1 (1893); *United States v. Chandler-Dunbar Co.*, 209 U. S. 447 (1908). The land, however owned, is subject to the same public trusts and limitations as lands under tide waters on the borders of the sea. Ill. Central R. R. Co. v. Illinois, 146 U. S. 387 (1892).

<sup>36</sup> *Plumleigh v. Dawson*, 6 Ill. (1 Gilm.) 544, 550 (1844).

<sup>37</sup> *West Chicago St. R. R. Co. v. People*, 214 Ill. 9, 20, 73 N. E. 393 (1905); *aff'd*, 201 U. S. 506, 520, 524 (1906); *People v. Canal Appraisers*, 33 N. Y. 461 (1865).

Drainage and land-reclamation are matters of state control, and state laws and grants of authority therefor are valid. *Leovy v. United States*, 177 U. S. 621 (1900); *Soliah v. Heskin*, 222 U. S. 522 (1912); *Wurts v. Hoagland*, 114 U. S. 606 (1885).

So the construction of bridges as parts of highways is primarily a state function.

the right of navigation,<sup>38</sup> and the public right of the state therein is incapable of alienation.<sup>39</sup> Where the title of the riparian owner extends to the middle thread of the stream, he holds title to the portion of the bed within that thread charged with the same public use in navigation — which at common law he could not defeat or unreasonably impair,<sup>40</sup> and which under acts of Con-

And the same rule applies to dams: *United States v. Rio Grande Dam, etc. Co.*, 174 U. S. 690 (1899); *Elgin Hydraulic Co. v. City of Elgin*, 194 Ill. 476, 62 N. E. 929 (1902); and to booms: *United States v. Beef Slough, etc. Co.*, 8 Biss. (U. S.) 421 (1879); *United States v. Duluth*, 25 Fed. Cas. no. 15,001 (1871); *Pound v. Turck*, 95 U. S. 459 (1877); *Heerman v. Beef Slough Mfg. Co.*, 1 Fed. 145 (1880); *United States v. Bellingham Bay Boom Co.*, 176 U. S. 211 (1900).

And similar powers and limitations exist as to ferries: *Conway v. Taylor*, 1 Black (U. S.) 603 (1861) (1 FARNHAM, ch. II, § 12a); and harbors: *Illinois v. Illinois Central R. R. Co.*, 33 Fed. 730 (1888), affirmed, 146 U. S. 387 (1892); *Ohio River Transportation Co. v. Parkersburg*, 107 U. S. 691 (1882).

The United States government has made no general grant of lands under navigable waters to individuals or classes of owners. *Morris v. United States*, 174 U. S. 196, 229 (1899); *Shively v. Bowlby*, 152 U. S. 1 (1894). And, without denying the jurisdiction and power of the state courts to determine this question of title, the United States Supreme Court has looked askance upon the extent to which the tide-water error has in some states been applied so as to extend the ownership of riparian owners to the bed of navigable streams. *Barney v. Keokuk*, 94 U. S. 324, 338 (1876).

As to the *corpus* of the water, *i. e.*, the particles of water forming a natural stream, the title of the riparian owner does not extend to them *in specie*, but to the flow of the water passing through or by his land. As the particles of water pass in succession over the lands of all the different owners and come to rest nowhere, the title to the particles of water does not vest in any of the riparian owners (2 BLACKSTONE, COMM. \*18; *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 69 (1913); *Hudson R. R. Co. v. Loeb*, 7 Robt. (N. Y.) 418 (1868)), but remains in the state for the benefit of all. *Mitchell v. Warner*, 5 Conn. 497 (1825); *Brown v. Best*, 1 Wils. 174 (1747); *Sury v. Pigot*, Popham, 166; *Rhodes v. Whitehead*, 27 Tex. 304 (1863); *Fleming v. Davis*, 37 Tex. 173 (1873).

<sup>38</sup> *Kaukauna W. P. Co. v. Green Bay Co.*, 142 U. S. 254 (1891); *Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387, 435, 452 (1892); *Mobile Transportation Co. v. Mobile*, 187 U. S. 479 (1903); *United States v. Great Falls Mfg. Co.*, 112 U. S. 645 (1884); *Great Falls Mfg. Co. v. Atty. Gen.*, 124 U. S. 581 (1888); *Brookhaven v. Smith*, 188 N. Y. 74, 80 N. E. 665 (1907); *Niagara County I. & W. S. Co. v. College Heights L. Co.*, 111 App. Div. 770, 772, 98 N. Y. Supp. 4 (1906); *Mayor v. Appold*, 42 Md. 442 (1875).

<sup>39</sup> *Ill. Central R. R. Co. v. Illinois*, 146 U. S. 387, 453 (1892); *West Ch. St. R. R. Co. v. People*, 214 Ill. 9, 73 N. E. 393 (1905), 201 U. S. 506 (1906) (tunnel under Chicago River).

<sup>40</sup> *United States v. Chandler-Dunbar Co.*, 229 U. S. 53 (1912); *HALE, DE PORTIBUS*, 51; *Avery v. Fox*, 1 Abb. (U. S.) 246 (1868); *Buffalo Pipe Line Co. v. N. Y., etc. R. R. Co.*, 10 Abb. N. C. (N. Y.) 107 (1880); *Pollock v. Cleveland Shipbuilding Co.*, 56 Ohio St. 655, 47 N. E. 582 (1897); *State v. Narrows Island Club*, 100 N. C. 477, 5 S. E. 411 (1888); *Doucette v. Little Falls Imp. & Nav. Co.*, 71 Minn. 206, 73 N. W. 847 (1898).

gress, as to the navigable waters of the United States, he cannot in any way impair without the express consent of the Government.<sup>41</sup>

Navigation does not necessarily involve title or ownership of the bed. Whether ownership of riparian lands extends to the middle thread, or stops with meander lines or with low-water lines, are local questions determined by state law, which is binding on the federal courts,<sup>42</sup> even to the latest decision changing the local rules.<sup>43</sup> And this applies to claims of title under federal grants, and to accretions and made land in national streams like the Mississippi.<sup>44</sup>

But questions of navigation, and of what are "navigable waters of the United States," are federal questions,<sup>45</sup> for the federal jurisdiction over interstate commerce carries as an incident control over waters which may be used therefor. The right of navigation and the power of Congress to regulate it are unaffected by the question whether the bed over which the stream flows is owned by nation, state, municipality, or riparian owner.<sup>46</sup> In any case, navigation is subject to regulation by governmental authority. If it is subjected to conflicting regulations, those which are local give way to those which are national.

Like all other rights, the right of navigation is subject to the police power, which is exercised primarily by the states; and reasonable state and municipal regulation of navigation, such as

<sup>41</sup> *Philadelphia Co. v. Stimson*, 223 U. S. 605 (1912); *West Chicago St. Ry. Co. v. Chicago*, 201 U. S. 506, 520 (1906); *Lewis Oyster Co. v. Briggs*, 198 N. Y. 287, 91 N. E. 846 (1910); *aff'd*, 229 U. S. 82 (1913).

<sup>42</sup> *St. Louis v. Rutz*, 138 U. S. 226, 242 (1891); *Shively v. Bowlby*, 152 U. S. 1 (1894); *Packer v. Bird*, 137 U. S. 661 (1891); *Rundle v. Delaware & R. Canal Co.*, 14 How. (U. S.) 80 (1852); *St. Anthony Falls Water Power Co. v. St. Paul Water Comms.*, 168 U. S. 349-358 (1897); *Hardin v. Jordan*, 140 U. S. 371 (1891); *Jones v. Souldard*, 24 How. (U. S.) 41 (1860).

<sup>43</sup> *Mobile Transp. Co. v. Mobile*, 187 U. S. 479 (1903).

<sup>44</sup> *Archer v. Greenville Gravel Co.*, 233 U. S. 60 (1913); *Barney v. Keokuk*, 94 U. S. 324 (1876). And so of the property in an island in a navigable river which at times is submerged and later reappears, *Widdicombe v. Rosemiller*, 118 Fed. 295 (1902); and so of an unsurveyed island, *United States v. Chandler-Dunbar Co.*, 209 U. S. 447 (1908).

<sup>45</sup> *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1 (1824); *Passenger Cases*, 7 How. (U. S.) 283 (1849); *Wisconsin v. Duluth*, 96 U. S. 379 (1877); *United States v. Rio Grande, etc. Co.*, 174 U. S. 690, 708 (1899); *Philadelphia Co. v. Stimson*, 223 U. S. 605, 634-635 (1912).

<sup>46</sup> *Scranton v. Wheeler*, 57 Fed. 803 (1893).

making harbor lines, authorizing bridges, requiring signals, and enforcing pilotage regulations, are valid<sup>47</sup> until superseded by federal regulations.<sup>48</sup> The Congressional control of navigable streams does not exclude the power of the states to authorize the construction and maintenance of improvements which do not interfere either with navigation or with the improvements or control of the Federal Government.<sup>49</sup> So a state can construct a canal through dry land, or canalize a non-navigable stream, or improve a navigable stream, or, as in the case of the Erie Canal, construct one canal which combines all of these features. But if such canal should connect with navigable waters of the United States, it thereby becomes itself a navigable water of the United States.<sup>50</sup> So, a state canal which, by connecting with a railway, is a link in a through line of interstate commerce, is subject to federal regulation. The Interstate Commerce Act<sup>51</sup> authorizes the Interstate Commerce Commission to establish such through routes, and adds, "Any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water."<sup>52</sup>

Concurrent improvements of the same stream may be made by the two governments or by one government, the other contributing to the cost. In the early days the Federal Government often contributed money or land grants to aid in meeting the cost of canals built or authorized by some one of the states. Thus it contributed money to the construction of the Louisville Canal around the falls in the Ohio, and made a land grant to help Illinois build the Illinois and Michigan Canal, which, as finally constructed, extended from Lake Michigan at Chicago one hundred miles west to La Salle, Illinois, at the head of steamboat navigation on the Illinois River. Still later, when the State by its agency, the Sanitary District of Chicago, built the great Sanitary and Ship Canal

<sup>47</sup> *Ex parte McNiel*, 13 Wall. (U. S.) 236 (1871); *Escanaba Co. v. Chicago*, 107 U. S. 678 (1882).

<sup>48</sup> *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1 (1824); *Sprague v. Thompson*, 118 U. S. 90 (1886), reversing 69 Ga. 409 (1882).

<sup>49</sup> *Withers v. Buckley*, 20 How. (U. S.) 84 (1857).

<sup>50</sup> *Huse v. Glover*, 15 Fed. 292 (1883), 119 U. S. 543 (1886); *Sands v. Manistee River Improvement Co.*, 123 U. S. 288 (1887).

<sup>51</sup> Sec. 15, 24 STAT. AT L. 384, as amended by 34 STAT. AT L. 589, 36 STAT. AT L. 552.

<sup>52</sup> 4 FED. STAT. ANN., 2 ed., p. 469.

extending thirty-one miles between Lake Michigan and the Des Plaines River and costing more than \$50,000,000, the Federal Government contributed by consenting that the waters of Lake Michigan be turned into it through the Chicago River, upon the improvement of which the Federal Government had expended about \$15,000,000. The city also had expended large sums on the Chicago River.<sup>53</sup>

This close co-operation between the states and the Federal Government emphasizes the anomalous legal situation, wherein the state and federal courts are competent to take opposite views concerning the navigability of a given stream, which both governments may have joined in improving. The reason for the attitude of some of the state courts is to be found primarily in their adjudications of title. Title to submerged land is, as we have seen, solely determined by state law. Decisions upon such titles frequently pass unnecessarily upon navigability. This was so in the first group of Illinois cases cited above<sup>54</sup> and in *Palmer v. Mulligan*,<sup>55</sup> wherein Chancellor Kent mingled in his decision and in effect confused questions as to the title of nontidal stream beds with those concerning the navigability of those streams. The

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<sup>53</sup> 20 OPINIONS ATTY. GEN. 101 (1891); *Tempel v. United States*, 248 U. S. 121 (1918).

In 1908 Illinois adopted an amendment to her constitution, authorizing the legislature to provide for the construction of a deep waterway from Lockport on the Des Plaines and Sanitary and Ship Canal (which merge at that point) to Utica on the Illinois River 70 miles west, and to issue \$20,000,000 of state bonds to provide funds for the cost (ILL. L. 1907-8, p. 102).

The necessary legislation was enacted (ILL. L. 1915, pp. 18-35, and ILL. L. 1919, pp. 977-990); Congress enacted co-operative legislation (36 STAT. AT L., part. 1, pp. 659-661), and the improvement of the Des Plaines is in progress.

<sup>54</sup> See note 3, *supra*.

<sup>55</sup> 3 Caines (N. Y.), 307 (1805). By the common law, the title to lands bounded upon non-tidal streams extended to the middle thread (HALE, DE JURE MARIS, c. 1), and by a body of decisions following Chancellor Kent's judgment in *Palmer v. Mulligan*, *supra*, such streams were also held non-navigable; and the result has been a tendency to confuse the one subject, land-title, with the other, navigation.

Mr. Farnham, in his chapter III, has assembled the decisions showing that in formulating this tide-water test, in that case, Chancellor Kent committed one of his very few errors: that the question was one of title and not one of navigation. That case was decided in 1805, and Kent repeated the rule in his lectures, first published as Commentaries in 1826. It was adopted by Mr. Angell in his work on WATER COURSES (first published in 1824), in which he endeavored to make a distinction between navigable streams and boatable streams.

courts have conceived themselves bound by these prior cases which seemed, from their language, to have settled that certain streams were unnavigable.

In the contest between the riparian owner who wishes to dam and the navigator who wishes a free channel, the court which emphasizes riparian rights tends unconsciously to interpret facts, weigh evidence, and resolve incidental questions, all favorably to the riparian right; and *vice versa*.

So in the *Des Plaines River Cases* the Illinois court, adopting the view of experts for the defense, emphasized the admitted difficulties of navigation, especially two shallows occupying less than two miles in length, the lack of water for half the year, and the absence of navigation for nearly a century, and decided that the Des Plaines had never been navigated at all, by the fur trade or any other use. The Federal Court of Appeals, on the other hand, emphasized the evidence that for one hundred ninety days out of the year gage readings proved that the Des Plaines had a navigable depth of from twelve to fifteen inches (excepting the two shallow spots), and that this is sufficient for navigability; that during forty-seven days of high water each year a boat drawing fifteen inches can pass from the Des Plaines to Lake Michigan without portage; that for a varying period between these extremes boats of deeper draft can navigate the Des Plaines; and that this was done for more than a century by the fur traders. The federal court enumerates fourteen recorded voyages. Of these, nine were in evidence before the state court but three only were considered to be "well authenticated voyages" of the Des Plaines,<sup>66</sup> by the state court, which also disregarded the evidence presented by a multitude of books of travel, geography, history, and reports of surveys by United States engineers, and reports by territorial governors and other public officers. The river had not been navigated commercially for three quarters of a century, and that was made de-

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<sup>66</sup> In each of the cases exclusive proofs were introduced of use in the fur trade, consisting of documents, official reports by Indian agents, by the Governor of Illinois Territory, Gallatius Report on Means of Communication (1808), by United States Surveyor Hotchins (1778-1797), by Governor St. Clair (1790), by the Congressional Committee: H. R. 18th Congress, 2d Session, Vol. I, ser. no. 172 (1825), finding "uninterrupted navigation from the river into the lake"; and by reports of ten surveys by the United States Engineers. A discussion of this evidence and the legal questions involved would require a separate article.

cisive. The federal court found that the parallel canal first displaced the river and that a parallel railroad afterwards displaced the canal; just as did the Erie Canal and the New York Central Railway in the case of the Mohawk River. But it decided that though the river was thus long disused, the public right inhered.<sup>57</sup> In brief, each court decided the incidental questions in accordance with its tendency on the main question.<sup>58</sup>

These conflicting standards of navigability recall the period when railroads in different states were built of different widths. They prevent the development of commerce. A uniform standard is necessary, and this can be most certainly obtained by action of the Federal Government, establishing the federal standard. All the navigable streams of the country have now been declared by Congress to be navigable waters of the United States. But if the courts of different states may determine in conflicting judgments, some that the Mississippi is and some that it is not navigable, each according to some standard of its own, and those judgments are respected as final and not reviewable by the Supreme Court of the United States, the confusion will continue. The question of navigability, at least for the purpose of determining what are "navigable waters of the United States," should not be left to final determination by local or state courts. This development of the law is much needed but not yet accomplished, as the first of the *Des Plaines River Cases* shows. There the Supreme Court of the United States<sup>59</sup> accepted as final and unreviewable the decision of the state court that the Des Plaines was not a navigable stream, as amounting to a conclusive determination of the question, "Was it a navigable water of the United States?"

But the United States was not a party to the suit of the State; the evidence in the Government's case was much fuller than that in the State's case; and in the Government's case the decision of the

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<sup>57</sup> See *People v. Page*, 39 App. Div. 110, 115, 56 N. Y. Supp. 834 (1899).

<sup>58</sup> The tendency of the state court is exemplified in *Illinois v. New*, 280 Ill. 393, 400, 117 N.E. 597 (1917) (concerning Thompson Lake, a tributary of the Illinois River), where a depth of three feet in a state of nature seems required to meet the court's idea of navigability; and the fact that the discharge of the Ship Canal has added between three and four feet to depth, is disregarded, and the question determined by the condition existing before the alteration.

<sup>59</sup> 234 U. S. 497 (1914).

State's case is held not to make the matter *res judicata*, and not to be persuasive against the new finding of navigability.

### III. THE SOURCE OF NATIONAL AUTHORITY, AND THE CAUTIOUS AND GRADUAL EXERCISE OF CONTROL

The grant of power to Congress to regulate commerce<sup>60</sup> is the source of its authority to regulate navigation and navigable waters. The Ordinance of 1787 had already ordained that

"the following . . . shall be considered as articles of compact between the original States, and the People and States in the said territory [northwest of the Ohio], and forever remain unalterable, unless by common consent, to wit; . . . The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States," etc.<sup>61</sup>

By Act of August 7, 1789, the first Congress continued this ordinance in effect.<sup>62</sup>

The final decision in the *Des Plaines River Cases* is notable for its holding that this provision of the Ordinance is still in force, "being analogous in this respect to legislation enacted under the exclusive power of Congress to regulate commerce with the Indian tribes."<sup>63</sup>

By Act of May 18, 1796,<sup>64</sup> Congress enacted that "all navigable rivers, within the territory to be disposed of by virtue of this act, shall be deemed to be, and remain public highways." This was generalized and made part of the Revised Statutes of the United States.<sup>65</sup>

<sup>60</sup> United States Const., Art. I, § 8, cl. 3.

<sup>61</sup> U. S. REV. STAT., 2 ed., 15-16, § 14.

<sup>62</sup> 1 STAT. AT L. 50-53.

<sup>63</sup> Per Pitney, J., 41 Sup. Ct. Rep. 409, 412 (1921). An analysis of the conflicting decisions on the Ordinance, or on its navigation clause alone, would require a separate article.

<sup>64</sup> 1 STAT. AT L. 468, § 9.

<sup>65</sup> U. S. REV. STAT., § 2476. This provision as to navigable rivers is repeated in the Act of March 3, 1803, for disposal of the lands of the United States south of the State of Tennessee, 2 STAT. AT L., ch. 27, pp. 229, 235, § 17, and by the Act of March 26, 1804, for the disposal of the public lands in the Indiana Territory, 2 STAT. AT L., ch. 35, p. 279, § 6, and in several of the Acts for admitting states to the Union. Act of March 2, 1819, for the admission of Alabama, 3 STAT. AT L., ch. 47, § 6, p. 492, interpreted in *Pollard v. Hagan*, 3 How. (U. S.) 212 (1845); Act of Feb. 14, 1859, for



Among the earlier federal cases there is a marked tendency to avoid an exercise of jurisdiction which would interfere with the authority of the state. Chief Justice Marshall set the example in *Wilson v. Blackbird Creek Marsh Co.*<sup>66</sup> A Delaware statute authorized a dam across a little-used but actually navigable tidal stream. The dam, by reclaiming marsh land, increased the value of the riparian property, and was said to improve the health of the community. A sloop seeking to navigate this creek injured the dam, and its owner was held liable by the state court. The federal court refused to disturb the judgment, on the ground that since the whole subject matter was within the domain of Congress, it alone had the power to object to obstructions which a state authorized. While Congress did not act, the state might validly act, and obstructions authorized by it would not be interfered with by the federal courts.

In 1851, in *State of Pennsylvania v. Wheeling Bridge Company*,<sup>67</sup> the court held that Congress had acted

"by licensing vessels, establishing ports of entry [along the Ohio River], and imposing duties upon masters and other officers of boats; . . . and they [Congress] have expressly sanctioned the compact made by Virginia with Kentucky at the time of its admission into the Union [that the] use and navigation of the River Ohio . . . shall be free and common to the citizens of the United States . . . This compact, by the sanction of Congress, has become a law of the Union. What further legislation can be desired for judicial action?"<sup>68</sup>

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admission of Oregon, 11 STAT. AT L., ch. 33, p. 383, interpreted in *Willamette Iron Bridge Co. v. Hatch*, 19 Fed. 347 (1884), 125 U. S. 1 (1887).

<sup>66</sup> 2 Pet. (U. S.) 245 (1829).

<sup>67</sup> 13 How. (U. S.) 518, 565, 566 (1851).

<sup>68</sup> Congressional action was shown by appropriations by twelve acts of Congress for improving the Ohio (4 STAT. AT L. 32), by the government ownership of shares in the Louisville and Portland Canal Co., which built a canal around the falls of the Ohio (4 STAT. AT L. 162, 353), and by surveys of the river by the national government in 1843 and 1845. (See U. S. ENGINEERS REPORTS for 1882, pp. 1881-1887, Part II.) McLean, J., referred to these in bulk, saying: "Appropriations by Congress have been frequently made, to remove obstructions to navigation from its channel" 13 How. (U. S.) 518, 561 (1851).

After the bridge was decided to be unlawful, Congress passed an act authorizing the bridge; and it was decided that although the bridge did impede navigation, it was a valid exercise of congressional power, which included "the power to determine what shall or shall not be deemed, in the judgment of law, an obstruction of navigation" 18 How. (U. S.) 421 (1855). This has been followed ever since. The Clinton Bridge, 10 Wall. (U. S.) 454 (1870).

Gradually Congress exercised its power. First came harbor bills, then river and harbor appropriations. Interspersed with these were special acts, and sections buried in the heart of appropriation acts,<sup>69</sup> authorizing particular works, and a great variety of more or less public enterprises. Then came the slow realization that definite and uniform rules and standards should be applied, and general legislation followed.

In recent years Congress has passed several acts evincing a growing tendency to protect the navigable waters of the United States. The following are of especial interest:

*Act of 1880*; for the removal of obstructions, such as sunken craft, at the expense (1) of the owners thereof, or (2) of the United States;<sup>70</sup>

*Act of 1884*; for the construction of aids to navigation at points of bridge construction, as specified by the Secretary of War;<sup>71</sup>

*Act of 1888*; for the alteration of bridges as specified by the Secretary of War, so as to render navigation "free, easy and unobstructed," and for the insertion of fish-ways in dams;<sup>72</sup>

*Act of 1890*; requiring permission by the Secretary of War for building structures in, or altering channels of, navigable waters, and making it unlawful thereafter to commence such constructions under any act of state legislation until the location and plan of same shall have been approved by him (with exception for bridges theretofore duly authorized by law);<sup>73</sup>

*Act of 1892*; extending the prohibition of the Act of 1890 against alterations of channels, so as to apply to ports, harbors, etc.<sup>74</sup>

And by the important Act of 1899 it was provided<sup>75</sup> that

"It shall not be lawful to construct or commence the construction of any bridge, dam, dike or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other *navigable water of the United States* until the consent of Congress . . . shall have been obtained, . . .

<sup>69</sup> Such, for example, as sections 6 and 7 of the General Post-office Appropriation Act of 1852, legalizing the Wheeling Bridge; Act of August 31, 1852, §§ 6, 7; 10 STAT. AT L. 112, quoted in 18 HOW. (U. S.) 421, 426 (1855).

<sup>70</sup> 21 STAT. AT L. 197, § 4 (June 14, 1880).

<sup>71</sup> 23 STAT. AT L. 148, § 8 (July 5, 1884).

<sup>72</sup> 25 STAT. AT L. 424-425, §§ 9-12 (Aug. 17, 1888).

<sup>73</sup> 26 STAT. AT L. 454, § 7 (Sept. 19, 1890).

<sup>74</sup> 27 STAT. AT L. 110, § 7 (July 13, 1892).

<sup>75</sup> 30 STAT. AT L. 1151, § 9 (March 3, 1899).

until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided*, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: *And provided further*, That when plans for any bridge or other structure have been approved . . . it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War."

The next section <sup>76</sup> sweepingly prohibits any obstruction "to the *navigable capacity* of any of the *waters of the United States*" not affirmatively authorized by Congress, or any alteration of a channel unless recommended by the Chief of Engineers and authorized by the Secretary of War before the work is begun. This, it was decided, in *United States v. Rio Grande Irrigation Company* <sup>77</sup> protects a stream from any interference which would diminish the capacity of the navigable portions, though that interference be by irrigation works authorized by the state in the non-navigable portions of the stream several hundred miles from the navigable part. The New Mexico court had held that since the navigable portion within the territory was relatively short and far removed from the improvements, and since the interests of navigation involved were relatively small while those of agriculture, to be promoted by irrigation, were large, the improvements were lawful even though they did diminish the volume of the stream. The Supreme Court of the United States held that these were questions exclusively for Congress, saying: <sup>78</sup>

"Evidently Congress, perceiving that the time had come when the growing interests of commerce required that the navigable waters of the United States should be subjected to the direct control of the National Government, and that nothing should be done by any State tending to destroy that navigability without the explicit assent of the National Government, enacted the statute in question."

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<sup>76</sup> 30 STAT. AT L. 1151, § 10.

<sup>77</sup> 174 U. S. 690 (1899), reversing 9 N. Mex. 292, 51 Pac. 674 (1898).

<sup>78</sup> *Ib.*, 174 U. S. 690, 708 (1899).

The Act of Congress of June 21, 1906,<sup>79</sup> entitled "An Act to regulate the construction of dams across navigable waters," still more explicitly asserts the federal authority. It provides,

"that when, hereafter, authority is granted by Congress to any persons to construct and maintain a dam for water power . . . across any of the navigable waters of the United States, *such dams shall not be built or commenced* until the plans and specifications for its construction, . . . and such map of the proposed location as may be required for a full understanding of the subject, have been submitted to the Secretary of War and Chief of Engineers for their approval, or until they shall have approved such plans and specifications and the location of such dam and accessory works," etc.

Many previous decisions were rendered inapplicable by these provisions.

The Acts of 1899 and 1906 were drafted by Hon. Theodore E. Burton of Ohio, long the efficient chairman of the River and Harbor Committee of the House, and an eminent lawyer. They were early expressions of the movement for conservation of natural resources which later received fuller expression in the measures for flood control, improvement of navigation, and water-power regulation.

But the Act of 1899 does not entirely supersede state authority. Where the navigable portion lies wholly in one state, concurrent assent of the state legislature is provided for; and the permit of the Secretary of War alone is not sufficient to authorize the licensee to disregard the laws of the state or ordinances of its municipality.<sup>80</sup> This makes the consent of the state legislature a federal prerequisite, and in effect appoints the state legislature a federal agency to assist in protecting the interests of the nation.

#### IV. REMEDIES OF A STATE FOR BREACHES OF FEDERAL LAWS

A peculiar interest attaches to the question of a state's remedy for breaches of federal laws, because of the concurrent jurisdiction granted to enforce prohibition by Section 2 of the Eighteenth

<sup>79</sup> 34 STAT. AT L. 386.

<sup>80</sup> *Cummings v. Chicago*, 188 U. S. 410 (1903); *Montgomery v. Portland*, 190 U. S. 89 (1903); *Cobb v. Lincoln Park*, 202 Ill. 427, 67 N. E. 5 (1903); *Minnesota Canal & Power Co. v. Pratt*, 101 Minn. 197, 112 N. W. 395 (1907); *Hubbard v. Fort*, 188 Fed. 987 (1911); *Wilson v. Hudson Water Co.*, 76 N. J. Eq. 543, 76 Atl. 560 (1910).

Amendment and the many unsolved problems arising therefrom. A problem somewhat similar was raised in the *Des Plaines River Cases* by the suit of the State of Illinois.

The navigable portion of the Des Plaines is wholly in Illinois, and under Section 9 of the Act of Congress of 1899, if it was a navigable stream, the consent of the state legislature was necessary in order to dam it. The defendant began damming the stream with no permit from either government; whereupon the suit by the state and that by the United States were successively filed.

The Illinois courts found the Des Plaines River non-navigable in its natural condition, sustained the demurrer to the claim of artificial navigability, and dismissed the information. The State thereupon sued out a writ of error from the Federal Supreme Court and there insisted that its claim that the river was a navigable water of the United States such as to entitle the State to succeed in its suit, was not concluded by the finding and judgment of the State courts. The State further contended that on the question whether permanent alterations of the river and the addition of water from Lake Michigan made it navigable, there had been no finding of fact in the Illinois courts but a decree sustaining a demurrer upon a question of law. The Supreme Court dismissed the writ of error. One reason suggested by Chief Justice White, at the argument, was that the State was bound by the decision of its own courts. But this contention is met by the decisions in *New Jersey v. Yard*,<sup>81</sup> and *Alabama v. Schmidt*,<sup>82</sup> to the effect that a state may assert a right in its own courts under federal laws, and may maintain a writ of error in the Supreme Court of the United States to review a judgment adverse to such claim. During the argument of the State's writ of error the court ascertained that the Federal Government was maintaining a distinct but similar suit against the same dam; and this may have had some influence in leading the court to avoid a determination on the merits in the State's case.

In its decision on the State's writ of error the Supreme Court held that "the State is not the instrument through which the jurisdiction can be exercised."<sup>83</sup> Underlying this seems to be the idea that the state and federal governments may each enforce its

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<sup>81</sup> 95 U. S. 104 (1877).

<sup>82</sup> 232 U. S. 168 (1914).

<sup>83</sup> *Illinois v. Economy Power Co.*, 234 U. S. 497, 524 (1914).

own laws in its own courts, and must confine itself to its own remedies in its own courts, or at any rate that a state must do so. But that method of dealing with the problem is not convincing. The United States rightfully can sue in the state courts, and upon occasion has maintained suit in the state courts and invoked state and local laws and remedies to protect its interests, and has been sustained in so doing, not because of any pre-eminence, but because it is a body politic and property owner and may rightfully exercise the same rights and pursue the same remedies as any other body politic or property owner.<sup>84</sup> So the acts of Congress are the law of the land, and except as otherwise provided are enforceable in the state courts and by the states.<sup>85</sup> And they are also laws of the United States, the enforcement of which involves federal questions, so that the denial of a right claimed under such acts presents a question for review in the Supreme Court of the United States.<sup>86</sup>

The Act of Congress of March 3, 1899, gives each state a special interest in streams whose navigable portions lie wholly in that state. This interest it holds as *parens patriae* for all its people.<sup>87</sup> In giving this special interest, Congress was giving effect to the principle of public policy which Chief Justice Marshall had formulated in the *Blackbird Creek* case. The state is made more than a federal agent. Its permit is a federal prerequisite to damming a water navigable wholly within its boundaries. It has power under the acts of Congress to give or withhold the permit, and to sue the wrongdoer who dams without a permit; and the existence or non-existence of the permit, and of the necessity for a permit, are federal questions.<sup>88</sup> And since the state has a power conferred by federal law and enforceable in a federal court, it may bring its suit there, as Pennsylvania did to enjoin the construction of the Wheeling Bridge before the Act was passed.<sup>89</sup> And as it can maintain a federal suit,

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<sup>84</sup> *Cotton v. United States*, 11 How. (U. S.) 229 (1850); *United States v. Graff*, 67 Barb. (N. Y.) 304 (1875); *United States v. Davy, Brayt.* (Vt.) 146 (1820); *United States v. Noyes*, 4 Conn. 340 (1822); *United States v. Smith*, 7 La. Ann. 185 (1852).

<sup>85</sup> *Second Employers' Liability Cases*, 223 U. S. 1, 55-59 (1911).

<sup>86</sup> See U. S. REV. STAT., § 709; FED. JUDICIAL CODE, § 237; *Defiance Water Co. v. Defiance*, 191 U. S. 184 (1903).

<sup>87</sup> *Kansas v. Colorado*, 185 U. S. 125 (1902).

<sup>88</sup> *United States v. Bellingham Bay Boom Co.*, 176 U. S. 211 (1900).

<sup>89</sup> *State of Pennsylvania v. Wheeling Bridge Co.*, 13 How. (U. S.) 518 (1851).

so it would seem it should be allowed to maintain a writ of error in the Supreme Court of the United States to review the judgment of a state court which denies such claim under a federal law. Such a writ of error by a state was upheld in the two cases mentioned above.<sup>90</sup>

In the *Wheeling Bridge* case,<sup>91</sup> the standing of Pennsylvania to maintain its suit was upheld in part because of the investment by the state of some thirty millions of dollars in canals which connected directly or indirectly with the Ohio River. By the same token, Illinois should have succeeded in its *Des Plaines River* case, for through its public agency, the Sanitary District of Chicago, it had invested over \$50,000,000, at the time of beginning suit, in the Sanitary and Ship Canal which connected directly with the Des Plaines River; it had directly expended \$8,000,000 on the Illinois and Michigan Canal which connected with the Des Plaines; and its leading municipality had expended other large sums in improving the Chicago River, which was connected by both these canals with the Des Plaines River. And by Act of March 3, 1899 (the same Act which inaugurated the new policy), Congress itself appropriated \$30,000 for a survey and estimate of the cost of improving the Upper Illinois and Lower Des Plaines;<sup>92</sup> this was repeated<sup>93</sup> by Act of June 6, 1900; and by Act of June 13, 1902, \$200,000 more was appropriated for the same purpose.<sup>94</sup> By Act of June 25, 1910, \$1,000,000 was appropriated for improvement of the Des Plaines,<sup>95</sup> subject to provisions for state co-operation. No valid distinction as to interest or investment seems practicable between the *Des Plaines River* case and the *Wheeling Bridge* case.

In *Missouri v. Illinois and Sanitary District of Chicago*,<sup>96</sup> the court recognized the right of a state to act for all its citizens in seeking to prevent the pollution of a navigable water of the United States. In that case the State of Missouri filed a bill alleging that Illinois and its public corporation, the Sanitary District, "acting as a governmental agency of said State," had constructed a channel connecting Lake Michigan and the Chicago River with the Des Plaines, and so indirectly the Illinois and Mississippi Rivers, and

<sup>90</sup> See notes 81 and 82, *supra*.

<sup>91</sup> 30 STAT. AT L. 1146.

<sup>92</sup> 32 STAT. AT L. 364.

<sup>93</sup> 180 U. S. 208 (1901).

<sup>94</sup> See note 89, *supra*.

<sup>95</sup> 31 STAT. AT L. 580.

<sup>96</sup> 36 STAT. AT L. 659.

was about to discharge sewage greatly diluted with water of Lake Michigan, through this channel and these rivers into the Mississippi, to the injury to the health and commercial prosperity of the citizens of Missouri. Illinois and the Sanitary District demurred for want of jurisdiction. The court, speaking by Mr. Justice Shiras, said,<sup>97</sup> "But it must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them." And later in a final hearing upon the merits, the same court, speaking by Mr. Justice Holmes, said,<sup>98</sup> "It is decided that a case such as is made by the bill may be a ground of relief"; — but a review of the evidence led to the decision that the bill was not proved, and ought to be dismissed without prejudice.

In *Georgia v. Tennessee Copper Co.*,<sup>99</sup> as well as in the cases by Missouri, Kansas, and Pennsylvania,<sup>100</sup> the court recognized the standing of the state to claim a federal remedy, and the jurisdiction of the court to provide it. The Act of 1899, which gave the state additional recognition, can hardly have taken that standing away.

Those suits were originally brought in the Supreme Court and hence there was no court below and no finding below. But in the *Des Plaines River* case, although there was a finding by the state court, that according to its standards the river was not a "navigable stream," still there was no finding of fact by the state court upon the other question, "Is it a navigable water of the United States?" The State, by its governor and attorney general, pursuant to the statute of the State, averred in its suit that Congress by the Acts of 1899, 1900, 1902, and 1910, the last of which appropriated \$1,000,000 for the improvement of the Des Plaines, had said in effect, "the Des Plaines is a navigable water of the United States," and that this inured to the benefit of the State. The state court, it contended, might find or decide that the Des Plaines was not a "navigable stream," but Congress had effectually impressed upon it the character of a "navigable water of the United States."

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<sup>97</sup> 180 U. S. 241.

<sup>98</sup> 200 U. S. 496, 520 (1906).

<sup>99</sup> 206 U. S. 230 (1907).

<sup>100</sup> See respectively notes 96, 98, 87, and 89, *supra*.



"Navigable stream" (by Illinois standard, judicial or other), and "navigable water of the United States," are not identical terms. The latter is the creation of Congress; and the final determination whether a stream for the improvement of which Congress has appropriated money is or is not navigable water of the United States must, *ex necessitate*, when denied by the state court, rest with the federal courts, which in turn will be guided by the action of Congress. These Acts of Congress having affixed this character upon the stream, and its navigable portion being wholly in Illinois, section 9 of the Act of 1899 gave the State a special right arising under the laws of the United States, upon which it should have been entitled either to maintain original suit in the Supreme Court of the United States, or — since it had sued under an act of Congress in the state court — to bring up for review in the United States Supreme Court the denial of the right it claimed. And on the claim by the state of the right under federal law to have the stream adjudged a navigable water of the United States by reason of these improvements of the navigability of the river by the concurrent action of the two governments, there had been no finding of fact, but only a decree sustaining a demurrer thereto.

The dismissal of the state's writ of error was rendered innocuous as to this particular stream by the subsequent decree enjoining the same dam in the suit by the Federal Government itself.<sup>101</sup>

#### V. RELATION OF FEDERAL AND STATE DECISIONS ON SAME RES

The supremacy of the federal judgment in matters within federal jurisdiction has been recognized from the beginning. Though an act of Congress may give exclusive jurisdiction to the federal courts for the enforcement of a federal right, state courts may in the absence of such provision exercise jurisdiction.

Although in the two *Des Plaines River Cases* diametrically opposite decisions were rendered as to the natural navigability, in actual fact, of one and the same river, the Supreme Court of the United States following its rule not to review facts, left each decision undisturbed.

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<sup>101</sup> Economy Light & Power Co. v. United States, 256 Fed. 792 (1919), *aff'd*, 41 Sup. Ct. Rep. 409 (1921).

That rule, while seemingly held to be the result of statute,<sup>102</sup> has occasionally been departed from, and notably in *Leovy v. United States*.<sup>103</sup> There Leovy, the defendant below and plaintiff in error was a state official who, in pursuance of a resolution of the Police Jury directing such action, had in 1895 built a dam across Red Pass, which "is not a natural stream, but is in the nature of a crevasse, caused by the overflow of water from the Mississippi River."<sup>104</sup> "The crevasse seems to have been formed some time before the grant by the United States to Louisiana."<sup>105</sup>

The Circuit Court found Leovy guilty of violating the Act of Congress of 1890 by damming a navigable water of the United States, and imposed a fine, which judgment was affirmed by the United States Circuit Court of Appeals. The Supreme Court weighed the evidence and reversed this, saying:

"Our conclusion, upon the record now before us, is that Red Pass, in the condition it was at that time when this dam was built, *was not shown by adequate evidence* to have been a navigable water of the United States, actually used in interstate commerce, and that the court should have charged the jury, as requested, that, upon the whole evidence adduced, the defendants were entitled to a verdict of acquittal."

This was a weighing of the evidence.

In the *Montello* case,<sup>106</sup> the court twice held erroneous the decisions below that the Fox River in Wisconsin was non-navigable; and in order to reach that conclusion it not only weighed the evidence before the court, but went outside the record and exercised the power of an appellate court to take judicial notice of what the trial court should itself have known judicially.

## VI. NEW LEGISLATION — THE FEDERAL WATER POWER ACT OF 1920

The River and Harbor Appropriations Act<sup>107</sup> of 1917 provided for a Waterways Commission to formulate plans for developing water resources for navigation,

<sup>102</sup> See *Egan v. Hart*, 188 U. S. 186 (1897).

<sup>103</sup> 177 U. S. 621 (1900).

<sup>104</sup> *Ib.*, 627.

<sup>105</sup> *Ib.*, 637.

<sup>106</sup> 11 Wall. (U. S.) 411 (1870), 20 Wall. (U. S.) 430 (1874).

<sup>107</sup> 40 STAT. AT L., ch. 49, p. 269 (Aug. 8, 1917).

"including therein the related questions of irrigation, drainage, forestry, arid and swamp land reclamation, clarification of streams, regulation of flow, control of floods, utilization of water power, prevention of soil-erosion and waste, storage, and conservation of water for agricultural, industrial, municipal, and domestic uses, co-operation of railways and waterways, and promotion of terminal and transfer facilities, to secure the necessary data, and to formulate and report to Congress, as early as practicable, a comprehensive plan or plans for the development of waterways and the water resources of the United States for the purposes of navigation and for every useful purpose."

That section was repealed in 1920 by the Federal Water Power Act.<sup>108</sup> Section 18 was all-comprising in scope, but called mainly for plans to be reported and considered. The Act of 1920 was more limited in scope; but it formulates a plan and puts it in force. The pending proposal to deliver Muscle Shoals in the Tennessee River to private interests involves a repeal (so far) of the Act of 1920. Congress by the Act of 1920 created in lieu of the Waterways Commission "The Federal Power Commission," composed of the Secretary of War, the Secretary of the Interior, and the Secretary of Agriculture. By this Act Congress adopts a definite policy of licensing, regulating, and renting water powers in the navigable waters of the United States. The Act adopts President Roosevelt's view that the use of public property should be regulated and paid for, neither prohibited entirely nor given away. Congressional committees made divers reports as to the constitutional power of the national government to exercise such control of water powers.<sup>109</sup> The Act is too long to be abstracted here; and it bristles with new questions, the discussion of which would require a series of articles and which will inevitably involve much new litigation and many new decisions. It is sufficient for our purposes to notice that it lays down the statutory definition of navigable waters of the United States which was quoted at the outset of this article.

One effect of this definition is to establish the rules contended

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<sup>108</sup> 41 STAT. AT L., ch. 285, p. 1063 (June 10, 1920); FED. STAT. ANN. SUPP. of 1920, p. 367.

<sup>109</sup> See REP. SENATE COM. ON COMMERCE, Congressional Record, April 30, 1908, pp. 5664-5667, adverse to President Roosevelt's recommendation that water power be conserved and rented ("sold"); it remarks: "The Federal Government has nothing to 'sell.'"

for by both state and federal governments in the *Des Plaines River Cases*, (1) that a stream which has been artificially improved is to be judged thenceforward in its improved condition; (2) that parts of a stream where natural obstacles prevent navigation are nevertheless protected; (3) that streams for whose improvement Congress has made provision, or which have been recommended to Congress for improvement by the United States Engineers, are "navigable waters of the United States," whether deemed navigable streams by state courts or not.

The *Des Plaines River Cases* present another instance of conflict between federal and state judicial powers:<sup>110</sup> but more important, they take their place among the decisions establishing federal control of inland waters, which include *Gibbons v. Ogden*,<sup>111</sup> the *Genesee Chief*,<sup>112</sup> the *Passenger Cases*,<sup>113</sup> the case of the *Wheeling Bridge*<sup>114</sup>: and the cases of the *Daniel Ball*,<sup>115</sup> the *Montello*<sup>116</sup> and the *Lake Front* case<sup>117</sup>; and these may be considered together as judicially registering our progress in the conservation of the navigable waters of the United States.

Merritt Starr.

#### CHICAGO, ILLINOIS.

<sup>110</sup> Among many such, see these navigation cases: — *Belden v. Chase*, 150 U. S. 674 (1893), reversing s. c., 117 N. Y. 637 (1889) (action in State Court for negligently navigating yacht and so sinking steam-boat: defendant claimed to be navigating in obedience to Federal Statute and navigation rules); *Harmon v. Chicago*, 147 U. S. 396 (1893), reversing s. c., 140 Ill. 374, 29 N. E. 732 (1892). (The city collected from Harmon, owner of tugs, license fees for navigating tugs in Chicago River within city limits. He paid under protest and sued to recover same. Judgment for city in state court reversed, on the ground that the city had no power to impose such license tax.)

<sup>111</sup> 9 Wheat. (U. S.) 1 (1824).

<sup>112</sup> 12 How. (U. S.) 443 (1851).

<sup>113</sup> 7 How. (U. S.) 283, 286 (1849).

<sup>114</sup> 13 How. (U. S.) 518 (1851).

<sup>115</sup> 10 Wall. (U. S.) 557 (1870).

<sup>116</sup> 11 Wall. (U. S.) 411 (1870); 20 Wall. (U. S.) 430 (1874).

<sup>117</sup> *Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387 (1892).

# HARVARD LAW REVIEW

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THE LAW SCHOOL ASSOCIATION. — All those interested in the Harvard Law School, and particularly its graduates, will be glad to learn of the formation by the Harvard Law School Association of a nation-wide network of local corresponding secretaries. The plan for this new system was adopted by the Association at the time of the Centennial Celebration. Secretaries have been chosen from the prominent graduates of the school, so distributed that the districts assigned to them will cover most of the country. A list showing the secretary for each district so covered will be found in the announcement on pages xxi-xxii, *infra*.

In general, the motive behind the new plan is the desire to strengthen the Law School Association and to increase its usefulness to the school. Such a broad-spread organization will be able to handle successfully problems whose solution could not otherwise be attempted.

The immediate objectives are:

1. To constitute these secretaries informal local representatives of the school, with whom young men desirous of information about it or graduates desirous of practising in a particular region may consult, and from whom they may obtain information or advice.

2. To increase the membership of the Association among graduates of the school. The number of members is growing rapidly, but more still are needed to allow the Association to attain its fullest usefulness. The larger it grows, the greater its power for binding together all the graduates in serving the school and the cause of legal education in general. Furthermore, increased receipts from membership will enable it

to continue to carry out for the school, on an even greater scale than in the past, such services as the publication of records, catalogues, and histories, the endowing of special libraries, the painting and presentation of portraits of certain professors, and the establishment of courses and special lectures.

3. To co-operate in the foundation of local scholarships for first-year men, and, if they are successfully established, to aid in the choice of the successful candidates for such scholarships. It has long been recognized that some financial assistance should be available to first-year men. Scholarships are even more urgently needed for them than for others, in order to enable good men of small means to get through what is usually the crucial year. But the difficulty of selection has always proved an obstacle, and the result is that there are a large number of scholarships open to second- and third-year men, and but very few open to first-year men.

The new system seems eminently suited to meet these problems in view of the scheme of its organization and its excellent personnel. Its source of power is the unselfish willingness expressed by those who have become local secretaries to give of their time and their strength for the service of the school. For their acceptance of their new responsibilities, with the unique opportunity they carry, the Association and the school owe these men a real debt of gratitude.

**THE LAW SCHOOL.** — The enrollment in the school this year has just missed attaining the thousand-mark. It is 908, which exceeds by fifty-three the record enrollment of last year. In the geographical distribution of the students there has been little change. The percentage of students in the entering class who come from outside New England continues to increase steadily, following the general trend in that direction of the past decade, and reaching in this year's entering class 77 per cent. Another indication of the broad appeal of the school is the fact that its thousand students represent one hundred eighty different colleges and universities.

The following tables show the registration figures for the entering classes of the last twelve years, the geographical sources from which these classes have been drawn, the division into classes for twelve years, and the colleges represented (as usual the figures are compiled as of the date of November 15.):

Class	Massachusetts		New England outside of Massachusetts		Outside of New England		Total in Class
	Number	Percentage	Number	Percentage	Number	Percentage	
1913	65	22	32	11	200	67	297
1914	73	25	44	15	172	60	289
1915	59	21	34	12	194	67	287
1916	59	22	23	9	179	69	261
1917	65	23	29	10	194	67	288
1918	81	26	39	12	188	62	308
1919	70	21	26	8	239	71	335
1920	25	26	5	5	66	69	96
1921	6	27	4	18	12	55	22

Class	Massachusetts		New England outside of Massachusetts		Outside of New England		Total in Class
	Number	Percentage	Number	Percentage	Number	Percentage	
1922	77	18	51	11	307	71	435
1923	49	14	37	10	277	76	363
1924	64	17	21	6	295	77	380

	1911-12	1912-13	1913-14	1914-15	1915-16	1916-17
Res. Grad. . . .	3	6	4	5	8	10
Third year . . .	219	176	169	167	177	213
Second year . . .	217	186	197	197	226	234
First year . . .	289	287	260	288	308	335
Unclassified . . .	76	84	64	68	66	64
Specials . . . .	4	5	1	5	1	2
	808	744	695	730	786	858

	1917-18	1918-19	*1919-19	1919-20	1920-21	1921-22
Res. Grad. . . .	5	3	—	8	11	8
Third year . . .	73	37	67	156	196	271
Second year . . .	87	24	66	221	285	245
First year . . .	96	36	153	438	363	380
Unclassified . . .	31	13	21	59	90	49
Specials . . . .	0	1	—	1	—	45
	292	114	307	883	945	998

In the present first-year class one hundred twelve colleges and universities are represented, as follows (the corresponding figures for the other two classes, at the time they entered, will be found in 34 HARV. L. REV. 198 and 33 HARV. L. REV. 86):

Harvard, 72; Yale, 24; Princeton, 18; Dartmouth, 17; Univ. of Michigan, 14; Univ. of California, Univ. of Pennsylvania, 9; Williams Coll., 8; Univ. of Wisconsin, 7; Bowdoin Coll., Univ. of Illinois, 6; Brown Univ., City Coll. (N. Y.), Holy Cross Coll., The Rice Institute, 5; Univ. of Georgia, Lafayette Coll., New York Univ., Univ. of North Carolina, Northwestern Univ., Ohio State Univ., Univ. of Oklahoma, Univ. of Virginia, Washington & Lee Univ., Wesleyan Univ. (Conn.), Amherst Coll., 4; Univ. of Chicago, Columbia Univ., Cornell Univ., Univ. of Pittsburgh, Pomona Coll., Univ. of Rochester, Rutgers Coll., Virginia Military Institute, 3; Univ. of Alabama, Baker Univ., Boston Coll., Carleton Coll., Univ. of Cincinnati, Colby Coll., Univ. of Delaware, Georgetown Univ., Hamilton Coll., Indiana Univ., Univ. of Iowa, Univ. of Kansas, Lehigh Univ., Marietta Coll., Univ. of Missouri, Univ. of Nebraska, Ohio Wesleyan Univ., Purdue Univ., Swarthmore Coll., Univ. of Texas, Trinity Coll. (Conn.), Union Coll. (N. Y.), Wabash Coll., Univ. of Washington, 2; Univ. of Akron, Bates Coll., Boston Univ., Brigham Young Univ., Cambridge Univ. (England), Case School of Applied Science, Catholic Univ. of America, Clark Coll., Colgate Univ., Univ. of Colorado, De Pauw Univ., Des Moines Univ., Emory Univ. (Atlanta), Fisk Univ., Univ. of Florida, Franklin & Marshall Coll., Furman Univ., George Washington Univ., Grinnell Coll., Hamline Univ.,

\* These figures are for the special session which began on February 3, 1919, and ended on

Heidelberg Univ., Illinois Coll., Iowa Wesleyan Coll., Kenyon Coll., Leland Stanford Jr., Univ., Univ. of Lille, Univ. of Maine, Univ. of Maryland, Massachusetts Institute of Technology, Michigan Agricultural Coll., Univ. of Minnesota, Mount Allison Univ., Muhlenberg Coll., New Hampshire State Coll., Univ. of New Mexico, Notre Dame Univ., Occidental Coll., Pennsylvania State Coll., Reed Coll., Ripon Coll., St. Louis Univ., Univ. of South Carolina, Syracuse Univ., Transylvania Coll., Trinity Coll. (N. C.), Tufts Coll., United States Naval Academy, Valparaiso Univ., Washington Coll. (Md.), West Virginia Univ., West Virginia Wesleyan Coll., Whitman Coll., Wittenberg Coll., Wofford Coll., Univ. of Wyoming, 1.

**IMMUNITY OF STATE EXECUTIVE FROM ARREST.** — On July 20, 1921, the grand jury of Sangamon County, Illinois, returned an indictment against Len Small, governor of the state, charging him with embezzlement of public funds during a previous term as State Treasurer. Counsel for Governor Small, appearing as *amici curiae*, urged that the governor was immune from arrest during his term of office and sought to have the clerk of the court restrained from issuing a *capias*. The court decided that there was no such immunity, and ordered the clerk to issue process and the sheriff to make the arrest, unless the governor voluntarily submitted to the jurisdiction of the court.<sup>1</sup>

The question of whether the chief executive of a state may be arrested on a criminal charge during his term of office has never been directly decided.<sup>2</sup> Nor is any express provision as to the question to be found in the constitution or statutes of Illinois. Certain officers are specifically exempted from arrest under certain circumstances,<sup>3</sup> but there is no such provision regarding the governor. He is made liable to impeachment,<sup>4</sup> but this does not exclude the possibility of criminal prosecution.<sup>5</sup>

<sup>1</sup> *People v. Small*, Ill. Circ. Ct., 7th Jud. Circ. (E. S. Smith, J.), decided July 27, 1921. The opinion may be found in the CHICAGO TRIBUNE for July 28, 1921. The governor refused to submit voluntarily to the jurisdiction of the court, and was arrested. He was released on bond, and the case is now awaiting trial, after a change of venue to Lake County.

<sup>2</sup> There are *dicta* taking the view of the principal case. See Attorney-General *ex rel. Bashford v. Barstow*, 4 Wis. 567, 762 (1856); *United States v. Kirby*, 7 Wall. (U. S.) 482, 486 (1869); *Martin v. Ingham*, 38 Kan. 641, 17 Pac. 162 (1888). But intimations to the contrary may be found. See *Latture v. Frazier*, 114 Tenn. 516, 86 S. W. 319 (1905); *State v. Holden*, 64 N. C. 829 (1870).

<sup>3</sup> Members of the legislature during sessions. See ILL. CONST., Art. IV, § 14. Electors while at the polls. *Ibid.*, Art. VII, § 4. Members of the militia while attending musters. *Ibid.*, Art. XIII, § 4. Judges and attorneys while attending court. See 1913 HURD'S REV. STATS. 107, § 9. In none of these cases does the immunity extend to cases of felony or breach of the peace. This in itself disposes of the argument that in the principal case the governor should be considered a member of the legislature, on account of his veto power, and hence exempt.

<sup>4</sup> See ILL. CONST., Art. V, § 15.

<sup>5</sup> *Ibid.*, Art. IV, § 24. "The party, [impeached] whether convicted or acquitted, shall, nevertheless, be liable to prosecution, trial, judgment and punishment according to law." In the Constitutional Convention an attempt was made to amend this section, so far as it applied to the governor, by adding the words "after the expiration of his term of office"; but this was debated and rejected. See 1 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1869-70, 792. This indicates that



The ordinary rule of the common law is that an official is not exempt from liability for his unlawful acts while in office,<sup>6</sup> even when he presumes to act as an official, but acts *ultra vires*.<sup>7</sup> The general policy is that "all men are equal before the law." *A fortiori*, election to a public office does not, in the ordinary case, carry with it immunity from prosecution for crime committed before such election. But there are certain exceptions to these general principles. Where the official is a personal sovereign, such as the King of England, or the personal representative of such a sovereign,<sup>8</sup> he is immune from all process, civil or criminal. It can hardly be contended that the governors of the several states come within this category. Another exception exists where the suit against the official is in substance a suit against the state,<sup>9</sup> which is clearly not the case here. Should there be a further exception in the case of the governor of a state *qua* governor?

One argument in support of the exemption is that the courts cannot enforce the arrest of the chief executive.<sup>10</sup> It is said that the ultimate sanction of the court's process is the military power of the state, which is under the control of the governor, and hence it will be vain for the court to attempt his arrest. But, as has been forcibly pointed out,<sup>11</sup> it must be presumed that the governor will obey the law, and will not call out the militia to prevent its enforcement. That he may act unlawfully is no reason why the court should refuse to enforce the law so far as it is able.<sup>12</sup>

It is also urged that the constitutional principle of the separation of

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the framers of the constitution did not intend that the governor should be exempt from arrest during his term of office. Nor can it be said that impeachment is a condition precedent to trial. If this were so, every subordinate official constitutionally liable to impeachment would be exempt from arrest until after impeachment; and where, as in the present case, the offense was one committed before election to office, trial would be impossible while the offender held office.

<sup>6</sup> *Burton v. United States*, 202 U. S. 344 (1906); *Williamson v. United States*, 207 U. S. 425 (1908). See 2 WILLOUGHBY, CONSTITUTIONAL LAW, 1062; DICEY, LAW OF THE CONSTITUTION, 7 ed., 185. See also *United States v. Kirby*, 7 Wall. (U. S.) 482, 486 (1868), and cases cited in note 7, *infra*.

<sup>7</sup> *Osborn v. Bank of the United States*, 9 Wheat. (U. S.) 738 (1824); *Davis v. Gray*, 16 Wall. (U. S.) 203 (1872); *United States v. Lee*, 106 U. S. 196 (1882). The English rule is the same. *Fabrigas v. Mostyn*, 1 Cowp. 161 (1775). This is in remarkable contrast to the *droit administratif* of the continental law. See DICEY, LAW OF THE CONSTITUTION, 7 ed., 324-401.

<sup>8</sup> *Fabrigas v. Mostyn*, *supra* (crown governor of a British colony).

<sup>9</sup> *Hagood v. Southern*, 117 U. S. 52 (1886).

<sup>10</sup> See *Rice v. Draper*, 207 Mass. 577, 93 N. E. 821 (1911); *State ex rel. Robb v. Stone*, 120 Mo. 438, 25 S. W. 376 (1894). These were cases of *mandamus*, but the court refused the writ because of inability to enforce obedience and not for constitutional reasons.

<sup>11</sup> See *Ekern v. McGovern*, 154 Wis. 157, 142 N. W. 595 (1913). See also Ballantine, "Is a Governor Privileged by his Office from Arrest and Prosecution for Crime?" 93 CENT. L. J. 111.

<sup>12</sup> A variant of this argument is one based on the pardoning power. It is said that although the governor is convicted, he will remain governor, and can pardon himself; and hence the court's action will be nugatory. Even if this were true, which may well be doubted, such a pardon would not completely wipe out the effects of the conviction. Under the constitution of the state, the misappropriation of public money, without more, makes the wrongdoer ineligible to public office. See ILL. CONST., Art. IV, § 4. The conviction would establish this, though there were a later pardon. See Williston, "Does a Pardon Blot Out the Offense?" 28 HARV. L. REV. 657.

powers<sup>13</sup> prevents the courts from in any way coercing or restraining the chief executive.<sup>14</sup> On this ground it is held by a majority of the states that the governor is not subject to *mandamus*, even as to acts purely ministerial,<sup>15</sup> and this is the settled rule in Illinois.<sup>16</sup> The rule as to injunction is generally said to be the same,<sup>17</sup> though it is significant that the Supreme Court of Illinois has considered on the merits two bills for an injunction against the governor.<sup>18</sup> But the refusal of the courts to control the chief executive's official acts by *mandamus* or injunction is not conclusive of the present case. There the court is controlling an official act; here it is enforcing the law against a person whose wrongful act has no connection with his official position. Moreover, though the arrest of the governor may indirectly interfere with his official acts,<sup>19</sup> the principle of the separation of powers is not thereby violated. The effect of that principle is to forbid any department of the government to exercise the power belonging to another, except within more or less elastic limits.<sup>20</sup> It is a rule of separation of function, not of special privileges and immunities. It may well be that when a court by *mandamus* or injunction controls the performance of an official act, it is exercising executive power, but this is certainly not the case when the executive is arrested, although his performance of his official duties may be hampered thereby. Nor is such indirect interference forbidden by a constitutional principle that no department of the government is to hamper any other in the performance of its duties. It is claimed by some that there is such a principle, which rests on the prac-

<sup>13</sup> This principle is expressly embodied in the constitution of Illinois. See ILL. CONST., ART. III.

<sup>14</sup> This is the principal argument urged in a recent article dealing with the principal case. See Gillespie, "A Governor cannot be Lawfully Arrested or Put upon Trial while in Office," 93 CENT. L. J. 149. Mr. Gillespie was of counsel for Governor Small.

<sup>15</sup> See MERRILL, *MANDAMUS*, §§ 92-96. The prevailing view is that *mandamus* will not issue even where the act is purely ministerial. But a few courts allow it in such cases. *McCauley v. Brooks*, 16 Cal. 11 (1860); *Cotten v. Ellis*, 7 Jones L. (N. C.) 545 (1860).

<sup>16</sup> *People ex rel. Billings v. Bissell*, 19 Ill. 229 (1857); *People ex rel. Harless v. Yates*, 40 Ill. 126 (1863); *People ex rel. Bruce v. Dunne*, 258 Ill. 441, 101 N. E. 560 (1913).

<sup>17</sup> *Mississippi v. Johnson*, 4 Wall. (U. S.) 475 (1866); *Frost v. Thomas*, 26 Colo. 222, 56 Pac. 899 (1899). See 2 HIGH, *INJUNCTIONS*, § 1326.

<sup>18</sup> *Hubbard v. Dunne*, 276 Ill. 598, 115 N. E. 210 (1917); *Mitchell v. Lowden*, 288 Ill. 327, 123 N. E. 566 (1919). But these cases may perhaps be reconciled with the prevailing view on the ground that in them the governor did not object to the jurisdiction. It has been held in Illinois that if the governor submits to the jurisdiction, the court may direct a *mandamus* to him. *People ex rel. Stickney v. Palmer*, 64 Ill. 11 (1872). But if the court has no constitutional power to act, it would seem that the fact of the governor's failure to object to the jurisdiction should be immaterial. This is the view taken in most states. *State ex rel. Robb v. Stone*, *supra*; *State ex rel. County Treasurer v. Dike*, 20 Minn. 363 (1874).

<sup>19</sup> See Gillespie, *op. cit.*, 152 *et seq.*

<sup>20</sup> See 1 STORY, *COMMENTARIES ON THE CONSTITUTION*, 3 ed., § 525. See also *Greenwood Cemetery Land Co. v. Routh*, 17 Colo. 156, 163, 28 Pac. 1125, 1127 (1892). Cf. THE *FEDERALIST*, No. 42. The doctrine of the separation of powers does not prevent the courts from taking jurisdiction in *no warrant* to determine who is *de jure* governor. *Attorney-General ex rel. Bashford v. Barstow*, *supra*; *State ex rel. Thayer v. Boyd*, 31 Neb. 682, 48 N. W. 739, 51 N. W. 602 (1891). Here there is an interference with the *de facto* operation of a coördinate department of the state government, but no exercise of executive power.

tical necessities of government.<sup>21</sup> But it is very doubtful whether an exception to the common-law denial of official immunity can be supported on this basis.<sup>22</sup> How much less, then, can a constitutional exemption, fixing an immutable rule which even the legislature cannot alter, be implied, in the absence of any constitutional provision even remotely bearing on the point.<sup>23</sup>

The most forcible argument in favor of executive immunity is the practical one. It is said that public policy demands that the governor be free to devote all his time to his official duties, unhampered by liability to stand trial in the criminal courts.<sup>24</sup> It must be admitted that this difficulty is a serious one, and that it has apparently prevailed in some cases where it was sought to compel the governor to testify as a witness.<sup>25</sup> But the alleged testimonial immunity of the chief executive had been severely criticized,<sup>26</sup> and it may well be doubted whether it exists.<sup>27</sup> Even if it does, it is submitted that the public policy that crime shall be punished according to law is weightier than that which requires all competent witnesses to testify. Further, in the subpoena cases, there was no positive statute to be construed away.<sup>28</sup> In dealing with the practical argument, little is to be gained by imagining possible extreme cases. It is not enough to show that the governor might conceivably be kept so busy answering vexatious criminal charges that the state government would be virtually without a head;<sup>29</sup> nor to point out, on the other hand, that a governor immune from arrest might conceiv-

<sup>21</sup> See W. T. Hughes, "Immunity for Governors," 54 CHICAGO LEG. NEWS, 51.

<sup>22</sup> See p. 188, *infra*.

<sup>23</sup> See *Martin v. Ingham*, 38 Kan. 641, 645, 17 Pac. 162, 165 (1888). "There is no express provision in the constitution, nor in any statute, exempting any member of the executive department, chief or otherwise, from being sued in any action . . . civil or criminal . . ., or from being liable to any process or writ properly issued by any court . . .; and if any one of such officers is exempt . . ., it must be because of some hidden or occult implications in the constitution or statutes, or from some inherent and insuperable barriers founded on the structure of the government itself. . . . Ordinarily, constitutional limitations must be traceable to express provisions; here there are none, while the traditional common law as to official immunity is the other way. See COOLEY, CONSTITUTIONAL LIMITATIONS, 6 ed., 201. An express provision is especially needed when dealing with the executive department, since the constitution of Illinois is construed as a grant to the executive and judiciary, and a limitation on the legislature, so that any residuary powers are in the latter. *Field v. People ex rel. McClelland*, 3 Ill. 79 (1842).

<sup>24</sup> See Gillespie, *op. cit.*, 153. Cf. 10 JEFFERSON, WORKS, ed. by Ford, 403-405.

<sup>25</sup> See *Thompson v. Railroad Co.*, 22 N. J. Eq. 111 (1871); Appeal of Hartranft, 85 Pa. St. 433 (1877). But see note 24, *infra*. See also 23 HARV. L. REV. 633.

<sup>26</sup> See 4 WIGMORE, EVIDENCE, 2 ed., § 2371.

<sup>27</sup> See *United States v. Burr*, Fed. Cas. 14,692d (1809); 23 HARV. L. REV. 633. The cases cited in favor of the supposed exemption are not square decisions. In *Thompson v. Railroad Co.*, *supra*, the subpoena was issued, but the court in its discretion refused to commit the governor for contempt for failure to obey. In Appeal of Hartranft, *supra*, the case really turned on the privileged character of state secrets.

<sup>28</sup> See note 30, *infra*.

<sup>29</sup> That the disastrous consequences, which some supporters of gubernatorial immunities seem to fear, are not likely to follow is shown by experience in England. The prime minister and other cabinet members are, of course, liable to arrest and to civil process. See *King v. Lords Commissioners of the Treasury*, 5 N. & M. 589 (1835); *Ellis v. Earl Grey*, 6 Sim. 214 (1833). Yet we do not hear of the English government being hampered by continual vexatious criminal prosecutions against the prime minister.

ably commit crimes with impunity. If such situations arise, they will be met by extra-legal action. The real question is whether executive immunity from arrest is of sufficient practical necessity to require a departure from the traditional Anglo-American principle of equality before the law, and to justify reading an exception into criminal statutes in their terms absolute.<sup>30</sup> To give an elected governor the personal immunity of an hereditary king is so contrary to the spirit of American institutions that a greater practical necessity than exists in this case should be required in order to reach that result.<sup>31</sup>

Judicial readiness to resist the executive prerogative when carried beyond its legal limits has been one of the glories of the common-law tradition. Bacon to the contrary notwithstanding, the judges have not been "lions under the throne." The action of the Illinois court in this case, in the face of a threat by the governor to call out the militia to resist arrest, is reminiscent of Coke's sturdy resistance to James I in the famous *Case of the Prohibitions*.<sup>32</sup>

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**EFFECT OF ABANDONMENT OF DOMICIL OF CHOICE.**—It is to the interest of organized society that the civil status of everyone be governable by some one system of civilized jurisprudence. In order to effectuate this interest, the law has built up the concept of domicile,<sup>1</sup> which may be described,<sup>2</sup> roughly, as a person's "legal home."<sup>3</sup> Obviously, this includes two elements—one of fact, the other of law. Where one has established his "domestic hearth" is a question of fact. But, since domicile is the legal conception of and not necessarily the actual home of a person, rules of law and circumstances of fact may not, at times, coincide. Thus, though it is factually possible for one to have any number of homes or none at all, it is axiomatic in the common law that no person can at the same time have more than one domicile,<sup>4</sup> and that everyone must

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<sup>30</sup> The procedure following the return of an indictment is entirely regulated by statute. See 1913 HURD'S REV. STATS. 877, §§ 414-420. It is provided that the judge *shall* fix the amount of bail (§ 414), that the clerk of court *shall* issue process of *capias* (§ 415), and that the sheriff *shall* make the arrest (§ 417). None of these officials are given any discretion in the matter.

<sup>31</sup> It may be argued that no one could take the governor's place in case he is convicted. The constitution provides for the conduct of the government in case of death, conviction on impeachment, failure to qualify, resignation, absence from the state, or "other disability" of the governor. See ILL. CONST., Art. V, § 17. This would seem to cover arrest and imprisonment, which is certainly a "disability." It is hardly a case for the application of the maxim of *eiusdem generis*.

<sup>32</sup> 12 Co. 63 (1607).

<sup>1</sup> Both the term "domicil" and the legal idea which it represents were conceived in the Roman law. See 4 PHILLIMORE, INTERNATIONAL LAW, 3 ed., § 38. The common-law theory of domicile did not begin to take shape until the reign of Charles II. See 2 BURGE, COMMENTARIES ON COLONIAL AND FOREIGN LAWS, 1908 ed., 15. And see *In re Capdevielle*, 2 H. & C. 985, 1018 (1864).

<sup>2</sup> Eminent authorities have found difficulty in agreeing upon an exact definition of domicil. See DICEY, DOMICIL, Appendix, n. 1.

<sup>3</sup> See BEALE, SUMMARY, CONFLICT OF LAWS, § 28.

<sup>4</sup> *Abington v. North Bridgewater*, 23 Pick. (Mass.) 170 (1840). There are no cases *contra*. There are, however, strong *dicta* asserting the possibility of double domicil. See *In re Capdevielle*, *supra*, at 1018. It has been suggested that a person may, at the

have a domicile somewhere.<sup>5</sup> Consequently, while this relation between person and place is usually a natural one, it must sometimes be determined by arbitrary rules of law.<sup>6</sup>

There is necessity for the application of such a rule in determining the effect of the abandonment of a present domicile. Where, without more, one abandons his domicile of origin<sup>7</sup> with intent never to return, it is agreed that the old domicile is retained.<sup>8</sup> If, however, a domicile of choice had been acquired, and then abandoned, there is a decided conflict in the authorities as to the location of the domicile *in itinere*. Is there a valid distinction between these cases?

An understanding of this question involves an examination of the bases of domicile. The reasons for choosing domicile<sup>9</sup> as the determinant of civil status rest both in justice and expediency. For not only is it fair that the personal law which governs one should be that of the place he has chosen as his home, but it is also at that place that he is most consistently within reach of the sovereign's power. Since these considerations underlie the

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same time, have different domicils, but for different purposes. See *Somerville v. Somerville*, 5 Ves. Jr. 750, 786 (1801). And see 4 PHILLIMORE, *op. cit.*, c. 5. But this seems to be the result both of an over-caution and a confusion of domicile with residence. See DICEY, *DOMICIL*, 62-65.

Double domicile seems to have been possible in Roman law. See DIG. 50, t. 1, l. 5. See 34 HARV. L. REV. 543, n. 4. Modern civilians accord. See DONELLUS, *DE JURE CIVILI*, l. 17, c. 12. But the existence of a later domicile is ignored, for one draws his personal law from the earliest established domicile still adhering to him. See 8 SAVIGNY, *SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS*, § 359. The result reached is thus practically the same as that of the common law.

<sup>5</sup> *Shaw v. Shaw*, 98 Mass. 158 (1867); *Udny v. Udny*, L. R. 1 H. L. Sc. App. 441, 453, 457 (1869). But see *Matter of Grant*, 83 Misc. 257, 266, 144 N. Y. Supp. 567, 573 (1913). The Roman law was *contra*. See DIG. 50, t. 1, l. 27 (2). And so in the later civil law. See VOET, *AD PANDECTAS*, l. 5, t. 1, no. 92. But, though the old domicile ceased upon abandonment, the subjection of the person to its laws continued. See 8 SAVIGNY, *op. cit.*, § 359. The result reached is thus only theoretically different from that of the common law. But see *Interdiction of Dumas*, 32 La. Ann. 679 (1880). And see GERMAN CIVIL CODE, § 7.

<sup>6</sup> It is for the law of the *forum*, and for that law only, to define the operative facts and rules of law which make up domicile. See J. H. Beale, "The Progress of the Law, 1919-1920, The Conflict of Laws," 34 HARV. L. REV. 50. And see 28 YALE L. J. 810, 813.

<sup>7</sup> Every person, at birth, is assigned by the law the domicile of the person with whom he is legally bound to live. In Roman law, if the infant were legitimate, it took the domicile of its father. See CODE, 10, t. 31, l. 36. And, if illegitimate, that of its mother. See DIG. 50, t. 1, l. 9. The common law accords. *In re Craignish*, [1892] 3 Ch. 180; *Blackstone v. Seekonk*, 8 Cush. (Mass.) 75 (1851).

Some writers define domicile of origin as the domicile of the child when he reaches majority. See 2 LAURENT, *PRINCIPES DE DROIT CIVIL FRANÇAIS*, 3 ed., § 73; WESTLAKE, *PRIVATE INTERNATIONAL LAW*, 2 ed., § 245. But the authorities are *contra*.

<sup>8</sup> *Somerville v. Somerville*, 5 Ves. Jr. 750 (1801); *Gilman v. Gilman*, 52 Me. 165 (1863); *Bell v. Kennedy*, L. R. 1 H. L. Sc. App. 307 (1868). But see *Matter of Rice*, 42 Mich. 528, 4 N. W. 284 (1880); *Brown v. Beckwith*, 58 W. Va. 140, 143, 51 S. E. 977, 978 (1905).

<sup>9</sup> Allegiance, rather than domicile, has been suggested as the criterion from which the consequences of civil status should flow. See MINOR, *CONFLICT OF LAWS*, § 66, n. 7. This was the rule in the ancient state. See FOOTE, *PRIVATE INTERNATIONAL JURISPRUDENCE*, 4 ed., xl. And it is recovering its pre-eminence on the Continent. See BAR, *LEHRBUCH DES INTERNATIONALEN PRIVAT- UND STRAFRECHTS*, § 30 (Gillespie's translation, 110). And see STAT. 24 & 25 VICT., c. 121. But the common law has clung to the test of domicile. *Brunei v. Brunei*, L. R. 12 Eq. Cas. 298 (1871). See 23 HARV. L. REV. 211.

continued recognition of domicile as a valuable criterion of personal law, they should be satisfied whenever a change of domicile occurs. Consequently, in order to acquire a new domicile, there must not only be an intent<sup>10</sup> to make the new place a home, but that *animus* must be coexistent with the *factum* of actual presence<sup>11</sup> there. After an abandonment of present domicile and before these two requirements are satisfied in the acquisition of a new, there is necessity for an arbitrary rule of law fixing the domicile. Following analogies<sup>12</sup> in other branches of the law, the general rule is that the old domicile persists.<sup>13</sup>

The English rule,<sup>14</sup> however, varies from this where there is an abandonment of a domicile of choice. In such case, it is held that the original domicile, which is merely kept in abeyance by the person's positive act and intent, immediately reverts, to be pushed aside again only on the

<sup>10</sup> *Bell v. Kennedy*, *supra*; *Dupuy v. Wurtz*, 53 N. Y. 556 (1873). But see *Hicks v. Skinner*, 72 N. C. 1 (1875). Unexplained continued presence is presumptive evidence of intent. *Bruce v. Bruce*, 2 B. & P. 229, note (1790). The early English cases required an intent to remain "permanently" in the new home. *Bempde v. Johnstone*, 3 Ves. Jr. 198 (1796). But later opinions substituted an intent to remain "indefinitely." *Att'y Gen'l v. Pottinger*, 6 H. & N. 733 (1861). In this country, a less settled intention will suffice, as, e.g., to stay until one can find a better place. *Wilbraham v. Ludlow*, 99 Mass. 587 (1868).

The Scotch law requires an intent to acquire a new civil status. *Donaldson v. McClure*, 20 Sc. Sess. Cas., 2d Sess., 307 (1857). And such seemed to be the unconsidered opinion of some of the early English judges. See *Moorhouse v. Lord*, 10 H. L. Cas. 272 (1863); *Att'y Gen'l v. Countess de Wahlstatt*, 3 H. & C. 374, 387 (1864). This view is maintained by some writers. See 2 FRASER, HUSBAND AND WIFE, 2 ed., 1265. But the common-law authorities are clearly *contra*. *Douglas v. Douglas*, L. R. 12 Eq. Cas. 617 (1871). See J. H. Beale, *supra*, 34 HARV. L. REV. 50, 52. And see DICEY, DOMICIL, 80, note 2.

<sup>11</sup> *Goods of Raffanel*, 3 Sw. & Tr. 49 (1863); *Talmadge v. Talmadge*, 66 Ala. 199 (1880). The presence at the new domicile, which may be momentary, must be actual. *Lyll v. Paton*, 25 L. J. Ch. 746 (1856); *Williams v. Roxbury*, 12 Gray (Mass.) 21 (1858). It was at one time thought that a new domicile could be acquired upon *death in itinere* toward an intended home. See *Munroe v. Douglas*, 5 Madd. 379, 405 (1820). And later, that it would suffice if the person merely *be en route*. See *Forbes v. Forbes*, Kay, 341, 354 (1854). And see 1 WHARREN, CONFLICT OF LAWS, 3 ed., § 58. But this notion has now been rejected by the highest authorities. *Lyll v. Paton*, *supra*; *Graham v. Public Administrator*, 4 Bradf. (N. Y.) 127 (1856).

<sup>12</sup> There is a close analogy between possession and domicile. As the state has an interest in not having chattels without possessors, so has it an interest in not having persons without domicils. Consequently, in the absence of actual possessor or home, it posits a continuance of possession or domicile. Cf. 1 DEMOLOMBE, COURS DE CODE NAPOLÉON, 4 ed., § 351. So also, for this purpose, is there a possible parallel between nationality and domicile. See *Ex parte Weber*, [1916] 1 K. B. 280 n, 283. But see *Stoeck v. Public Trustee*, [1921] 2 Ch. 67, 79. See RECENT CASES, *infra*, p. 210.

<sup>13</sup> Opinion of the Justices, 5 Metc. (Mass.) 587 (1843); *Gilman v. Gilman*, 52 Me. 165 (1863). This principle lies at the bottom of most of the rules as to acquisition and change of domicile, and is to be distinguished from a mere presumption of continued intent to retain the old home. *Att'y Gen'l v. Rowe*, 1 H. & C. 31 (1862).

<sup>14</sup> *Udny v. Udny*, L. R. 1 H. L. Sc. App. 441 (1869), overruling *Munroe v. Douglas*, *supra*; *King v. Foxwell*, L. R. 3 Ch. D. 518 (1876). The English rule is followed in Scotland. *Colville v. Lauder*, 17 Morison Dict. Dec., tit. Succession, 14963, Appendix 1. (1800). But it seems not to be held on the Continent. See JACOBS, DOMICIL, § 202.

The leading decision seems to have rested upon English Prize Cases. The *Indian Chief*, 3 C. Rob. Adm. 12 (1801); *La Virginie*, 5 C. Rob. Adm. 98 (1804). These involve national character in time of war and are wholly unsafe as guides in ordinary cases of civil domicile. See DICEY, DOMICIL, Appendix, note 3.

attainment of another actual home.<sup>15</sup> This "reverter theory" is artificial in the extreme. There seems to be no valid basis for imposing upon a man a domicile in a country which he may never have seen and to which he may never intend to go. Accordingly, the weight of American authority has repudiated this rule.<sup>16</sup> A few cases<sup>17</sup> in this country have suggested that, while it might be applicable to a situation where the abandoned domicile of choice was foreign to the original domicile, it should not be followed where both domicils were under one national flag. The basis of domicile in common-law jurisdictions is not allegiance,<sup>18</sup> but a home in a legal territorial unit. This so-called "quasi-national view"<sup>19</sup> accedes to an unwarranted distinction, and cannot be supported on authority.<sup>20</sup>

While it is clear that most American jurisdictions do not fully accept the English doctrine, many *dicta*<sup>21</sup> and most of the few cases<sup>22</sup> which have arisen on the point adopt a modified rule first announced by Judge Story.<sup>23</sup> Under this view, the domicile of origin would revert immediately upon the abandonment of the domicile of choice when, and only when, the person has given up his acquired domicile with fixed present intent to establish a home in the land of original domicile.<sup>24</sup> There seems no reason for

<sup>15</sup> The court seems to have been influenced by the then idea of perpetual allegiance. Doubt was once expressed whether an Englishman could change his English domicile. See *Curling v. Thornton*, 2 Add. 6, 17 (1823). This doubt was soon put at rest. *Stanley v. Bernes*, 3 Hagg. Eccl. 373 (1830). And, to-day, every person who is *sui juris* and capable of controlling his personal movements may change his domicile at pleasure.

<sup>16</sup> *First National Bank v. Balcom*, 35 Conn. 351 (1868); *Succession of Steers*, 47 La. Ann. 1551, 18 So. 503 (1895). See *Plant v. Harrison*, 36 Misc. 649, 655, 74 N. Y. Supp. 411, 415 (1902). But see, *contra*, *Bremme's Estate*, 13 Pa. Co. Ct. 177 (1892). Much influenced by the English views of birth, locality, and family history, *Udny v. Udny* is said not to be applicable to conditions in this country. See *Succession of Steers*, *supra*, at 1553. And the American judges have frequently laid down the general rule broadly, without noting the English exception. *Borland v. Boston*, 132 Mass. 89, 95 (1882). See BEALE, SUMMARY, CONFLICT OF LAWS, § 32.

<sup>17</sup> *First National Bank v. Balcom*, *supra*; *Succession of Steers*, *supra*.

<sup>18</sup> See note 9, *supra*.

<sup>19</sup> See JACOBS, DOMICIL, § 207.

<sup>20</sup> *Church v. Rowell*, 49 Me. 367 (1861). See *Valentine v. Valentine*, 61 N. J. Eq. 400, 406, 48 Atl. 593, 595 (1901). And it is to be noted that *Udny v. Udny* itself concerned a case in which the state of original domicile and that of acquired domicile were component parts of the same nation.

<sup>21</sup> See *Miller's Estate*, 3 Rawle (Pa.), 312, 319 (1832); *State v. Hallett*, 8 Ala. 159, 161 (1845); *Russell v. Randolph*, 11 Tex. 460, 464 (1854); *Reed's Appeal*, 71 Pa. St. 378, 383 (1872); *Sheldon v. Forsman*, 17 Lanc. L. Rev. (Pa.) 85, 87 (1899); *Denny v. Sumner County*, 134 Tenn. 468, 476, 184 S. W. 14, 16 (1916); *Stein v. Fleischmann Co.*, 237 Fed. 679, 680 (S. D. N. Y., 1916).

<sup>22</sup> *Matter of Wrigley*, 8 Wend. (N. Y.) 134 (1831); *Allen v. Thomason*, 11 Humph. (Tenn.) 536 (1851); *Mills v. Alexander*, 21 Tex. 154 (1858); *Re Walker*, 1 Lowell, 237 (U. S. D. Mass., 1868); *Kellar v. Baird*, 5 Heisk. (Tenn.) 39 (1871); *Bremme's Estate*, 13 Pa. Co. Ct. 177 (1892).

<sup>23</sup> See STORY, CONFLICT OF LAWS, 8 ed., § 47 (17). To the same effect is the decision of a Scotch court. *Colville v. Lauder*, *supra*.

<sup>24</sup> Mere intention to return to the domicile of origin at a future time is not sufficient. *Stanley v. Bernes*, 3 Hagg. Eccl. 373 (1830); *State ex rel. Graham, in re Toner*, 39 Ala. 454 (1864). Nor is mere return without abandonment of the acquired domicile. *Maxwell v. M'Clure*, 6 Jur. (N. S.) 407 (1860); *Williamson v. Parisien*, 1 Johns. Ch. (N. Y.) 389 (1815). The necessary *factum* to accomplish reverter is quitting the country of acquired domicile. *Goods of Raffanel*, 3 Sw. & Tr. 49 (1863). But the transit to the domicile of origin need not be direct. *Re Walker*, *supra*.

making this exception.<sup>25</sup> If intent alone be necessary, why does it not suffice to acquire a domicile of choice upon abandonment of the domicile of origin? The authorities are conclusive against this.<sup>26</sup>

A recent Iowa case<sup>27</sup> squarely rejects the distinction, and, it is submitted, properly. Once a domicile is imposed by operation of law or acquired *animo et facto*, that domicile should be retained until a new one is acquired upon the concurrence of the necessary mental and physical elements.<sup>28</sup> Too important consequences flow from domicile to admit of its law being encumbered with artificial exceptions and unnecessary distinctions. When general principles are arbitrarily tampered with, a regretted distinctive local jurisprudence naturally results in a field where uniformity is much desired.

**DUE PROCESS AND RETROSPECTIVE LEGISLATION.** — Retrospective legislation is not *per se* unconstitutional<sup>1</sup> in the United States. It may, however, be invalid because it runs athwart the due-process clause.<sup>2</sup> To what extent is it due process for a legislature to compel one man to surrender property to another, predicated its action on a past transaction which gave rise to no legal compulsion? Clearly, due process does not allow a legislature by mere fiat unpredicated upon some prior transaction to give B a claim against A.<sup>3</sup> It is suggested<sup>4</sup> that the same objection is valid in two other situations although the legislative fiat is there based upon some prior transaction: first, where the transactions of the parties have created a legal obligation, the remedy for which has been withdrawn by law, as by a statute of limitations; second, where the transactions created no legal obligation because of some irregularity. Such an analysis is sound in pointing out that A holds his property equally free from enforceable claims in the three cases, and so the legislature in substance legislates A's property to B.<sup>5</sup> That

<sup>25</sup> But see JACOBS, *DOMICIL*, § 191.

<sup>26</sup> See note 8, *supra*.

<sup>27</sup> *In re Jones' Estate*, 182 N. W. 227 (Ia., 1921). For the facts of this case, see RECENT CASES, *infra*, p. 202.

<sup>28</sup> *Cooper v. Beers*, 143 Ill. 25, 33 N. E. 61 (1892). See 33 HARV. L. REV. 863.

<sup>1</sup> *League v. Texas*, 184 U. S. 156 (1901); *Luria v. United States*, 231 U. S. 9 (1913); *Drehman v. Stifle*, 8 Wall. (U. S.) 595 (1869). It was early held that the prohibition as to *ex post facto* laws applied only to criminal matters. *Calder v. Bull*, 3 Dall. (U. S.) 386 (1798). In several states there are constitutional provisions expressly barring retrospective legislation, but the effect of such provisions is outside the scope of the present discussion.

<sup>2</sup> Of course retrospective legislation may also be unconstitutional as impairing the obligation of contracts, or as a usurpation of judicial power.

<sup>3</sup> See *Medford v. Learned*, 16 Mass. 215, 216 (1819).

<sup>4</sup> *Danforth v. Groton Water Co.*, 178 Mass. 472, 59 N. E. 1033 (1901).

<sup>5</sup> There are only a limited number of cases on the problem of the constitutionality of retrospective statutes, because in many cases the courts do not reach that question, having regard to the settled rule against construing statutes as retroactive unless there be express language which requires that construction. See COOLEY, *CONSTITUTIONAL PROHIBITIONS*, 7 ed., 529; ENDLICH, *INTERPRETATION OF STATUTES*, 362. This rule is qualified by holding that it is not applicable where a statute merely adds a remedy for an existing right and does not affect vested rights. In fact the statute is given a prospective effect entirely, viewing the situation as of the time the remedy is applied. *Berkowitz v. Arbib*, 230 N. Y. 261, 130 N. E. 288.



analysis does not, however, end the problem, for it should be due process to deprive A of his former freedom from claims against his property so long as the legislature does not act arbitrarily. To decide this question, it is necessary to consider the source and nature of the freedom with which A holds his property as illustrated by three typical situations.

First, there are cases where through a prior transaction A has incurred a legal obligation for which a remedy is offered by law, but A's property is free because the remedy is limited. For instance, all of A's property may be protected by statutory exemptions. Clearly, it is not arbitrary, and so is due process of law for a legislature to remove the exemptions although B secures property which A held in absolute freedom before the retrospective enactment.<sup>6</sup>

Second, there are cases where through a prior transaction A has incurred a legal obligation but the remedy for enforcing the obligation has been withdrawn. For instance, a recent New York case<sup>7</sup> holds that a legislature may remove the bar of a statute of limitations on a personal claim though the period has run. Such statutes merely withdraw the remedy offered by local law without affecting the legal obligation which remains enforceable by remedies offered in other jurisdictions.<sup>8</sup> Although before the legislature acted A's property was free under the laws of that jurisdiction,<sup>9</sup> it is not arbitrary to end that freedom by reestablishing a remedy for the existing obligation.<sup>10</sup>

Third, there are the more difficult cases where no legal obligation has arisen from the prior transaction because of the neglect of some legal formality, or the inclusion of some illegal element. The freedom of A's property is here based upon the fact that he never incurred a legal obligation and so his position is more nearly analogous to that of the person who objects to the creation of a claim against him by legislative fiat unpredicated upon any prior transaction. However, many cases go beyond the first and second situations suggested above where the fiat is based upon a transaction which created an actual legal obligation and hold that it is due process for the legislature to bind the parties to an obligation which a prior transaction would have created but for the

<sup>6</sup> *Myers v. Moran*, 113 App. Div. 427, 99 N. Y. Supp. 269 (1906); *Leak v. Gay*, 107 N. C. 468, 12 S. E. 312 (1890); *Bull v. Conroe*, 13 Wis. 233 (1860).

<sup>7</sup> *Hopkins v. Lincoln Trust Co.*, 187 N. Y. Supp. 883 (1921). For the facts of this case see RECENT CASES, *infra*, p. 202.

<sup>8</sup> *Bulger v. Roche*, 11 Pick. (Mass.) 36 (1831); *Williams v. Jones*, 13 East, 439 (1811); *Thompson v. Reed, etc.*, 75 Me. 404 (1883); *Home Ins. Co. v. Elwell*, 111 Mich. 689, 70 N. W. 334 (1897).

<sup>9</sup> Under the decisions in note 8 *supra*, it might be possible for the plaintiff to secure a judgment in a jurisdiction where the remedy is not barred, sue on that judgment in the state where the remedy for the original right is barred, and secure execution on the property in that state.

<sup>10</sup> *Campbell v. Holt*, 115 U. S. 620 (1885); *McEldowney v. Wyatt*, 44 W. Va. 711, 30 S. E. 239; *Orman v. Van Arsdell*, 12 N. M. 344, 78 Pac. 48 (1904). It is often suggested that the weight of authority is against these cases, but there is really very little authority because the courts construe the statutes as having only a prospective effect, or the statutes attempt to remove the bar where title to tangible property has vested by operation of the statute. It may well be held arbitrary for the legislature to upset proprietary titles by moulding a legal obligation out of a moral obligation to return the property. Such a result would be in accord with the reluctance of common-law courts to upset vested property rights.

absence of some technical requirement<sup>11</sup> or the presence of some ingredient against public policy.<sup>12</sup> The courts have thus upheld the legislatures in retrospectively repairing technical mistakes or validating contracts unenforceable because of illegality. A typical instance is found where the legislature validates a contract invalid at the time of negotiation because usurious.<sup>13</sup> Such decisions may be supportable<sup>14</sup> on the ground that it is not arbitrary for the legislature to give B a claim against A when it is predicated upon acts of the parties which almost consummated a legal obligation. It is not unreasonable to take away A's freedom from liability by discarding a legal formality or changing the public policy which prevented the obligation from arising. When the legislature goes beyond validating the substance of an obligation, however, and attempts to predicate one upon a transaction which did not approximate the creation of an obligation, it is not due process.<sup>15</sup> Such an attempt would be as arbitrary as to predicate a claim upon no previous transaction.

**POWER OF THE DIRECTORS OF A CORPORATION TO FILE A VOLUNTARY PETITION IN BANKRUPTCY FOR THE CORPORATION.** — The Bankruptcy Act of 1898,<sup>1</sup> as amended June 25, 1910, extended to a corporation the right to become a voluntary bankrupt.<sup>2</sup> Although, and indeed because the provisions of the act<sup>3</sup> regarding this matter are apparently unqualified, there has been considerable dispute as to their exact meaning and scope. The law is clear, although it is not expressly so provided in the act, that in the absence of statutory or charter restrictions, the directors of a corporation may file or authorize the filing of a voluntary

<sup>11</sup> *State v. Norwood*, 12 Md. 195 (1858); *Gibson v. Hibbard*, 13 Mich. 214 (1865); *Danforth v. Groton Water Co.*, 178 Mass. 472, 59 N. E. 1033 (1901).

<sup>12</sup> *Gross v. U. S. Mortgage Co.*, 108 U. S. 477 (1883); *Berry v. Clary*, 77 Me. 482 (1885); *Lewis v. McElvain*, 16 Ohio 347 (1847); *Hewitt v. Wilcox*, 1 Metc. (Mass.) 154 (1840); *Washburn v. Franklin*, 24 How. Pr. (N. Y.) 515 (1861).

<sup>13</sup> *Ewell v. Daggs*, 108 U. S. 143 (1883); *Welch v. Wadsworth*, 30 Conn. 149 (1861).

<sup>14</sup> Many courts avoid the real issue by applying some set formula, such as: "no vested right to do wrong," *Foster v. Bank*, 16 Mass. 245, 273 (1819); "curing irregularities," *Lane v. Nelson*, 79 Pa. 407 (1875); *Randall v. Krieger*, 23 Wall. (U. S.) 137 (1874); or "a party has no vested right to a defense based upon an informality not affecting his substantial equities," COOLEY, CONSTITUTIONAL PROHIBITIONS, 7 ed., 529. Such formulæ merely state a result and so should not be used to justify a decision. They tend to cover up the fact that in this class of cases A will be compelled to surrender his property by force of legislative enactment and that alone. The problem should receive a direct answer on the ground that the legislature has, or has not, acted arbitrarily and so without or with due process of law.

<sup>15</sup> *Medford v. Learned*, 16 Mass. 215 (1819); *Addoms v. Marx*, 50 N. J. L. 253 (1888); *Philip v. Heraty*, 147 Mich. 473, 111 N. W. 93 (1907).

<sup>1</sup> See 30 U. S. STAT. AT L., § 544.

<sup>2</sup> While the amendment of 1910 first gave to a corporation the right to become a voluntary bankrupt, yet as prior to this time a corporation could admit its insolvency and express its willingness to be adjudged a bankrupt, and get a friendly creditor to file a petition against it, the change in substance wrought by this amendment was not very great. See WILLISTON, CASES ON BANKRUPTCY, 2 ed., 107, note; BRANDENBURG, BANKRUPTCY, 4 ed., § 60.

<sup>3</sup> See § 4a. "Any person except a municipal, railroad, insurance, or banking corporation shall be entitled to the benefits of this act as a voluntary bankrupt."

petition in bankruptcy for the corporation.<sup>4</sup> But where a state court has appointed a receiver over a corporation there is a dispute as to the power of the directors, thereafter, to petition the corporation into voluntary bankruptcy.

In a recent decision<sup>5</sup> a district court annulled voluntary proceedings in bankruptcy by the directors of a corporation, and the appointment of a receiver thereunder by the federal court, where it appeared that by order of the state court a receiver had already been appointed, at the instance of the stockholders, on the ground that the directors and officers of the corporation were guilty of fraud and mismanagement. The argument of the court was, that the appointment of a receiver over the corporation by the state court deprived the bankruptcy court of its jurisdiction.<sup>6</sup> It is clear that such action by the state court does not effect the dissolution of the corporation.<sup>7</sup> To refuse, therefore, to adjudicate it bankrupt, merely because of the appointment of a receiver, is to deny it the right to a discharge to which it is entitled by the Bankruptcy Act.<sup>8</sup> Often such a question as is here presented is confused with the case where the state and federal courts have concurrent jurisdiction.<sup>9</sup> There the court first in possession of the *res* retains it.<sup>10</sup> But the court of bankruptcy, within the limits of the bankruptcy statute, has a jurisdiction superior to that of any state court;<sup>11</sup> and proceedings

<sup>4</sup> *In re Kenwood Ice Co.*, 189 Fed. 525 (D. Minn., 1911); *In re Foster Paint & Varnish Co.*, 210 Fed. 652 (E. D. Pa., 1914). See 1 COLLIER, BANKRUPTCY, 12 ed., 143; 3 FLETCHER, CYCLOPEDIA CORPORATIONS, § 1985. See also 2 ST. LOUIS L. REV. 97-105; 25 HARV. L. REV. 562.

<sup>5</sup> *Matter of Associated Oil Co.*, Bankrupt, 46 Am. B. Rep. 482 (E. D. La., 1921). For the facts of this case see RECENT CASES, *infra*, p. 202.

<sup>6</sup> The other ground advanced by the court, namely, that in view of the peculiar facts of the case the trustee who would have been elected by the creditors would have been one of the very officers who had been found guilty of mismanagement and fraud by the state court, is hardly tenable, the law being that the trustee selected by the creditors must be approved by the referee or judge. *Kiser Co. et al. v. Georgia Cotton Oil Co.*, 208 Fed. 548 (5th Circ., 1913).

<sup>7</sup> *Penna. Steel Co. v. N. Y. City Ry. Co.*, 198 Fed. 721 (2d Circ., 1912). See 1 WILLISTON, CONTRACTS, § 305. Even a corporation which has been adjudicated bankrupt is not thereby dissolved. *Nat'l Surety Co. v. Medlock*, 2 Ga. App. 665, 58 S. E. 1131 (1907). See 1 REMINGTON, BANKRUPTCY, 2 ed., § 451½. And, where a corporation has been dissolved by a decree of a state court, its life has been extended by a fiction to permit the creditors of the corporation to file an involuntary petition in bankruptcy against it in the federal court. See 22 HARV. L. REV. 447.

<sup>8</sup> *In re Marshall Paper Co.*, 102 Fed. 872 (1st Circ., 1900).

<sup>9</sup> Section 2 of the Bankruptcy Act conferred upon courts of bankruptcy two classes of jurisdiction: first, jurisdiction over the proceedings in bankruptcy initiated by the petition and ending with the distribution of the assets among the creditors and the discharge or the refusal to discharge the bankrupt; and second, jurisdiction, as an ordinary court, over suits at law or in equity in respect to the estate of the bankrupt. *Lathrop v. Drake*, 91 U. S. 516 (1875); *Bardes v. Hawarden Bank*, 178 U. S. 524 (1900). The first class of jurisdiction is exclusive. *Gibbons v. Trust and Savings Bank*, 225 Fed. 424 (W. D. Wash., 1915); *Bardes v. Hawarden Bank*, *supra*. See 1 COLLIER, BANKRUPTCY, 12 ed., 553.

<sup>10</sup> *Martin v. Oliver*, 260 Fed. 89 (8th Circ., 1919); *Matthews & Sons v. Webre Co.*, 213 Fed. 396 (E. D. La., 1914). See 1 COLLIER, BANKRUPTCY, 12 ed., 555. For a general discussion of the matter of concurrent jurisdiction in connection with this subject see 62 U. PA. L. REV. 718-721.

<sup>11</sup> *Bank of Andrews v. Gudger*, 212 Fed. 49 (4th Circ., 1914). See Jacob Trieber, "Relationship of State and National Courts," 42 AM. L. REV. 321, 324; Samuel

in the bankruptcy court take precedence over those instituted in the state court, unless the creditors by the proceedings in the state court have acquired an equitable lien (more than four months old) on the property of the bankrupt.<sup>12</sup> No such lien was involved in this case.

The result reached by the court is, however, sound<sup>13</sup> and may be supported on other grounds. Two cases must be distinguished: (1) Where the receiver has been appointed by the state court merely to administer the assets of the corporation; and (2) where the receiver has been appointed to take charge of the corporation because of the mismanagement and fraudulent conduct of its officers and directors. The effect of the appointment on the powers and authority of the officers and directors differs in each of these cases. Where the appointment is merely to preserve and administer the assets of the corporation, as at the instance of some local creditor, it is sound to hold that the directors may still file a voluntary petition in bankruptcy for the corporation. Such action might even be necessary to protect all the creditors of the corporation, and prevent some from obtaining a preference. Furthermore, the directors are still the directors of the corporation;<sup>14</sup> and are, therefore, the proper parties to assert its right to a discharge in bankruptcy. But where a receiver is appointed by the state court to take charge of the corporation because its directors have been found guilty of fraud or mismanagement, it is the intention of the court that the receiver shall forthwith supersede those directors, whose whole authority to represent the corporation shall cease.<sup>15</sup> The effect of such a decree in the state court is to declare that the directors are incompetent to act for the corporation. To permit them, thereafter, to file a voluntary petition in bankruptcy, as the petition of the corporation, would in effect be to disregard the decision of the state court. This the bankruptcy court may properly refuse to do.<sup>16</sup> Nor is this a denial of the corporation's right to a discharge, as it is still within the power of any one<sup>17</sup> who represents the corporate will to file for it a voluntary petition in bankruptcy. The fundamental distinction is between the case where the directors represent the corporate will and where they do not. On its facts the principal case falls within the second classification.

Furthermore, it is generally recognized that within the limits laid

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Williston, "Effect of a National Bankruptcy Law upon State Laws," 22 HARV. L. REV. 547.

<sup>12</sup> *Metcalf v. Barker*, 187 U. S. 165 (1902); *Pickens v. Roy*, 187 U. S. 177 (1902).

<sup>13</sup> No mention was made in the principal case of the case of *Zeitinger v. Hargadine McKittrick Co.*, 244 Fed. 719 (8th Circ. 1917), where the court reached the same result on almost identical facts.

<sup>14</sup> See HIGH, RECEIVERS, 4 ed., § 344 b.

<sup>15</sup> See HIGH, RECEIVERS, 4 ed., § 290. Many text writers and decisions fail to make any clear distinction as to the effect of the appointment of a receiver in these two situations.

<sup>16</sup> It is quite clear that the bankruptcy court has no authority to question the decision of the state court that the officers and directors of the corporation were guilty of fraudulent conduct and mismanagement. See BRANDENBURG, BANKRUPTCY, 4 ed., § 19.

<sup>17</sup> It is doubtful whether the receiver, who is an officer of the court, should be allowed to file a voluntary petition in bankruptcy for the corporation. It would be proper to permit newly elected directors to do so.

down by the Bankruptcy Act and the special rules of practice prescribed by the Supreme Court, bankruptcy proceedings are to be administered in accordance with the general principles of equity.<sup>18</sup> While the creditors of a corporation will not be permitted to object where the directors file a voluntary petition in bankruptcy,<sup>19</sup> yet in some cases it is reasonable to allow the stockholders to do so<sup>20</sup> for their relation to the corporation is more intimate than that of the creditors. The latter's sole claim is that the assets be kept unimpaired.<sup>21</sup> The former has a legally recognized interest in the life and welfare of the corporation.<sup>22</sup> Proceedings in bankruptcy do not deplete the corporate assets, but they do, usually, seriously injure, if not practically destroy, the corporation as a going concern. On equitable principles, therefore, and on analogy to cases where equity permits stockholders to sue or defend on behalf of the corporation whose directors fraudulently refuse to do so,<sup>23</sup> the bankruptcy court might well allow the stockholders to intervene where the directors are fraudulently, and in utter disregard of the corporate welfare, petitioning it into voluntary bankruptcy, and might, to prevent the unconscionable exercise of a legal right, refuse to entertain such a petition.

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**LIABILITY OF A *DE FACTO* CORPORATION IN TORT.** — Although, broadly speaking, a corporation exists *de facto* whenever associates assume without authority to act as a corporation,<sup>1</sup> the courts have rarely treated a group which has taken no further steps as more than a partnership.<sup>2</sup> But when there is a colorable compliance with a law authorizing incorporation, followed by purported corporate action, a *de facto* corporation exists in a restricted sense.<sup>3</sup> Here in certain cases and in favor of persons

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<sup>18</sup> *In re Kane*, 127 Fed. 552 (7th Circ., 1904); *In re Broadway Savings Trust Co.*, 152 Fed. 152 (8th Circ., 1907); *Zeiting v. Hargadine, etc.*, 244 Fed. 719 (8th Circ., 1917); *Bardes v. Hawarden Bank*, 178 U. S. 524 (1900). See 1 COLLIER, BANKRUPTCY, 12 ed., 25; BRANDENBURG, BANKRUPTCY, 4 ed., § 10.

<sup>19</sup> *In re Guanacevi Tunnel Co.*, 201 Fed. 316 (2d Circ., 1912); *In re Lachenmaier*, 203 Fed. 32 (7th Circ., 1913); *In re United Grocery Co.*, 239 Fed. 1016 (S. D. Fla., 1917). See BRANDENBURG, BANKRUPTCY, 4 ed., § 60. And see 2 ST. LOUIS L. REV. 97.

<sup>20</sup> *Zeiting v. Hargadine-McKittrick Dry Goods Co.*, *supra*. For a discussion of that case and the right of the stockholders to intervene in opposition to a petition filed by the directors of a corporation, see 3 SO. L. Q. 53-57.

<sup>21</sup> See *N. J. Ins. Co. v. Meeker*, 37 N. J. L. 282, 300; *Atwater v. Manchester Savings Bank*, 45 Minn. 341, 346, 48 N. W. 187, 189 (1891).

<sup>22</sup> *Beal v. Essex Savings Bank*, 67 Fed. 816 (1st Circ., 1895); *Storrow v. Texas Mfg. Assoc.*, 87 Fed. 612 (5th Circ., 1898); *Bijur v. Standard Distilling & Distributing Co.*, 74 N. J. Eq. 546, 70 Atl. 934 (1908).

<sup>23</sup> *Hawes v. Oakland*, 104 U. S. 450 (1881); *Bronson v. LaCrosse R. R. Co.*, 2 Wall. (U. S.) 283 (1863). See *In re Swofford Bros. Co.*, 180 Fed. 549, 553 (W. D. Mo., 1910).

<sup>1</sup> *Appleton Mutual Fire Insurance Co. v. Jesser*, 5 Allen (Mass.), 446, 448 (1862). "But when . . . persons were found . . . actually exercising the corporate powers, . . . they constituted a corporation *de facto*."

<sup>2</sup> *Bradley Fertilizer Co. v. So. Publishing Co.*, 1 Misc. 512, 17 N. Y. Supp. 587 (1892); *Harrill v. Davis*, 168 Fed. 187 (8th Circ., 1909).

<sup>3</sup> *Von Lengerke v. New York*, 150 App. Div. 98, 134 N. Y. Supp. 832 (1912); *Meramec Spring Park Co. v. Gibson*, 268 Mo. 394, 188 S. W. 179 (1916); *Spahr v. Farmers' Bank*, 94 Pa. St. 429 (1880); *Tulare Irr. Distr. v. Shepard*, 185 U. S. 1 (1902).

acting in *bona fide* reliance upon the corporate existence,<sup>4</sup> the same results are predicated as if the attempted incorporation had been successful. The extent of this doctrine is in much dispute, and the authorities are not clear whether it applies to the case of a tort by the agent of such a body.<sup>5</sup> But a recent New Jersey case<sup>6</sup> goes further, holding a *de jure* corporation liable for the tort of an agent of associates who had not colorably complied with the terms of the incorporation statute.<sup>7</sup>

A rigid rule appears in many *dicta*<sup>8</sup> that every *de facto* corporation in the narrower sense above is to be recognized by the courts as a legal unit, though a somewhat inferior one because destructible at the will of the state.<sup>9</sup> This rule fixes a definite level of attainment below which no legal unit, however inferior, can exist or act with corporate significance.<sup>10</sup> Only the *de facto* corporation above that level can be a legal unit, or be liable for its agent's torts. Upon this theory the principal case is clearly not supportable.

But this point of view, it is submitted, is unsound, infringing on the one hand an admittedly exclusive power of the legislature to create corporations<sup>11</sup> and on the other hand failing to explain many of the adjudicated cases, where the courts have refused to permit collateral attack upon corporations not *de facto* in the restrictive sense.<sup>12</sup> It seems, therefore, preferable to say that a *de facto* corporation is never a legal unit,

<sup>4</sup> See Edward H. Warren, "Collateral Attack on Incorporation," 20 HARV. L. REV. 456, note 13 (4).

<sup>5</sup> The authorities upon this subject are few. The balance, however, seems to favor tort liability. *Demarest v. Flack*, 16 Daly 337, 11 N. Y. Supp. 83 (1890); *Howard v. Long*, 142 Ga. 789, 83 S. E. 852 (1914); *Lamming v. Galusha*, 81 Hun 247, 30 N. Y.; Supp. 767 (1894). See *Chicago R. R. Co. v. Glenn*, 175 Ill. 238, 51 N. E. 806 (1898); *Pinkerton v. Pa. Traction Co.*, 193 Pa. St. 229, 44 Atl. 284 (1899). But cf. *Smith v. Warden*, 86 Mo. 382 (1885); *Vredenburg v. Behan*, 33 La. Ann. 627 (1881). And in criminal prosecutions, collateral attack is denied. *U. S. v. Amedy*, 11 Wheat. (U. S.) 392 (1826).

<sup>6</sup> *Frawley v. Tenafty Transportation Co.*, 113 Atl. 242 (1921). For the facts of this case, see RECENT CASES, *infra*, p. 203.

<sup>7</sup> 1896 N. J. COMP. STAT., p. 1604, § 10. The statute provided that an incorporating body, which had recorded its certificate with the county clerk, would become a corporation upon the date of filing said certificate with the Secretary of State. The defendant's certificate was recorded the day after the accident, and filed four days later.

<sup>8</sup> *Heaston v. Cincinnati R. R. Co.*, 16 Ind. 275, 278 (1861); *Hasselman v. U. S. Mortgage Co.*, 97 Ind. 365, 368 (1884). See *Snider's Son's Co. v. Troy*, 91 Ala. 224, 230, 8 So. 658, 660 (1890).

<sup>9</sup> See Charles E. Carpenter, "De Facto Corporations," 25 HARV. L. REV. 625.

<sup>10</sup> This level of attainment is determined by the courts in each jurisdiction. It might be possible to modify the rule, and consider the level as varying according to the circumstances of the case. This would require a reasonable consideration of the interests involved in each case, but would differ from the view contended for, *infra*, in that the common-law principle and legislative policy there mentioned would not be recognized as factors necessary to be overcome.

<sup>11</sup> See *People v. Mackey*, 255 Ill. 144, 156, 99 N. E. 370, 374 (1912). But see MORAWETZ, PRIVATE CORPORATIONS, §§ 652, 744; MACHEN, MODERN LAW OF CORPORATIONS, §§ 1, 19. See also *Robie v. Sedgwick*, 35 Barb. (N. Y.) 319 (1861).

<sup>12</sup> *Baltimore R. R. Co. v. Fifth Baptist Church*, 137 U. S. 568 (1890); *St. Louis R. R. Co. v. Belleville City R. R. Co.*, 158 Ill. 390, 41 N. E. 916 (1895); *M. E. Union Church v. Pickett*, 19 N. Y. 482 (1859).

but will be treated like one when public policy<sup>13</sup> or fairness between the parties<sup>14</sup> call with sufficient strength for a departure from common-law principles and from the legislative policy manifested in the requirements for incorporation. In proportion as the associates fail to attain those requirements the legislative policy against treating them as incorporated becomes stronger, so that more powerful considerations of policy or of fairness are necessary to override it. But no bright line can be drawn between those *de facto* corporations which will and those which will not for some purposes be treated as legal units. In each case opposing considerations are to be balanced.

This balance must be applied in three situations in fixing responsibility for the tort of an agent of a *de facto* corporation. First: the injured party may sue the associates individually. He has not consented to deal with them on a corporate basis, and clearly they should not be able to assert against him the corporate feature of limited liability to which they have not entitled themselves by compliance with the conditions precedent of the statute. Any consideration of fairness to the associates who acted in the belief that their liability was limited is outweighed by the hardship on the plaintiff in forcing him to bring a new action, on which the Statute of Limitations may have run, against a possibly insolvent *de facto* corporation. *A fortiori* is it insufficient to override common-law principles, especially when, because of a material failure to meet the statutory requirement, the legislative policy against treating the associates as incorporated is strong.

Second: the plaintiff may sue the *de facto* corporation. If he does so relying on the validity of its incorporation, the associates should not be permitted to disclaim corporate capacity to his prejudice, and he should share equally with other creditors who have dealt with the associates in the same reliance. But even if he knows at the time of suit that the corporation is not *de jure*, he should recover subject only to the rights of creditors who in good faith have dealt with the associates on the corporate basis and whose rights are therefore limited to the *de facto* corporate assets.<sup>15</sup> For if the plaintiff will accept a limited corporate liability in the place of a full individual liability, whether he sue the corporation or join the associates as defendants, is a mere matter of procedure;<sup>16</sup> and his choice to sue the corporation is eminently fair to the associates, who are thereby actually conceded the benefit of

<sup>13</sup> Especially where the *de facto* corporation has acted as a conduit of title. *Society Perun v. Cleveland*, 43 Ohio, 481 (1885).

<sup>14</sup> This interest would be paramount where there have been dealings between the parties on a corporate basis, as in contract cases. See Edward H. Warren, "Collateral Attack on Incorporation," 20 HARV. L. REV. 456, note 33.

<sup>15</sup> *Snider's Son's Co. v. Troy*, 91 Ala. 224, 8 So. 658 (1890). See WARREN, CASES ON CORPORATIONS, p. 610, note.

Difficulty might arise where creditors of the associates attempt to levy on property of the *de facto* corporation as property of the associates, and thereby come into conflict with the creditors of the *de facto* corporation. If the latter have relied upon this property as assets of the corporation, and the former have not relied upon it as assets of the associates, the corporate creditors should prevail. If, however, both have relied upon it as assets of their debtor, they should share equally.

<sup>16</sup> This is the converse of the problem presented where the *de facto* corporation is permitted to sue in tort. *Remington Paper Co. v. O'Dougherty*, 65 N. Y. 570 (1875).

limited liability. How far these considerations should move the courts when there is very material departure from the requirements for incorporation is debatable, but the procedural convenience, avoidance of inquiry into details of incorporation, and fairness to all parties may well override a fairly strong legislative policy against treating the associates as though incorporated.

The principal case presents another situation. Between the commission of the tort and the bringing of the suit, the *de facto* corporation has become *de jure*. To allow recovery against the *de jure* corporation is to grant a right against its assets to parties who have a valid remedy elsewhere, to the prejudice of creditors whose claims were acquired by dealing with the new corporation and whose only remedy is, therefore, against those assets. It imposes a pre-natal obligation upon the corporation and is analogous to allowing recovery against it for the tort of its promoters, which is clearly not permitted.<sup>17</sup> The holding of the principal case is therefore indefensible.

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## RECENT CASES

**AGENCY — PRINCIPAL'S LIABILITY TO THIRD PARTY IN CONTRACT — WHERE THIRD PARTY THINKS AGENT IS NOT WITHIN HIS AUTHORITY.** — The plaintiff's agent had authority to make contracts without confirmation by his principal. The agent entered into a contract with the defendant on behalf of the plaintiff. In an action by the plaintiff on another transaction, the defendant seeks to recoup for breach of this contract. The court instructed the jury that unless the defendant knew that the agent had authority to contract without confirmation, and relied on such authority, there was no contract. *Held* the instruction was erroneous. *North Alabama Grocery Co. v. J. C. Lysle Milling Co.*, 88 So. 590 (Ala.).

The case decides for the first time it is believed, whether a good contract results when an agent and a third party purport to make a contract which the latter mistakenly believes not to be within the scope of the agent's authority. The result could clearly not be reached on grounds of estoppel. But, as is now generally recognized, the fundamental principle on which the law of agency rests is not estoppel, but identity, *viz.*, that the acts of an agent within the scope of his authority are the acts of his principal. See *Wallace v. Fenwick*, [1893] 1 Q. B. 346. *Kinahan & Co., Ltd. v. Parry*, [1910] 2 K. B. 389. The principal case is merely a logical application of this doctrine. Nor is the opposite result required by principles of contract, because of the belief of the third party that he was not entering into a binding obligation with anyone. In the face of his expressed intent to contract, his silent mental attitude is immaterial. See 1 WILLISTON, CONTRACTS, §§ 21, 22.

**BANKRUPTCY — JURISDICTION OF FEDERAL COURTS — POWER OF THE DIRECTORS OF A CORPORATION TO FILE A VOLUNTARY PETITION AFTER THE APPOINTMENT OF A RECEIVER BY THE STATE COURT.** — A corporation, by its directors, filed a voluntary petition in bankruptcy and was at once adjudicated and a receiver appointed. It then appeared that a few days previous to these proceedings a state court of proper jurisdiction had, upon petition

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<sup>17</sup> *Stewart v. Mynatt*, 135 Ga. 637, 70 S. E. 325 (1911).



of stockholders, appointed a receiver over the corporation on the ground that the directors and officers were guilty of fraud and mismanagement. This receiver now prays that the federal court's adjudication and appointment of a receiver be set aside. *Held*, that the federal proceedings be annulled. *Matter of Associated Oil Co., Bankrupt*, 46 Am. B. R. 482 (E. D. La.).

For a discussion of the principles involved, see NOTES, *supra*, p. 195.

**BILLS AND NOTES — PURCHASERS FOR VALUE WITHOUT NOTICE — RECOVERY OF STIPULATED ATTORNEYS' FEES BY PLEDGEE WHERE MAKER HAS DEFENSE AGAINST PAYEE.** — A note made by the defendant, containing a stipulation for the payment of ten per cent as attorneys' fees, in case it should be placed in the hands of an attorney for collection, was transferred by the payee to the plaintiff as collateral security for credit then advanced. A defense of fraud by the payee was proved. The amount of the note was greater than the debt it was pledged to secure. *Held*, that the plaintiff be allowed to recover the amount of his claim against the payee, plus ten per cent thereof as attorneys' fees. *Buller Bros. v. Dunsworth*, 233 S. W. 311 (Tex. Civ. App.).

It is well settled that the *bona fide* pledgee of a note to which the maker has a defense, may recover only the amount of the debt secured. *Stoddard v. Kimball*, 6 Cush. (Mass.) 469; *Elk Valley Coal Co. v. Third Nat. Bank*, 157 Ky. 617, 163 S. W. 766. See NEGOTIABLE INSTRUMENTS LAW, § 27. It would seem that the logic of the rule stated is this: the pledgee is a holder in due course, but if he recovered the full amount of the note he would have to hold everything above the amount of the debt secured, in trust for the pledgor; the maker could recover that amount from the wrongful pledgor; hence to avoid circuity of action he is given a direct defense against the pledgee. See *Stoddard v. Kimball*, *supra*, at 471, 11 HARV. L. REV. 194. See also *Maitland v. Citizens' Nat. Bank*, 40 Md. 540; *Bailey v. Inland Empire Co.*, 75 Ore. 309, 146 Pac. 991. On this reasoning the pledgee's recovery is limited to the amount of the pledgor's debt, as determined by the agreement between him and the pledgor. This is in every case a question of fact. Perhaps it is possible, by implication, to incorporate into this agreement the provision as to attorneys' fees, where, as in the principal case, the note is pledged as security for a present advance. But where it is pledged as security for an antecedent debt, the stipulation for the payment of ten per cent, if the note is placed with an attorney for collection, can have no effect upon the original agreement between pledgor and pledgee. See *Citizens' Bank v. Limpricht*, 93 Wash. 361, 160 Pac. 1046. The particular point does not appear to have been adjudicated before.

**CONFLICT OF LAWS — DOMICIL — EFFECT OF ABANDONMENT OF DOMICIL OF CHOICE.** — Decedent, born in Wales of parents who were domiciled there, left when thirty-three years of age, for America. He married, settled in Iowa, and remained there for thirty-two years, having become a naturalized citizen of the United States. He left Iowa with fixed present intent to return to and re-establish his home in Wales. He was drowned *in itinere*. The question was, which law governed the disposition of his personal property. *Held*, that the decedent was domiciled in Iowa at the time of his death, and that the law of that jurisdiction should govern. *In re Jones' Estate*, 182 N. W. 227 (Ia.).

For a discussion of the principles involved, see NOTES, *supra*, p. 189.

**CONSTITUTIONAL LAW — DUE PROCESS — VALIDITY OF RETROSPECTIVE LEGISLATION.** — Action was begun September 2, 1920, to recover for fraud alleged to have occurred August 20, 1912. The six-year period allowed by statute had expired on August 20, 1918, but the method of computation was

changed by a statute passed September 1, 1920, providing that the period should start running on a claim for fraud when the fraud was discovered. The complaint set forth the date of discovery of the fraud as May 1, 1919. The defendant moved for judgment on the pleadings. *Held*, that the motion be denied. *Hopkins v. Lincoln Trust Co.*, 187 N. Y. Supp. 883 (Sup. Ct.).

For a discussion of the principles involved, see NOTES, *supra*, p. 193.

**CONSTITUTIONAL LAW — SEPARATION OF POWERS — IMMUNITY OF GOVERNOR FROM ARREST.**—The Governor of Illinois was indicted for embezzlement alleged to have been committed during a previous term as State Treasurer. *Held*, that he is liable to arrest and trial during his term of office. *People v. Small*, Ill. Circ. Ct., 7th Jud. Circ., decided July 27, 1921 (not officially reported).

For a discussion of the principles involved, see NOTES, *supra*, p. 185.

**CORPORATIONS — CORPORATIONS DE FACTO — LIABILITY OF CORPORATION FOR TORT OF ASSOCIATES BEFORE INCORPORATION.**—The plaintiff was injured in a collision between two auto busses operated by associates who later incorporated as the defendant corporation. The busses had been purchased in the corporate name two days before the accident. At the same time, a certificate of incorporation had been drawn and signed. A statute provided that an incorporating body which had previously recorded its certificate with the county clerk should become a corporation upon the date of filing said certificate at the office of the Secretary of State. (1896 N. J. COMP. STAT., p. 1604, § 10.) The certificate was recorded the day after the accident and filed four days thereafter. *Held*, that the defendant corporation is liable. *Frawley v. Tenafly Transportation Co.*, 113 Atl. 242 (N. J.).

For a discussion of the principles involved, see NOTES, *supra*, p. 198.

**CORPORATIONS — DIRECTORS AND OTHER OFFICERS — POWER OF DIRECTORS: VOLUNTARY PETITION IN BANKRUPTCY UNDER CHARTER FORBIDDING DIRECTORS TO ASSIGN.**—The charter of a corporation provided that the directors should have authority to dispose of the whole property of the corporation with the consent of the stockholders. By resolution of the board of directors, without the consent of the stockholders, the corporation filed a voluntary petition in bankruptcy. *Held*, that the adjudication should not be vacated. *In re De Camp Glass Casket Co.*, 272 Fed. 558 (6th Circ.).

The present Bankruptcy Act, as amended, allows a corporation to become a voluntary bankrupt, but does not specify by whom the corporate decision shall be made. BANKRUPTCY ACT, § 4a, 1919 BARNES, FEDERAL CODE, § 9089. A similar situation existed before the amendment, as to the commission of an act of bankruptcy by admission of insolvency. BANKRUPTCY ACT, § 3a (5), 1919 BARNES, FEDERAL CODE, § 9088. In the absence of specific charter provision or state legislation, power to do either is generally held to be in the directors. *In re C. Moench & Sons Co.*, 130 Fed. 685 (2d Circ.); *In re S. & S. Mfg. & Sales Co.*, 246 Fed. 1005 (N. D. Ohio); *Dodge v. Kenwood Ice Co.*, 204 Fed. 577 (8th Circ.). See 25 HARV. L. REV. 562. This power is usually rested on the power of committing an act of bankruptcy by making an assignment for the benefit of creditors. *Dodge v. Kenwood Ice Co.*, *supra*; *Home Powder Co. v. Geis*, 204 Fed. 568 (8th Circ.); *In re Foster Paint & Varnish Co.*, 210 Fed. 652 (E. D. Pa.). Occasionally the result is reached without this step, by deduction from the general authority of the directors to manage the corporation. *In re S. & S. Mfg. & Sales Co.*, *supra*; *In re United Grocery Co.*, 239 Fed. 1016 (S. D. Fla.). It has been held, however, that an admission of insolvency could not be made by directors not having the power to assign for the benefit of creditors. *In re Bates Machine Co.*, 91 Fed. 625 (D. Mass.).

See 1 REMINGTON, BANKRUPTCY, 2 ed., § 44; 1 LOVELAND, BANKRUPTCY, 4 ed., § 157. This would also be true of a voluntary petition in bankruptcy. See 1 LOVELAND, BANKRUPTCY, 4 ed., § 158. Cf. *Bell v. Blessing*, 225 Fed. 750 (9th Circ.). As the charter provision in the principal case is evidently intended to limit the directors only when their act might be adverse to the interests of the stockholders, it should be construed as permitting them to make an assignment for the benefit of creditors when the corporation is insolvent. So the decision seems correct. See *Fitts v. Custer Slide Mining Co.*, 266 Fed. 864 (8th Circ.).

**CORPORATIONS — DISTINCTION BETWEEN CORPORATION AND ITS MEMBERS — DISREGARDING THE CORPORATE FICTION WHERE NO ILLEGALITY IS INVOLVED.** — The B corporation owed the A corporation upon a contract. X, the sole stockholder of the A corporation, was personally indebted to the B corporation, this debt being secured by A corporation stock. At maturity, X failed to pay, and the A corporation directed the B corporation to deduct from its contract debt to A the amount due to B from X. The B corporation refused. On a foreclosure sale it bought in the stock pledged by X as security, and now sues in equity as stockholder of the A corporation. *Held*, that the conduct of the B corporation was so inequitable as to preclude its suing in equity as stockholder. *United States Gypsum Co. v. Mackey Wall Plaster Co.*, 199 Pac. 249 (Mont.).

The language of the court is flavored with ready willingness to disregard the corporate fiction. It is intimated that X's obligation is such as might be set off by the B corporation in a contract action by the A corporation. See *Guy v. Hudson River Electric Power Co.*, 187 Fed. 12, 15. *Contra*, *Gallagher v. Germania Brewing Co.*, 53 Minn. 214, 54 N. W. 1115; *New York Ice Co. v. Parker*, 21 How. Pr. (N. Y. Super.) 302. And the refusal of the B corporation to deduct X's individual debt from its indebtedness to the A corporation is thought inequitable because, the A corporation and X being identical, the creditor has harshly chosen to sacrifice his debtor's collateral rather than receive full payment. In this case, as has been noticed in many others, the just result is attainable without violating the corporate conception. See 17 HARV. L. REV. 201; 27 HARV. L. REV. 386; 30 HARV. L. REV. 762; 31 HARV. L. REV. 894. When the corporation sought to have X's individual indebtedness deducted, in effect it directed its debtor to pay in part to X. Payment to the creditor's order is payment to the creditor. Since there was no question of impairing the corporate margin of safety by this transfer of assets to a stockholder, the B corporation could have reduced its indebtedness to the A corporation by doing as directed; and its choice of the harsher alternative was inequitable.

**CORPORATIONS — RECEIVERS — JURISDICTION OF EQUITY TO APPOINT A RECEIVER OF A SOLVENT PRIVATE CORPORATION WHERE NO OTHER RELIEF IS SOUGHT.** — The plaintiff was a shareholder and director of the defendant corporation. The shareholders were deadlocked and the majority of the board of directors were conducting the business with a view to driving the plaintiff out of it and diverting the assets to their own use. Relief by ordinary means was impossible. The plaintiff brought a bill for a temporary receivership. *Held*, that a receiver be appointed. *Schick v. Hood*, 30 Dist. Rep. 584 (Pa.), 78 Leg. Intel. 557.

There is no such thing as a substantive right to a receivership; courts are not agencies for running private enterprises. *Mabon v. Ongley Electric Co.*, 156 N. Y. 196, 50 N. E. 805. A receivership is a remedy. See 1 CLARK, RECEIVERS, § 238. It is usually ancillary to other relief sought by the bill. See, e. g., *Aiken v. Colorado River Co.*, 72 Fed. 591 (9th Circ.). But there seems to be no reason why it may not be granted as the sole remedy, if the plain-

tiff has substantive grounds for relief. Being an extreme remedy it should be granted against a solvent private corporation only as a last resort. *Merrifield v. Burrows*, 153 Ill. App. 523. It should appear that more restricted remedies are unavailable or inadequate. *Roman v. Woolfolk*, 98 Ala. 219, 13 So. 212; *Kahan v. Alaska Junk Co.*, 111 Wash. 39, 189 Pac. 262. A receivership has been denied where the offending officers were solvent and could be brought to an accounting. *Hayes v. Jasper Land Co.*, 147 Ala. 340, 41 So. 909. But an accounting covers only past delinquencies, so that where a continuous diversion of assets cannot be checked by injunction, and the offending officers cannot be removed, a temporary receiver may well be appointed. *Boothe v. Summit Mining Co.*, 55 Wash. 167, 104 Pac. 207. The matter is within the discretion of the court, with the burden on the plaintiff to overcome the strong objections to the remedy. In the principal case the hardship and impossibility of other relief justify the appointment.

**DAMAGES — CONTRACTS.** — In 1916 the defendant contracted to build a house for the plaintiff, to be completed within six months. The plaintiff reserved the right to complete the house himself if the defendant did not properly proceed with the work. After work was begun, the government prohibited all building except such as had already been commenced, which was permitted to continue on application for a license. The defendant intentionally delayed the work to insure a refusal of the license. It was refused and the plaintiff brought this action for breach of contract. It was impossible to continue building until 1919, when the plaintiff did so at a greatly increased cost. *Held*, that the plaintiff recover this increased cost, less the contract price. *Mertens v. Home Freeholds Co.*, [1921] 2 K. B. 526 (C. A.).

The court unconsciously departs from the rule allowing only such damages for breach of a contract as the parties may fairly be supposed to have contemplated when they made the contract. *Hadley v. Baxendale*, 9 Ex. 341; *Bradley v. Chicago, etc. Ry. Co.*, 94 Wis. 44, 68 N. W. 410. See *Griffin v. Colver*, 16 N. Y. 489, 494-495. See 1 SEDGWICK, DAMAGES, 9 ed., §§ 144-147a. The parties here contemplated that if the plaintiff should avail himself of his right to build, and to hold the defendant for the increased cost, this right would be exercised at the time set for the defendant's performance. That it would become impossible to proceed was clearly not foreseen. Even though the defendant knowingly caused this impossibility, to hold him for more than the cost of building the house in 1916, less the contract price, is to subject him to more damages than were contemplated at the time the contract was made. Damages in actions *ex contractu* differ from those in actions *ex delicto*. The former are based on consensual transactions and the liability of the parties is limited by the extent of the obligations they have undertaken. Actions *ex delicto* do not depend on consensual transactions. The defendant's liability is therefore not limited, but extends to all the damages he has proximately caused. *Shedd v. Calumet Construction Co.*, 270 Fed. 942 (7th Circ.).

**DEEDS — CONSTRUCTION — LAND "DIVIDED BETWEEN" A AND HIS HEIRS.** — A deed provided that land should "revert to and be divided between" A and his heirs. *Held*, that A took a half-interest, and his children a half-interest, as tenants in common. *Shugart v. Shugart*, 233 S. W. 303 (Tex. App.).

It is clear that the deed, correctly construed, creates a tenancy in common. To conceive of "dividing" land as separating a fee in that land into life estate and remainder, seems beyond reason. The cases confirm this view, uniformly treating the parts of a "divided" estate as contemporaneous. *Griswold v. Johnson*, 5 Conn. 363; *Herring v. Rogers*, 30 Ga. 615; *Stamwood v. Stamwood*, 179 Mass. 223, 60 N. E. 584; *Pruden v. Paxton*, 79 N. C. 446.

See *Layton v. State*, 4 Harr. (Del.) 8, 37. See also *Brasington v. Hanson*, 149 Pa. St. 289, 24 Atl. 344. As there can by no possibility be a freehold plus a remainder, the Rule in Shelley's Case can have no application. But the court, sublimely oblivious to this, wasted its time considering the Rule, and reached the obviously correct result by construing "heirs" as "children," a word of purchase. Cf. *Seymour v. Bowles*, 172 Ill. 521, 50 N. E. 122; *Tinder v. Tinder*, 131 Ind. 381, 30 N. E. 1077; *Eckle v. Ryland*, 256 Mo. 424, 165 S. W. 1035; *Wood v. Taylor*, 9 Misc. 640, 30 N. Y. Supp. 433; *Brasington v. Hanson*, *supra*. The court's language is as loose as its reasoning. A court cannot now be excused for saying that "the manifest intention of the grantor will control the rule in Shelley's Case, if in conflict with it." Once given a chance to operate, the Rule ruthlessly defeats intent. *Wilson v. Harrold*, 288 Ill. 388, 123 N. E. 563; *Kirby v. Broaddus*, 94 Kan. 48, 145 Pac. 875; *Van Grullen v. Foxwell*, [1897] A. C. 658. See *Sellers v. Rike*, 292 Ill. 468, 127 N. E. 24. See Joseph Warren, "Progress of the Law — Estates," 34 HARV. L. REV. 508, 519; 1 TIFFANY, REAL PROPERTY, 2 ed., § 151; 11 HARV. L. REV. 418; 12 HARV. L. REV. 64. It is only where the grantor effectuates his intent by giving the remainder to purchasers, thus keeping the case from the beginning out of the Rule's path, that the Rule does not apply. *Etna Life Ins. Co. v. Hoppin*, 249 Ill. 406, 94 N. E. 669; *Harris v. Brown*, 184 Iowa, 1288, 169 N. W. 664; *Moherman v. Anthony*, 106 Kan. 457, 188 Pac. 434; *Hopkins v. Hopkins*, 103 Tex. 15, 122 S. W. 15.

**DOWER — INCHOATE RIGHT OF DOWER — RIGHT OF WIFE OF ONE ENTITLED TO LAND BY CONSTRUCTIVE TRUST.** — A made a gratuitous conveyance of lands to B upon an oral agreement that B would return them when requested. Thereafter A met and married the complainant. A then demanded the lands of B, who refused to deed them back, but did convey a life estate. The complainant sued B to establish her inchoate right of dower in the lands. The defendant demurred. *Held*, that the demurrer be overruled. *Melenky v. Melen*, 189 N. Y. Supp. 798 (Sup. Ct.).

Too frequently when an equity court sees a desirable result but does not quite see how to reach it, it mumbles something about "fraud" and then decrees according to its conscience. The practice is never justified. Can the result thereby reached in the principal case be upheld? A could have forced the defendant to convey to him upon a theory of constructive trust. *Medical College Lab. v. N. Y. University*, 178 N. Y. 153, 70 N. E. 467. See 21 BENCH AND BAR (N. S.) 61; George P. Costigan, "Trust Based on Oral Promises," 12 MICH. L. REV. 427, 527. This, however, did not give him an equitable estate in which the complainant might have asserted a right of dower. See *Jeremiah v. Pitcher*, 26 App. Div. 402, *aff'd*, 163 N. Y. 574, 57 N. E. 1113. See Roscoe Pound, "Progress of the Law — Equity," 33 HARV. L. REV. 420-423. But she was possessed of a beneficial expectancy as regards the land, in the possibility that A might call for the legal title, whereupon her inchoate right of dower would at once attach. See *Sutherland v. Sutherland*, 69 Ill. 481. See 4 KENT, COMMENTARIES, 50. The defendant willfully and without justification interfered with this valuable chance. If the case is to be supported at all, it must be on the ground that this conduct, though consisting in non-action, was tortious. If so, the injury to the complainant's expectancy was actionable. *Rice v. Manley*, 66 N. Y. 82; *Concordia Fire Ins. Co. v. Simmons Co.*, 167 Wis. 541, 168 N. W. 199. See *Lewis v. Corbin*, 195 Mass. 520, 526, 81 N. E. 248, 250. Legal damages would be inadequate. Equity, therefore, may well give specific reparation by decreeing to the wife an interest in the land equivalent to an inchoate right of dower in it as a legal estate. See 20 HARV. L. REV. 403.

**EASEMENTS — MODES OF ACQUISITION — IMPLIED GRANT OF RIGHT OF WAY.** — Four adjoining houses and lots were sold by the owner at auction. Across the rear of each lot, but included within its boundaries in the respective deeds, was a twelve-foot strip of land, lying between the garden wall and the boundary hedge, the upper end walled, the lower abutting on the highway. The strip was hard from years of use by the former tenants, and showed tracks leading to gates in the garden walls. The plaintiff, purchaser of the lot which included the open end of the strip, resists the claim of the other purchasers to a right of way over it. *Held*, that they have a right of way by implied grant. *Hansford v. Jago*, [1921] 1 Ch. 322.

The weight of authority upholds this case in applying the rules of implied grant, not implied reservation, to simultaneous transfers. *Baker v. Rice*, 56 Ohio St. 463, 47 N. E. 653; *Stephens v. Boyd*, 157 Ia. 570, 138 N. W. 389. *Contra*, *Whyte v. Builders' League*, 164 N. Y. 429, 58 N. E. 517. See 14 HARV. L. REV. 466. See WASHBURN, EASEMENTS, 4 ed., 105. A way in *de facto* use was originally held not sufficiently continuous and apparent to pass by implied grant. *Morgan v. Meuth*, 60 Mich. 238, 27 N. W. 509; *Parsons v. Johnson*, 68 N. Y. 62. Many jurisdictions consider this objection removed where there is a paved or constructed way. *Brown v. Alabaster*, 37 Ch. Div. 490; *Gorton-Pew Fisheries Co. v. Tolman*, 210 Mass. 402, 97 N. E. 54. See WASHBURN, EASEMENTS, 4 ed., 107. Since there was no pavement or construction in the principal case, it marks a step toward further leniency, which has not generally been taken in the United States. *O'Rourke v. Smith*, 11 R. I. 259. But the fact that the way was delimited by fence and hedge makes the step easy. See *Phillips v. Phillips*, 48 Pa. St. 178. It is doubtful, however, if any extension of the doctrine of implied grant of easements is desirable, in view of the strong policy underlying the Statute of Frauds and the parol evidence rule and, in the United States, the registry system. See *Buss v. Dyer*, 125 Mass. 287, 291; *Warren v. Blake*, 54 Me. 276, 289; *Dodd v. Burchell*, 1 H. & C. 113, 120. The decision of the principal case may be supported upon alternative grounds stated by the court.

**ELECTION OF REMEDIES — INCONSISTENCY — REMEDIES AGAINST CARRIER AND CONSIGNEE.** — The plaintiffs delivered goods to the defendants to be forwarded as the plaintiffs should direct. The goods were consigned to one Beilin, but the plaintiffs later directed the defendants not to deliver them to Beilin. The defendants notwithstanding delivered the goods to him. The plaintiffs sued Beilin for goods sold and delivered, and recovered judgment. Being unable to satisfy the judgment they now sue the defendants for negligence and breach of duty. *Held*, that a judgment for the defendants be affirmed. *Verschures Creameries v. Hull & Netherlands Steamship Co.*, [1921] 2 K. B. 608 (C. A.).

Where a plaintiff has two inconsistent remedial rights, the assertion of one of them by an unequivocal act is treated as a binding election, and precludes resort to the other. Jurisdictions differ as to what acts are necessary, but in any jurisdiction proceeding to judgment would be sufficient. *Stewart v. Salisbury Realty & Ins. Co.*, 159 N. C. 230, 74 S. E. 736; *Droege v. Ahrens & Ott Mfg. Co.*, 163 N. Y. 466, 57 N. E. 747; *Terry v. Munger*, 121 N. Y. 161, 24 N. E. 272; *Scarff v. Jardine*, 7 A. C. 345. But see *Rice v. Reed*, [1900] 1 Q. B. 54; *Morris v. Robinson*, 3 B. & C. 196. See Walter Hussey Griffith, "Election between Alternative Remedies," 16 LAW QUART. REV. 160. Nevertheless the principal case seems wrong. The doctrine of election of remedies is founded on the logical repugnancy involved in the plaintiff's conduct. To make the doctrine applicable, the remedies must therefore be inconsistent. *Reynolds v. Union Station Bank of St. Louis*, 198 Mo. App. 323, 200 S. W. 711. See *American Process Co. v. Florida White Pressed Brick Co.*, 56 Fla. 116, 122-123,

47 So. 942, 944. There is no inconsistency in the remedies which the plaintiffs here are pursuing. It is true that in suing Beilin they acknowledge that he has title. But this does not necessarily involve an admission that the defendants' delivery in violation of instructions was not a breach of duty. Cf. *Pacific Vinegar & Pickle Works v. Smith*, 152 Cal. 507, 93 Pac. 85; *Robinson Machine Works v. Vorse*, 52 Iowa, 207, 2 N. W. 1108. An erroneous application of the doctrine of election is particularly to be regretted, because the doctrine, at best, is a sacrifice of justice to technical perfection. See Charles P. Hine, "Election of Remedies, A Criticism," 26 HARV. L. REV. 707.

EMINENT DOMAIN — POWER OF ONE STATE TO CONDEMN LAND IN ANOTHER.

— The plaintiff was a Wisconsin corporation supplying the defendant city in Wisconsin with water. A small but highly important part of its plant was land and an intake main in Minnesota, in which state, however, it performed no public service. Its franchises were held under a Wisconsin statute which gave to any municipality the right to acquire by condemnation any such public utility. The plaintiff sues to enjoin such condemnation proceedings by the defendant in so far as they relate to the property in Minnesota. *Held*, that a demurrer to the complaint be sustained. *Superior Water, etc. Co. v. City of Superior*, 183 N. W. 254 (Wis.).

It is true that the United States may condemn land within a state. *Kohl v. United States*, 91 U. S. 367. But no state can condemn property in another state. *Crosby v. Hanover*, 36 N. H. 404. See NICHOLS, EMINENT DOMAIN, 2 ed., § 28. Nor could Minnesota have allowed the defendant to take the property involved in this case by eminent domain, for a state may not authorize condemnation for purposes which do not substantially benefit its own public interest and welfare. *Grover Irr. & Land Co. v. Lovella Ditch, etc. Co.*, 21 Wyo. 204, 131 Pac. 43. Cf. *Gilmer v. Lime Point*, 18 Cal. 229; *Trombley v. Humphrey*, 23 Mich. 471; *Petition of United States*, 96 N. Y. 227. See Charles N. Gregory, "Expropriation by International Arbitration," 21 HARV. L. REV. 23, 26-27. Under the above authorities, the first ground of decision in the principal case is clearly wrong. It is argued that the property devoted to the franchise is merged in it, is personalty, and therefore is subject to the jurisdiction of Wisconsin. It may be that the whole plant and franchise is properly taxable as a unit and as personalty. *Town of Washburn v. Washburn Waterworks Co.*, 120 Wis. 575, 98 N. W. 539. And even that the foreign land may be included for this purpose. Cf. *Vanuxem's Estate*, 212 Pa. St. 315, 61 Atl. 876. But such a fiction is flagrantly abused if by means of it a court claims jurisdiction to operate *in rem* on land in another state. See *Lynde v. Columbus, etc. Ry. Co.*, 57 Fed. 993 (Circ. Ct., D. Ind.). If the principal case can be supported, it must be on the second ground of the court's decision: that the acceptance of the franchise under the statute gave rise to a specifically enforceable contract to convey in aid of condemnation proceedings all property devoted to the franchise.

EQUITY — SPECIFIC PERFORMANCE — FRAUD OF A THIRD PARTY AS A DEFENSE.

— Through the fraudulent representations of the defendants' agent as to collateral facts, the defendants were induced to agree to sell land to the plaintiff for less than its then market value. The plaintiff was wholly innocent. But the defendants notified him as soon as they discovered the fraud, and tendered him back the sum already paid on account. This the plaintiff refused and brought this bill for specific performance. *Held*, that the bill be dismissed. *Levin v. Atchison*, 69 PITTS. L. J. 385.

There is little direct authority upon the point, although the holding of the case has been predicted by an eminent author. See FRY, SPECIFIC PERFORMANCE, 4 ed., §§ 728, 729. A contract cannot be set aside for the fraud

of a third party. *Publishers v. Wilks*, 105 Ark. 243, 151 S. W. 280; *Martin v. Campbell*, 120 Mass. 126. Cf. *Root v. Bancroft*, 8 Gray (Mass.), 619. But misconduct of the plaintiff may cause denial of specific performance where rescission would not be allowed. *Kelly v. Central Pacific R. Co.*, 74 Cal. 557, 16 Pac. 386; *Allen v. Kirk*, 219 Pa. St. 574, 69 Atl. 50. The mistake of the defendant here was not, however, induced by the plaintiff. The cases of unilateral mistake coupled with hardship upon the defendant show that specific performance may be denied where the plaintiff's only moral obliquity arises after the contract and consists in then ignoring the appeal of the defendant's situation. See 3 WILLISTON, CONTRACTS, §§ 1425, 1427. But the terms of the contract in the principal case were not sufficiently harsh to be within the rule of these cases. *Day v. Wells*, 30 Beav. 220. If right, therefore, the case must rest on some additional ground. It may be significant that the plaintiff is seeking to take advantage of a tort. Cf. *Dixon v. Olmius*, 1 Cox Eq. 414; *Luttrell v. Olmius*, 11 Ves. Jr. 638 (*cit.*). But see *Dye v. Parker*, 194 Pac. 640, 195 Pac. 599 (Kans.). The defendant's mistake would be impaired as a defense if caused by his own negligence. *Tamplin v. James*, 15 Ch. D. 215. The probability that it was so caused is diminished by the fraud as the moving cause. Also a shade is cast upon the plaintiff's morality, and the weight of both these elements may just turn the balance of discretion, but certainly with no great preponderance.

**EVIDENCE — PRIVILEGED COMMUNICATIONS — STATEMENTS TO A PROSECUTING ATTORNEY.** — The defendant was convicted of statutory rape. At the trial, for the purpose of impeaching the testimony of the prosecuting witness, he offered in evidence her statements to the county attorney to the effect that the defendant had not assaulted her. This evidence was excluded. *Held*, that the exclusion was erroneous. *Centoamore v. State*, 181 N. W. 182 (Neb.).

The basis of privilege is confidence. See 4 WIGMORE, EVIDENCE, § 2285. There is a social interest that clients receive confidential advice from their attorneys without the menace of revelation upon the stand. See 1 TAYLOR, EVIDENCE, 11 ed., § 911. See Brougham, L. C., in *Greenough v. Gaskell*, 1 Myl. & K. 98, 103. There is a social interest in an administration of criminal law unembarrassed by the possibility that citizens, who pursuant to duty and in good faith inform the prosecuting attorney of crime, will be held liable for their accusations. *Gabriel v. McMullin*, 127 Ia. 426, 103 N. W. 355; *Vogel v. Gruaz*, 110 U. S. 311. See 4 WIGMORE, EVIDENCE, § 2374; NEWELL, SLANDER AND LIBEL, 3 ed., §§ 596-597. In both cases, to foster confidence, public policy raises the shield of privilege. But in neither case is the privilege indefeasible. The communications of a client seeking advice for a fraudulent purpose may be exposed in court. See HEGEMAN, PRIVILEGED COMMUNICATIONS, §§ 77-81; 1 TAYLOR, EVIDENCE, 11 ed., § 912. Information given by a citizen to a prosecuting officer in furtherance of a conspiracy to commit an indictable offence is subject to disclosure. *State v. Wilcox*, 90 Kan. 80, 132 Pac. 982. A balance of interests determines the decision of such cases. Lord Esher well said that when two public policies conflict, the one which says that the innocent man shall not be condemned when his innocence can be proved must prevail. See *Marks v. Beyfus*, 25 Q. B. D. 494, 498. In the principal case the evidence excluded was material to the proof of innocence. In such instance — especially where no liability devolves upon the informant by admitting the evidence — the privilege must give way. See *Riggins v. State*, 125 Md. 165, 93 Atl. 437, *accord*.

**EVIDENCE — RES GESTA — STATEMENTS OF BYSTANDER.** — In a trial for murder, the defendant pleaded self-defense. A witness for the defendant testi-



fied that during the struggle between the defendant and the deceased a bystander said to him, "Joe, he's going to cut him to pieces, ain't he?" This evidence was excluded. *Held*, that the exclusion was erroneous. *State v. Carraway*, 107 S. E. 142 (N. C.).

Words used testimonially derive their value from the credit of the person testifying. If the speaker is not on the stand with his credibility subject to the test of cross-examination, his words must be excluded as hearsay, unless, indeed, his credit may be otherwise vouched for. See *S. W. School Dist. v. Williams*, 48 Conn. 504; *Hately v. Kiser*, 253 Ill. 288, 97 N. E. 651; *United States v. Macomb*, 5 McLean (U. S.), 286 (Circ. Ct., Ill.). See 2 WIGMORE, EVIDENCE, § 1420. Utterances made under the stimulus of an exciting event, in reference to that event, are the automatic and ingenuous turning of perceptions into words. *State v. Hudspeth*, 159 Mo. 178, 60 S. W. 136; *Eby v. Travelers Ins. Co.*, 258 Pa. St. 525, 102 Atl. 209. See MCKELVY, EVIDENCE, § 208. The occasion of the utterance guarantees as to that utterance the credit of the speaker, and it is immaterial whether he be a principal in the event or a bystander. *State v. Walker*, 78 Mo. 380; *Britton v. Wash. Water Power Co.*, 59 Wash. 440, 110 Pac. 20. See 3 WIGMORE, EVIDENCE, § 1755. Upon that basis the statement in the principal case was correctly received. It may be urged that in these cases of "contemporaneous exclamatory narration" the excitement is likely to blur the perceptive faculties and so render the evidence unreliable. But would not this equally apply were the declarant to testify in person? The weight of authority is with the principal case. See 3 WIGMORE, EVIDENCE, § 1755. The decisions *contra* usually lose themselves in a discussion, where there should be analysis, of the *res gesta* doctrines. *Flynn v. State*, 43 Ark. 289; *Louisville Ry. v. Johnson*, 131 Ky. 277, 115 S. W. 207; *State v. Howard*, 120 La. 311, 45 So. 260.

INTERNATIONAL LAW — NATIONALITY — CONDITION OF STATELESSNESS. — The plaintiff was born in Prussia. Becoming of age, he obtained his release from Prussian nationality, and made his home in England. He did not become a naturalized British subject. After twenty years' domicile in England he was interned, and, in 1918, deported. After the war, the property of "German nationals" situate within the territories of the British Crown became subject to certain charges (TREATY OF VERSAILLES, Part X, § iv, Annex, clause 4). The plaintiff sues the Public Trustee and the Attorney-General for a declaration that he was not a German national within the meaning of the Treaty. *Held*, that the declaration be granted. *Sloock v. Public Trustee*, [1921] 2 Ch. 67.

On principles of international law, the municipal law of each state will be followed in deciding whether a particular individual is its national or not. See 3 MOORE, DIGEST OF INTERNATIONAL LAW, § 372; HERSHEY, ESSENTIALS OF INTERNATIONAL PUBLIC LAW, § 223. See also Theodore H. Thiesing, "Dual Allegiance in the German Law of Nationality and American Citizenship," 27 YALE L. J. 479, 482. The court, therefore, properly looked into the state of German law. By that law, the plaintiff had lost his German nationality. See BUNDES-GESETZBLATT DES NORDDEUTSCHEN BUNDES, No. 20, vom 1 Juni, 1870, §§ 14 *et seq.* (For translation, see CITIZENSHIP OF THE UNITED STATES, EXPATRIATION AND PROTECTION ABROAD, 59th Cong., 2d Sess., H. Doc. No. 326, pp. 329-330). Having become a subject of no other sovereign, the plaintiff was a stateless person. Such a condition is recognized by writers on international law. See HALL, INTERNATIONAL LAW, 7 ed., § 74; 1 OPPENHEIM, INTERNATIONAL LAW, 2 ed., §§ 311-312; BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD, § 262. But see MORSE, CITIZENSHIP, § 129. The principal case, however, seems to be the first actual decision of a common-law court to accept it. Cf. *Ex Parte Weber*, [1916] 1 K. B. 280 n., [1916] 1 A. C. 421; *Ludlam v. Ludlam*, 26 N. Y. 356, 374 *et seq.* But see *Séquestre de Jacob Ull-*

mann, 44 CLUNET, JOURNAL DU DROIT INTERNATIONAL PRIVÉ, 219. While probably correct in abstract legal theory, the result here reached is socially inexpedient. Aside from the injustice resulting to individuals in a condition of practical international outlawry, it would seem to be to the interest of organized society to admit of no person being without a political status. See 1 WESTLAKE, INTERNATIONAL LAW, 2 ed., 224. Particularly is this true in continental Europe, where the personal law depends on citizenship rather than on domicile. See *X. v. Y.*, 20 CLUNET, *op. cit.*, 530, 2 BEALE, CASES, CONFLICT OF LAWS, 37; *Cumming v. Cumming*, 23 CLUNET, *op. cit.*, 147, 2 BEALE, *op. cit.*, 40. The evident remedy seems to be a convention between states providing for uniform laws of nationality and naturalization. See 1 OPPENHEIM, *op. cit.*, § 313.

**LIBEL AND SLANDER — PRIVILEGE — CHARACTER OF A SERVANT — PUBLICATION — DICTATION TO A STENOGRAPHER.** — The plaintiff wrote requesting a statement regarding his services as a former employee of the defendant. The defendant replied in a letter dictated to his stenographer and transcribed and mailed by her. The letter related only to the character of the plaintiff's services. Both parties admitted that it was defamatory on its face. In an action for libel the defendant demurred. *Held*, that the demurrer be overruled. *Nelson v. Whitten*, 272 Fed. 135 (E. D. N. Y.).

Dictation to a stenographer is undoubtedly publication. *Gambrill v. Schooley*, 93 Md. 48, 48 Atl. 730. See *Pullman v. Hill & Co.*, [1891] 1 Q. B. 524, 527. Similarly, copying by a stenographer is publication. *Adams v. Lawson*, 17 Gratt. (Va.) 250; *Puterbaugh v. Furniture Co.*, 7 Ont. L. R. 582. But where a communication is made on a privileged occasion, publication to a typist, reasonably incident to the occasion, will not destroy the privilege. *Edmondson v. Birch & Co.*, [1907] 1 K. B. 371; *Bohlinger v. Germania Ins. Co.*, 100 Ark. 477, 140 S. W. 257. See 20 HARV. L. REV. 500. "An occasion is privileged when the person who makes the communication has a moral duty to make it to the person to whom he does make it, and the person who receives it has an interest in hearing it." *Per* Lord Esher, M. R., in *Pullman v. Hill & Co.*, *supra*, at 528. A communication by a former employer, in response to an inquiry from a prospective employer, is made upon a privileged occasion. *Child v. Affleck*, 9 B. & C. 403. See *Pullman v. Hill & Co.*, *supra*. And it seems that a reply to an inquiry from the employee is similarly made upon a privileged occasion. *Cf. Warr v. Jolly*, 6 C. & P. 497; *Hebner v. Great Northern Ry. Co.*, 78 Minn. 289, 80 N. W. 1128. In the principal case, the court ignored the question of privilege. It has been suggested that any dictation to a stenographer be made an exception to the rule of publication, but this proposition has no support in authority. See 4 ST. LOUIS L. REV. 42; 26 BENCH AND BAR, 105. The case also raises the neat question whether the wrong, if any, is libel or slander. See ODGERS, LIBEL AND SLANDER, 5 ed., 161; SALMOND, TORTS, 5 ed., 461. The view that either libel or slander can be maintained seems preferable. See *Gambrill v. Schooley*, 93 Md. 48, 48 Atl. 730, 732.

**PLEDGES — TRANSFER OF POSSESSION — BULKY GOODS.** — The defendant agreed to pledge certain bulky goods to the plaintiff. The goods were set apart in a compartment in the defendant's premises, the door locked, and the key given to the plaintiff, together with a license to enter the premises and use the key. Later the defendant went into voluntary liquidation, and the plaintiff brought this action to recover the goods. *Held*, that the plaintiff is entitled to the goods as pledgee. *Wrightson v. McArthur and Hutchinsons, Ltd.*, 125 L. T. R. 383 (K. B.).

The rule is generally stated that to constitute a pledge valid against third parties the pledgee must have and retain possession. See *Collins v. Buck*,

63 Me. 459, 461. See JONES, PLEDGES, 1 ed., § 47. The purpose of this rule is to protect third parties who rely on the pledgor's apparently unencumbered ownership of goods in his possession or custody. To this end, something more is required than what would amount to strict legal possession. *Collins v. Buck*, *supra*. Ordinarily, if the goods are left on the pledgor's premises, the pledge fails. *Casey v. Cavaroc*, 96 U. S. 467. See *Bank of North America v. Penn Motor Car Co.*, 235 Pa. St. 194, 83 Atl. 622. But in the case of bulky goods, it is sufficient if the goods are set aside on the pledgor's premises in a space devoted exclusively to the pledgee, and clearly indicated to be in the pledgee's possession, since this provides ample safeguard for third parties. *Philadelphia Warehouse Co. v. Winchester*, 156 Fed. 600 (D. Del.); *Bush v. Export Storage Co.*, 136 Fed. 918 (Circ. Ct., Tenn.). In the principal case also the purpose of the rule is achieved. The key, the sole means of entrance, is given to the pledgee, so the pledgor cannot exhibit the goods as his own. The decision, therefore, seems right.

**SALES — FRAUD — EFFECT OF IMPERSONATION BY BUYER ON PASSAGE OF TITLE.** — One A, representing himself as a partner of B, applied to the plaintiff for the purchase of goods on behalf of the pretended partnership, giving a forged draft therefor. The plaintiff agreed to sell the goods to the partners, took the forged draft in payment, and delivered the goods to A. A mortgaged the goods to the defendant, a *bona fide* purchaser, from whom the plaintiff seeks to recover them. *Held*, that the plaintiff recover the value of the goods without paying the mortgage debt. *Gose v. Brooks*, 229 S. W. 979 (Tex. App.).

The court's first argument, that A did not get title because title does not pass where goods are paid for with a forged draft, is erroneous. See Samuel Williston, "The Progress of the Law—Sales," 34 HARV. L. REV. 741, 749. The court's other argument, that A did not get title because the plaintiff did not intend to pass title to him, is sound. *Alexander v. Swackhamer*, 105 Ind. 81, 4 N. E. 433. In cases of impersonation, passage of title is a question of primary intent. See 16 HARV. L. REV. 381. Where a vendee, impersonating another, buys goods, title passes, on the theory that the seller's primary intent is to deal with the person before him rather than with the person he claims to be. *Phelps v. McQuade*, 220 N. Y. 232, 115 N. E. 441. However, where the buyer fraudulently claims to buy as agent of another, no title passes, as the seller intends to pass title to the principal who has no intent to receive it. *Peters Box Co. v. Lesh*, 119 Ind. 98, 20 N. E. 291. The courts generally do not distinguish cases of pretended partnership and pretended agency. See *Barker v. Dinsmore*, 72 Pa. St. 427, 433. The result is correct; for normally the seller thinks of the partnership as a unit, and intends to pass title to it, disregarding the proprietary interest of the individual partners, one of whom he thinks to be before him.

**TRUSTS — CREATION AND VALIDITY — TESTAMENTARY VOTING TRUST.** — The testator, majority stockholder in a corporation, left his stock to be kept intact as part of a trust fund for twenty years. The trustees were required to vote it in favor of themselves as directors, and to exercise all powers incident to ownership of the stock. In contesting the will, the plaintiff contends that this trust is void as against public policy. *Held*, that the trust is valid. *In re Pittock's Will*, 199 Pac. 633 (Ore.).

A few jurisdictions consider that any irrevocable separation of voting power from beneficial ownership is against the policy of the law. *Sheppard v. Power Co.*, 150 N. C. 776, 64 S. E. 894. But the great majority uphold voting trusts, provided their purposes are legitimate. *Carnegie Trust Co. v. Security Life Ins. Co.*, 111 Va. 1, 68 S. E. 412; *Boyer v. Nesbitt*, 227 Pa. St. 398, 76 Atl. 103.

See 29 HARV. L. REV. 433. Whether the stipulation in the principal case as to the use of the vote ought to be considered unfair to minority stockholders, so as to invalidate the trust, is not clear on the authorities. See *Cone v. Russell*, 48 N. J. Eq. 208, 21 Atl. 847; *Woodruff v. Wentworth*, 133 Mass. 309. But see *Winsor v. Coal Co.*, 63 Wash. 62, 114 Pac. 908. Trusts subjecting the vote to the dictation of living third parties have been upheld. *Elger v. Boyle*, 69 Misc. 273, 126 N. Y. Supp. 946; *Lafferty's Estate*, 154 Pa. St. 430, 26 Atl. 388. But where those in control of the majority vote are prevented by a fixed, predetermined restriction from using their discretion regarding so important a matter as the choice of directors, the minority stockholders may well complain. *Billings v. Marshall Furnace Co.*, 210 Mich. 1, 177 N. W. 222. See *Gage v. Fisher*, 5 N. D. 297, 307, 65 N. W. 809, 813; *Fennessy v. Ross*, 5 App. Div. 342, 346, 39 N. Y. Supp. 323, 325. This is particularly true in the principal case, since here the individuals designated by the will as directors are testamentary trustees, with perhaps no personal interest in the welfare of the corporation. See *Robotham v. Ins. Co.*, 64 N. J. Eq. 673, 702, 53 Atl. 842, 853. The undoubted jurisdiction of equity to relieve against the voting requirement if need arises may, however, be sufficient ground for supporting the decision. See *Pennington v. Metropolitan Museum*, 65 N. J. Eq. 11, 55 Atl. 468; *Johns v. Montgomery*, 265 Ill. 21, 106 N. E. 497.

**TRUSTS — FOLLOWING MISAPPROPRIATED PROPERTY — WHAT CONSTITUTES A PURCHASER FOR VALUE.** — A unlawfully obtained crossed checks payable to himself, drawn on the C Bank, which he deposited in the D Bank and which the D Bank collected. B was living with A as his mistress, and he gave her checks drawn on the D Bank, which she took in good faith. The E Bank collected for her and placed the amount to her credit. B's account still showed a balance in her favor when the C Bank brought suit, joining A, B, and the E Bank. The E Bank paid the money into court, and judgment was given for the plaintiff. B appealed. *Held*, that the appeal be dismissed. *Banque Belge pour L'Etranger v. Hambrouck*, [1921] 1 K. B. 321 (C. A.).

When a wrongfully acquired money *res* is mingled with other money, its substantial identity is not destroyed. *In re Hallet's Estate*, 13 Ch. D. 696; *Nat. Bank v. Ins. Co.*, 104 U. S. 54; *First Nat. Bank v. Hummel*, 14 Colo. 259, 23 Pac. 986. See Austin W. Scott, "The Right to Follow Money," 27 HARV. L. REV. 125. The former owner may claim either his *pro rata* share of the fund or a lien upon the whole fund. See James Barr Ames, "Following Misappropriated Property," 19 HARV. L. REV. 511; Austin W. Scott, "The Right to Follow Money," 27 HARV. L. REV. 125. And he may assert a lien against part of the fund which has been withdrawn, as long as it can be traced. *In re Oatway*, [1903] 2 Ch. 356. See SCOTT, CASES ON TRUSTS, 553 n; Austin W. Scott, *supra*, 27 HARV. L. REV. 125, 132. But his right of recovery is defeated if the *res* has come into the hands of a *bona fide* purchaser for value without notice. See James Barr Ames, *supra*, 19 HARV. L. REV. 511, 517. It is true in the present case that the E Bank, having given only a promise to pay to the depositor's order, was not such a purchaser. *Mann v. Second Nat. Bank*, 30 Kan. 412, 1 Pac. 579; *Batson v. Alexander City Bank*, 179 Ala. 490, 60 So. 313. See SCOTT, CASES ON TRUSTS, 655 n. But B was. Without notice she had given her body and her services, in return for title to the money. Is the defense of *bona fide* purchase to avail her nothing because she is guilty — not, under the laws of England, of a crime, but of conduct *contra bonos mores*? So, in effect, the court decides, by taking the title from B and giving it back to the C bank.

## BOOK REVIEWS

TRUST ESTATES AS BUSINESS COMPANIES. By John H. Sears. Kansas City, Mo.: Vernon Law Book Co. 1921. pp. xx, 782.

This is the second edition of a work originally issued in 1912. The book is not a scholarly development of the law of trusts, or a general treatise on the subject, and the author disclaims any intention to make it such. It is not a book from which to learn what the law was at the time of Lord Coke, but a working volume for the practitioner, a handbook revised and enlarged to date.

It is of less value perhaps to the Massachusetts lawyer because in the decisions of the Massachusetts courts are found the leading cases on the subject of that form of business organization which, as a federal judge remarked, is "not uncommon in Massachusetts, and very uncommon elsewhere." In fact, in most of the few decisions in other states such organizations are referred to as Massachusetts Trusts. But it does supply, in part at least, a need which the profession generally will presumably feel with the more extensive adoption of the trust estate for business purposes. Its "superiority over corporate formation for legitimate business" Mr. Sears regards as self-evident.

Wrightington's *Unincorporated Associations* and an excellent chapter on Massachusetts Trusts in Fletcher's *Cyclopaedia of Private Corporations* afford at present almost the only source of information on the subject of the treatise. The gathering into one book of reference, therefore, of the cases which are found in the reports under divers headings and strange titles is alone sufficient justification for the publication of the volume, especially since it is fair to say that the kind of trust treated in the volume under review is becoming a subject of greater and greater importance in most jurisdictions.

The discussion is in a way elementary, as it is bound to be when the subject is one on which the ordinary practitioner has only an elementary knowledge. There is little attempt to theorize as to the further development of the law on the subject, or to consider the legal problems that may arise in connection with the operation of the trust form in business undertakings, it being regarded as sufficient for the purpose of the book to state carefully and comprehensively what has been developed in form and substance thus far, and what the courts have decided or had to say in connection with such development. To that extent it will serve the practitioner well.

The pitfall of partnership into which some of the earlier Massachusetts trusts fell is pointed out with a true appreciation of its importance, and the proper method of avoiding it is carefully derived from the decided cases.

The liability of the trust estate for torts of the trustee, which conceivably may become an important branch of the subject under increased utilization of this form of organization, is dismissed rather briefly, and may be said to receive rather less adequate treatment than any other phase of the subject.

The arrangement of the book is on the whole logical, beginning with the establishment of the trust, and proceeding with the nature of the creation, the status of the trustee and his rights, the liabilities of the trust estate, and the rights and liabilities of the beneficiaries, to such particular details as the relation of these trusts to perpetuities and restraints upon alienation, the practice and procedure in litigation, taxation, management by the trustees, and public policy with relation to such trust estates. The last two chapters are devoted to the discussion of specific stipulations in instruments establishing these trusts. There is an appendix containing such few statutes as have been passed with reference to business trust estates — and these are confined to Massachu-

setts and Oklahoma — and containing also exhibits of trust agreements actually in use in Massachusetts and elsewhere as well as forms of general provisions for such declarations of trust.

A complete table of cases cited and a fairly adequate index complete the volume.

The author is obviously a believer in this form of business organization, although he denies any intention either to recommend or to discourage the adoption of the trust estate form by any individual enterprise. His belief, however, in the efficiency of courts of equity to right most legal wrongs which arise in the conduct of business as compared with statutes to remedy grievances arising in the creation and conduct of corporations is plainly apparent, and he cites "the struggle by courts to bring corporate assets to the status of a trust fund" as one of the "finest tributes to an excellence in justice of the theory herein expounded that one might hope to find."

The book will presumably be not less cordially approved by the profession because it deprecates the avoidance of attorneys' fees or cheapness in organizations, and emphasizes that no one but a competent legal adviser, skilled in the laws of his state, can be relied upon to determine that a trust should be created, to draft the trust instrument properly, and to advise and instruct the trustees in the safe management of the trust estate.

J. COLBY BASSETT.

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LE GOUVERNEMENT DES JUGES ET LA LUTTE CONTRE LA LÉGISLATION SOCIALE AUX ÉTATS-UNIS. L'expérience Américaine du contrôle judiciaire de la constitutionnalité des lois. By Édouard Lambert. Paris: Marcel Giard & Co. 1921. pp. 276.

Professor Lambert of the University of Lyon presents under the above title a discriminating analysis of certain phases of judicial review of legislation in the federal and state governments of the United States. Recent judgments of the French courts, it is observed, are comparable with some of the landmarks establishing and developing judicial review in the United States,<sup>1</sup> and during the war it was not unusual in France for judicial interpretation and executive orders to disregard the legislative intent. These tendencies have culminated in a campaign in favor of the abrogation of articles 11 and 12 of the Law of August 5, 1790, title II, and the provision of the Constitution of September 3, 1791, title III, ch. 5, art. 3, to the effect that the courts ought not to interfere in the exercise of legislative power and are not privileged to suspend the execution of the laws. This campaign has resulted in the favorable consideration of a proposal introduced for a number of years in the French Chamber of Deputies to amend the present French constitution to establish judicial control over legislation along lines similar to the American system. The party supporting this proposal is now in the majority, and it seems to be, according to Mr. Lambert, only a matter of time when, either by amendment to the constitution or by judicial interpretation based on the former declarations of rights, French courts will adopt a type of judicial review modeled in part after that of the United States. Three phenomena are regarded as pointing in this direction: First, the sentiment prevalent among ministers to revert to the theory that it is the duty of the judiciary to protect the fundamental laws against sudden and radical changes; second, the tendency of the French Supreme Court to adopt very liberal methods of interpretation; third, the aspirations of jurists and of popular

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<sup>1</sup> For example, a judgment of a court in the district of the Seine is compared with a similar judgment in the case of *Godcharles v. Wigeman*, 113 Pa. St. 431.

opinion toward a restoration of judicial control over the constitutionality of laws. These phenomena are referred to as the most striking characteristics of French politics.

Interest in the American theories and practices in relation to judicial review, it is noted, is not new in France. Among those who have defended the American system are Professors Beauregard,<sup>2</sup> Moreau,<sup>3</sup> Hauriou,<sup>4</sup> Jèze,<sup>5</sup> and numerous other scholars and publicists including the noted parliamentarian Charles Benoist.<sup>6</sup> In fact, interest in the problem of judicial control in France has been especially noteworthy during the last two decades, as is evidenced by frequent articles and such monographs as those of Albert Angley's<sup>7</sup> and Henry Desfougères.<sup>8</sup>

With a brief introduction on the French situation Professor Lambert proceeds to examine the theories and practices of judicial review in the United States with the purpose of furnishing a background for the public discussion which is sure to ensue in an effort to adopt a similar system in France. The basis of the American doctrine is attributed to the theory of the separation of powers introduced as a leading principle of American federal and state constitutions. It is observed, however, that a different type of separation is accomplished in England and in France, where the principle works against the judges and to the advantage of the legislature and there is established what is known as *legislative supremacy*, whereas in the United States the principle works to the advantage of the judges and there is established "*a regime of government by the judges.*"

Instead of repeating the traditional American views as to the separation of powers, judicial independence, and the necessity of judicial review, Mr. Lambert deals with the underlying principles and practices of judicial review of the constitutionality of laws and judicial construction of statutes whereby there has been established in the United States what is termed "the political supremacy of the judiciary." This political supremacy, it is found, renders the process of law-making in the United States very different from that prevailing in France and other European countries, owing to the fact that the statutes of the state and federal governments are frequently merely the realization of popular desires which cannot be rendered effective until affirmatively approved by the courts.

American judges, then, are regarded as the ultimate authorities to interpret the laws. Judicial supremacy in the United States is, Mr. Lambert thinks, due to three facts: First, the control over the constitutionality of laws under the general doctrine of judicial review; second, interpretation of statutes under the prevailing theories of the common law and the case system; third, the methods of legal study. Considerable emphasis is given to the American system of legal study in order to show that legal instruction in the United States, built upon the case method, tends to uphold common-law doctrines, and to depreciate the interest in and importance of statutes, with the result that the American judges and lawyers, contrary to the practice of the French jurists, are disposed to construe statutes strictly and to hold them invalid on minor pretexts in order to preserve the traditions of the common law which have been the groundwork of their legal education.

<sup>2</sup> *Monde Économique* of November 17, 1895.

<sup>3</sup> *Le Règlement Administratif*, 261.

<sup>4</sup> Note, *Conseil d'État*, August 7, 1909, Sirey, 1909, III, 145.

<sup>5</sup> *Revue Générale d'Administration*, 1895, II, 241, and *L'Inconstitutionnalité des Lois en Roumanie*, 29 *Revue du Droit Public*, 140 (1912).

<sup>6</sup> *Chambre: Documents Parlementaires*, sess. ord. 1903, 99.

<sup>7</sup> *Des Garanties Contre l'Arbitraire du Pouvoir Législatif, par l'Intervention du Pouvoir Judiciaire*, Chambéry, 1910.

<sup>8</sup> *Le Contrôle Judiciaire de la Constitutionnalité des Lois*, Paris, 1913.

The basis for what is regarded as modern judicial review in the United States is attributed to two provisions of the Constitution: First, that preventing the states from impairing the obligation of contracts; second, the due process clause of the Fourteenth Amendment. Through these provisions, which remained in a large measure inert during the period before 1880, there was evolved by judicial interpretation, says Professor Lambert, a new *Magna Charta* "to protect the energies of individuals and corporations against the arbitrary manifestations of popular sovereignty." It is recognized, however, that a mild form of review involving the determination of issues between federal and state governments and infractions against the Constitution beyond a reasonable doubt was in effect earlier. This moderate theory of judicial review is that which is found in the works of constitutional authorities such as Cooley and Thayer. It was in the light of these moderate statements that such French authors as Jalabert,<sup>9</sup> Saleilles,<sup>10</sup> and Thaller<sup>11</sup> were led to admire the American system.

In the new interpretation *due process* is what the Supreme Court declares *such* and thereby the court has become a censor of all state legislation. As a consequence the Supreme Court at the opening of the twentieth century is held to be in possession of two instruments to arrest political and economic progress in the United States; first, the rule of reason, and, second, the rule of expediency. The chief purpose of these instruments, as the author sees it, is to hold legislation in the traditional mold of the common law and to support the individualistic conceptions of the eighteenth century. Only such changes are permitted by legislative experiment as appear to the judges "legitimate and instituted with enough prudence and reflection."

A painstaking study of American books, articles, and court decisions relating to judicial review in federal and state governments, has led Professor Lambert to conclude that the moderate views of Cooley and Thayer have long ago been discarded in practice and that there is a marked tendency for courts to substitute their social and economic politics for that of the legislature in reference to labor legislation, concerning which numerous acts were held void because regarded as economically undesirable. So much is this true that labor leaders have come to feel that it is not constitutions that stand in the way of progressive labor legislation in the United States but reactionary judges who seek to hold legislation in accord with their own political and economic views.

The author considers various palliatives to judicial control, among which are: First, advisory opinions; second, declaratory judgments; third, administrative determination of legal relationships. These palliatives, it is held, although affecting American law to some extent, have frequently been checked, interfered with, and often destroyed by the judiciary, jealous of its own rights and prerogatives.

As to whether the American doctrine of "government by judges" should be adopted in other countries Professor Lambert believes that if they desire "a robust corset of iron" to defend the existing social and moral order against the permeation of reforms and revolutionary tendencies they could do no better than to adopt judicial review. To quote the author, "the judicial control of the constitutionality of laws with its two complements, the construction of laws in the American manner and government by injunctions, is without doubt the most perfect instrument of social statics to which one could actually have recourse to curb the agitation of labor leaders and to hold the legislature in check from going too rapidly in the direction of economic radicalism."<sup>12</sup>

<sup>9</sup> *Bulletin de la Société de Lég. Comp.*, 1902, 253.

<sup>10</sup> *Ibid.*, 240-246.

<sup>11</sup> *Ibid.*, 249.

<sup>12</sup> p. 224.



According to Mr. Lambert it is not necessary to amend the French Constitution to secure judicial review. The various declarations of rights which have never been repealed furnish, he thinks, ample basis for courts to control French legislation. But judicial review, as he sees it, would have to be adopted gradually in order to fit into a system unaccustomed to the checks which such a practice requires.

The treatise is concluded with a section on the advantages of the study of comparative legislation and jurisprudence which, in the judgment of the author, must include not merely a review of legislation but also of judicial decisions. He thinks the French attitude to confine attention almost exclusively to code and statute law is wrong and offers suggestions for the study of American case law.

The author fails to distinguish between judicial review of state laws, definite provision for which was made in the federal Constitution, and the review of acts of a co-ordinate department of the same government, which was the outgrowth of judicial construction in the states and in the nation. A few errors of fact, such as the discussion of the reform of the federal judicial code so as to secure greater uniformity in the interpretation of the federal due process clause without any mention of the amendment to remedy this defect, have probably resulted from the difficulty in securing material regarding foreign institutions and practices.

The author is to be commended for delving beneath the traditional theories and conventional platitudes which characterize the work of many American and foreign writers who deal with judicial review, and for presenting a succinct summary and critique on the underlying theories as well as some of the obvious results of judicial review of legislation. Dealing as the author does with the effects of judicial review largely in relation to social legislation, certain important phases of the practice are not considered and the significance of the practice of review is somewhat exaggerated in its relation to the general characteristics of American law. It is a type of work, however, which not only will be serviceable to Frenchmen but also will be of interest to judges, lawyers, and teachers of public law in the United States.

CHARLES GROVE HAINES.

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THE LAW IN BUSINESS PROBLEMS. By Lincoln Frederick Schaub and Nathan Isaacs. New York: The Macmillan Company. 1921. pp. xxxiv, 821.

The present volume aims in the main "to show the legal system in its relation to the problems and policies of business administration"; to "anatomize" business and to "study the part played by the law in this anatomy." It is intended primarily for use in training students whose chief interest lies in the field of business administration rather than in the field of law. It is divided into five parts: Introductory Topics includes such matters as the nature and sources of the law, and the place of business law in the general scheme of legal classification; Part I, Engaging in Business, relates to the so-called "right" of engaging in business together with the limitations imposed thereon by the law concerning public utilities, unfair trade, licensing statutes, etc.; Part II, the Law of Contracts with Special Reference to the Relation of Buyer and Seller, deals with the rules and principles relating to the formation and interpretation of contracts, parties, etc.; Part III, the Enforcement of Contracts, with Special Reference to the Relation of Debtor and Creditor, gives a general summary of the steps in an action, the various remedies provided by law, and the law of guaranty, suretyship, mortgages, conditional sales, pledges, and negotiable instruments; Part IV, the Law of Business Organization, deals in

a summary way with the relative merits of the different forms of business organization, and the law of agency, corporations, and partnership.

Much of the book is in the form of text, some of it consisting of excerpts taken from the writings of other authors. Interspersed with the text there is a large number of cases taken from the reports and freely edited. The cases are in large part merely illustrative. To some of the chapters has been added a list of practice problems. The work has been carefully and painstakingly done. The materials of a more or less general nature have been chosen with discrimination, and the legal rules and principles are, on the whole, stated with precision. One rather remarkable slip appears, however, on page 277, where the decision in *Henry v. A. B. Dick Co.*, 224 U. S. 1, is set out at length without mention of *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U. S. 502.

It must be apparent that one who purports to write a law book for lay readers, even although they be students of business administration, essays a difficult undertaking, and one that is pregnant with incalculable possibilities for mischief. There is ever present the danger that the limitations inherent in a summary statement of the law will result in the impression being conveyed that the law is such a simple and definitely articulated agency of social control as to make unnecessary the expert. It may well be doubted whether the layman with his lack of understanding of legal terminology and analysis will be able to read into such a summary the subtleties and refinements which to the skilled reader are an ever present reality. In view of this circumstance the promise contained in the quotation above, taken from the Preface, would seem to augur well. The vivisection of business to reveal the relation of its functions and activities to each other and to the law should certainly prove to be a highly instructive exercise for both the business man and the lawyer. It is, however, doubtful whether the promise has in the present instance been wholly fulfilled. There is much about the book that is different, but in the main it seems to follow the traditional lines. It consists in large measure of a summary statement, more or less detailed, of legal rules and principles. It must not be supposed that any attempt has been made to gloss over the perplexities of the law. The defect appears to consist rather in a failure sufficiently to emphasize these perplexities affirmatively. It may well be doubted whether it is feasible to do more for the lay reader than to detail for him the legal path along which it is possible for him to travel in perfect safety, at the same time pointing out that if he contemplates swerving from that path it would be wiser and less expensive in the end to consult one who has made the law his primary concern. For example, as regards the subject of contracts, it is submitted that it would be more understandable to the layman and more helpful to emphasize the necessity of his specifying fully and clearly, without the use of technical language, which he is apt to misunderstand, all the details of agreement, and of providing so far as possible for all contingencies, than it is to set out for him the numerous rules relating to the interpretation of contracts. (P. 285 *ff.*) One might much more profitably warn him of some of the contingencies which occur with frequency and cause trouble if not provided against. Instead of setting out the conflicting decisions relating to the construction of instruments signed by an agent on behalf of his principal (pp. 541-544), would it not be more to the point to tell the business student how such an instrument should be signed? It is arguable that by setting out the detailed rules in regard to what happens when the thing is not done properly the correct course appears by inference, and that it conduces to mental activity along legal lines to have it appear in this way. Were the reader a law student the argument would have weight. However, the average reader whose interest lies primarily in other fields will scarcely have either the time or the patience necessary to enable him to grasp the inference. When one considers the breadth of the field covered within the limits of a single, moderately-sized volume, one marvels that the attempt to do

more than to furnish a few general directions has succeeded so well as it has. The part of the book which seems to the writer to come nearer to fulfilling the promise than any other is the chapter headed *Internal Relations and Control*. There is here more that a layman can comprehend and less detailing of technical rules.

In the hands of a competent instructor the book will no doubt prove a valuable basis for class discussion. For the lawyer it is neither sufficiently unique nor comprehensive to be more than a hornbook, although it is a good one. For the lay reader there lurks the danger inherent in any attempt to gain a smattering of detailed knowledge concerning a difficult science.

GROVER C. GRISMORE.

**HANDBOOK OF THE LAW OF TRUSTS.** By George Gleason Bogert. St. Paul: West Publishing Company. 1921. pp. xiii, 675.

There has long been a need for a new American treatise on the law of Trusts. The leading text-book, that of the late, but not very late, Mr. Perry, has never been very satisfactory; and the latest edition, with its system of double footnotes, is somewhat chaotic and confusing to the reader. The subject is treated, it is true, in the text-books on Equity, notably in Pomeroy's *Equity Jurisprudence*, but the scope of these books forbids a very full treatment of any of the separate heads of equity jurisdiction. The English treatises on Trusts, such as those of Lewin, Godefroi and Underhill, are more and more concerned, in each successive edition, with English statutes, and are becoming less and less useful to the American practitioner and law student.

Professor Bogert's book purports to be an elementary treatise, one of the *Hornbook Series* published by the West Publishing Company. But it differs from most elementary books of the sort, in that it is a thorough and scholarly piece of work. Naturally the author cannot in less than 600 pages of text treat in detail all the problems of the law of Trusts; and some matters of interest have to be omitted altogether. The only question which may fairly be asked is whether the choice of material and the apportionment of space has been made with sound judgment; and the answer, it is believed, is an emphatic affirmative. One very valuable feature of the book is the extent to which the author has made use of articles in the law magazines. Such articles are receiving an increasing amount of attention in briefs of counsel and in judicial decisions.

It is to be regretted that Professor Bogert occasionally adopts the jargon of the earlier decisions, stating a principle in the form of what is obviously a fiction, as when he says that in certain cases fraud is conclusively presumed (p. 141), whereas liability is imposed in such cases regardless of fraud. But such instances are rare, for as a rule the author's statements are direct and clear. There is certainly no treatise on the law of Trusts which will be found more useful to the American student of the law; and it is believed that it will be of great value to lawyers also, as a clear presentation of fundamental principles and a guide to the most recent material on the subject.

AUSTIN W. SCOTT.

**PRINCIPLES OF CONTRACT.** By Sir Frederick Pollock, Bart. Ninth Edition. London: Stevens & Sons, Ltd. 1921. pp. lx, 820.

The ninth edition of this well-known work presents some changes which are noted in the preface. The author's remarks on the formation of contracts by correspondence are recast. As he truly says, the question has passed the

stage where argument is possible as to the law on this matter. Whether one likes it or not, the law is settled. The treatment of default or repudiation by one party to a bilateral contract, as affecting the rights of the other party, has been enlarged. In previous editions this important branch of the subject was never fully treated; and indeed in the present edition, the discussion is not full.

The important cases, brought about by the great war and by the statutes passed for the defence of the realm, on impossibility and frustration of adventure, are inserted with the matter formerly contained in a chapter headed "Impossible Agreements" under the heading of "Conditions," together with other matter more usually placed under that heading. In making this change the author is undoubtedly following the language of the courts. In the reviewer's opinion, however, he is not indicating the true basis of the doctrine on which the decisions must rest. The defence which has generally passed under the name of Impossibility should properly be treated in connection with Mistake, for the former defence rests on the mistaken assumption by the parties of the future existence of certain essential facts; while the defence of mistake rests on the erroneous assumption of the present existence of such facts. It is likely to cause confusion to speak of such defences as conditions. They are created by the law and not by the parties, and are affirmative in their nature.

In his preface the author makes the following interesting statement: "Learned Americans are still engaged from time to time in valiant efforts to reduce the common-law rules of contract, and the doctrine of consideration in particular, to strict logical consistency. That quest is, in my humble judgment, misconceived. Legal rules exist not for their own sake, but to further justice and convenience in the business of human life; dialectic is the servant of their purpose, not their master." A reply is perhaps justified, and it may, without fear of offence, be made in reviewing the work of one who has done more than any English writer of his generation to promote reason and logic in the law.

No one will dispute that logic should be the servant not the master of practical convenience, and that where logic and convenience are clearly at war, logic must yield; but courts seem less likely at the present time than ever before to forget this. On the other hand, there is a real danger that courts in considering the special facts of cases before them, and what seem to be the particular equities of those cases, will forget the high practical value of logic. Unless logic can in the main be trusted, no one can safely advise on the new problems which are constantly arising. It is probable that bad reasoning or antiquated precedent is the cause of quite as many decisions which are out of line with general principles as any arguments from practical convenience, and no assumption should be made that because a decision is illogical it must therefore be practically convenient. The United States have at least one advantage over England as partial compensation for the multiplicity and diversity of decisions which the division of this country into many separate jurisdictions involves. Decisions which are wrong in principle are somewhat easier to overthrow, and escape from antiquated precedents is a little less difficult.

SAMUEL WILLISTON.

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**WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES.** By Clarence A. Berdahl. University of Illinois Studies in the Social Sciences, Vol. IX, Nos. 1 and 2. Urbana, Ill.: The University of Illinois. 1920. pp. 296.

As the Constitution deals with executive power in very general terms, and as the literature on the subject is scanty, there is ample room for this pamphlet. The author has not had access to an adequate library; but the citations show that he has made conscientious use of the books at his disposal. His method is to state the various views of others, rather than those held by himself; and the result occasionally (*e. g.*, pp. 15-18 and 182-184) is somewhat obscure.

The author has analyzed the subject well, and has then covered, so far as the facts seem to permit, the several heads of the analysis. Thus it has happened that in several instances he has covered topics usually unnoticed. For example (pp. 37-42), he has explained well the distinction between treaties and exchanges of notes, and (pp. 143-148) he has given as to military commissions more information than is easily accessible elsewhere; and (pp. 148-151) he has given interesting details and generalizations as to the power of pardon. He does not, however, have full acquaintance with all the pertinent details regarding executive control in the World War. For example, he does not mention that exchange of notes upon which was based the exclusive jurisdiction of American courts-martial over offenses committed in France by members of the American armed forces or by persons accompanying them, and he does not mention the executive proclamations regulating aircraft.

In the discussion of courts-martial (pp. 142-154), it is noteworthy that the very important case of *Grafton v. United States*, 206 U. S. 333, is not mentioned. Such other omissions as have been discovered are doubtless due to inaccessibility of books.

The pamphlet is worthy of revision, enlargement, and republication.

EUGENE WAMBAUGH.

LEADING CASES IN COMMON LAW. By Ernest Cockle and W. Nembhard Hibbert. London: Sweet and Maxwell, Ltd. 1921. pp. xxxiv, 901.

To bring together in a single volume a collection of cases covering the whole field of the common law, is, of course, an impossible task. Even when, as here, the subject matter is confined to the private law of a single jurisdiction, any such volume is sure to be superficial in the extreme. But this ponderous book is not only superficial and incomplete; it is not even well worked out as to those subjects which it does cover. The cases, while in the main well selected, are hopelessly mutilated, so as to become a mere collection of *dida*; and the typography is such as to cause the reader to writhe. Moreover, the arrangement of the subjects treated is peculiar. Thus, Contracts, Torts and Damages are grouped together as "The Law of Things"; while under the sub-head of Contracts are included Agency, Carriers, Gifts and "Clubs." The law of property, distributed in procedural pigeon-holes, is treated under the section on Torts.

Apparently the volume was prepared for the use of English law students. To an American reviewer, accustomed to the scholarly case-books prepared by law professors, as used in American law schools for the last thirty years, the reasons for publishing such a book are difficult to comprehend. It is certain that the advantages of the case system cannot be gained by studying this hybrid of case-book and text-book; while if intended as a manual for English practitioners, it seems too elementary to be of value.

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## LAW, INDUSTRY, AND POST-WAR ADJUSTMENTS

### A NEW PROVINCE FOR LAW AND ORDER

**R**EADERS of the HARVARD LAW REVIEW need no reminder of the contributions of Mr. Justice Higgins on the subject of "A New Province for Law and Order." The value of those contributions is recognized by judges of Australian state industrial courts. These courts, although limited to adjudication in intrastate matters, possess within their respective geographical areas a less restricted jurisdiction and far greater powers than the Commonwealth Court of Conciliation and Arbitration. For example, the South Australian Industrial Arbitration Court has an original, an appellate, a civil and a criminal jurisdiction. Further, its process has been greatly assisted by determinations of industrial (or wages) boards constituted for particular industries. The boards include representatives of employers and employees, and an independent chairman. When the Arbitration Court was first constituted, the assertion was made that the court would be deluged by appeals from determinations of industrial (or wages) boards. It was said that the employees would get all they could on the board, and would then appeal to the court on the chance of getting something more. The prediction has been falsified. At most, not more than one in twenty determinations has ever come before the court for consideration on appeal. Several explanations may be suggested. In the first place, the court endeavors to prevent industrial disputes from arising or developing. It keeps in close touch with employers and employees, who have ready access to

a judge in chambers by way of deputations, conferences, etc. In the second place, when an industrial dispute is definitely before the court, whether the court is sitting in its original or its appellate jurisdiction, the practice of the court has been to hold a preliminary sitting with a view to constituting the parties an informal tribunal for the purpose of coming to some agreement among themselves. At such preliminary sittings, the presiding judge may make suggestions as to what modifications should be made at the outset in the claims of either party. If an agreement between the parties is arrived at, the agreement is only made an award of the court after judicial consideration of its terms. Otherwise, "consent awards" might be out of harmony with the general principles upon which the court acts in making an award, if they did not amount in substance to a conspiracy between employers and employees in a particular industry to exploit the general public. In the third place, should no agreement be arrived at, and the dispute come before the court for formal hearing, ordinary judicial process applies, with the accompaniment of the engagement (not inevitable but certainly prudent) of learned counsel. In the fourth place, when the court delivers a judgment, it does so with a view to stating principles clearly, and also to stating the precise grounds or reasons upon which those principles are based. The result of a sustained pursuance of this policy has been the development of a large body of doctrine for the purpose of rationalizing the operation of the Rule of Law in the sphere of industrial relations. Industrial boards have this body of doctrine to guide them when making their determinations. In other words, the boards both assist the court and are assisted by it. Parties, not within the ambit of any particular industrial board, are usually able to form a fairly accurate forecast as to what the decision of the court would be if the case were to come before the court by way of litigious process. The general result may be expressed by saying that there has been a minimum of industrial friction and a maximum of industrial harmony. There has also been more local autonomy than is possible in the case of the Commonwealth Court which is unassisted by any commonwealth industrial boards. Progress in the extension of the Rule of Law to industrial relations represents, to a remarkable degree, a combination of democratic and aristocratic elements.

## THE PRESENT SITUATION

Past achievement is no guarantee of future success. In fact, the system of compulsory arbitration in industrial matters is now being blamed, not only for alleged sins of commission or omission, but for many ills with which it has but a slight connection, or none at all. Several factors during the last twelve months have tended to develop class friction. (1) The Report of a Commonwealth Basic Wage Commission, constituted to inquire and report as to the cost of living (for a man, wife, and three children), and composed of representatives of employers and employees presided over by Mr. A. B. Piddington, K.C., has indicated a wage for adult males of sums varying in the capital cities of the different states, but averaging about £5.14.6 a week. The chairman, in a memorandum to the Right Hon. the Prime Minister, conceded in effect that Australian industries could not pay so high a rate of wage as a bed-rock wage. He suggested a flat basic rate of £4 a week, to be supplemented by a public maternity bonus system of 12s. each a week for each dependent child. Notwithstanding the memorandum just referred to, and notwithstanding an adverse report by the Commonwealth Statistician as to the wages which Australian industries would bear, there has been a persistent agitation on the part of wage earners to induce the various industrial courts throughout Australia to adopt the findings of the Commonwealth Basic Wage Commission as a bed-rock living wage for all adult males. The courts have refused to concede the claim. The disappointment among wage earners has been acute. How acute, may be imagined from the fact that most industrial courts in Australia had purported to provide a living wage likewise estimated on the basis of the needs of a worker with a wife and three children to support.<sup>1</sup> (2) Although the value of compulsory arbitration in Australia has been greatly impaired by the dual control of commonwealth and state courts (which has existed without any demarcation of jurisdiction, and without any appellate machinery for coördinating the awards of commonwealth and state courts), the evils of dual jurisdiction have been brought very much to the fore in the last twelve months for several reasons. One reason is a decision

<sup>1</sup> Cf. *The Living Wage (Printing Trades) Case*, 3 S. A. I. R. 215, 252-262 (1920).



of the Commonwealth High Court, which has held that state instrumentalities are amenable to the jurisdiction of the Commonwealth Court of Conciliation and Arbitration. Another reason has been a divergence of view as to hours per week and the method of estimating marginal differences for skilled workers. The general practice in Australia in the past has been to prescribe a forty-eight hour week, and to add to the basic wage the preëxisting customary marginal difference for skilled laborers. (In a world of rising prices it seemed desirable to avoid the evil of an excessive wages bill; and it also seemed more important to secure to the under dog a living wage than to award to the skilled worker a proportional margin as distinguished from a margin simply taken as a lump sum.) Some recent decisions of the commonwealth court have involved important departures. They display a tendency towards a forty-four hour week and the adoption of the principle of proportional margins in assessing the wages of skilled labor. Hence further dissonances between the commonwealth and most state courts.

(3) In Australia, as in America, world prices have called for adjustments in nominal wages. From May, 1914, to September, 1920, wages had risen about fifty-four per cent. The rise would probably have been much greater but for the fact that in Australia, where wages have been fixed generally by public authorities, and where employees generally had come to look upon public authorities as affording fairer criteria of wage justice than would be afforded either by the unrestricted operations of demand and supply in the labor market or by the results of collective bargaining, the rise in wages has not been so violent as in many other countries. Now that prices are descending, the difficulties of adjusting wages and prices may not be so formidable. They are, however, serious. So far as South Australia is concerned, the need is recognized, subject to conditions, in recent declarations of the local Board of Industry which is now entrusted with the duty of estimating the living wage. The board consists (in addition to the President of the Industrial Arbitration Court) of representatives of employers and employees. The board, after public inquiry into the adult male living wage, declared a wage of £3.19.6 a week (to replace a living wage declared about twelve months earlier by the Industrial Court of £3.15.0 a week). The declaration evoked much hostility on the part of both employers and employees. Undeterred by public

criticism, the board proceeded to conduct an inquiry as to the adult female living wage. In a report, dated August 11, 1921, the board made a declaration from which the following extract may be quoted:

"At the outset, the Board desires to state that it has acted on certain assumptions which, though amplified or implicit in its recent declaration as to the living wage for adult males, are also relevant for the purposes of the present report:—

"1. That, while the need for public and private economy is equally evident and urgent, the State of South Australia is not quite so hopelessly bankrupt in resources of material, or of mind, or of will, as to warrant the Board of Industry in declaring as a standard living wage for unskilled workers generally a sum inadequate to supply what may be regarded as the bare necessities of life in a supposedly civilized society.

"2. That there is no impropriety in a belief that a sane economy should be sought through increased efficiency on the part of either employees or of employers, or of both, in the complex mechanism of production rather than through wages so low as to menace the health of the working population, to depress purchasing power in the local market, and to give a legal sanction to the creation or growth of a malnourished and discontented proletariat. Further, that the employers and employees of this State, speaking generally, are not so devoid of intelligence as to fail to realize the importance of a more effective co-operation in the processes of production.

"3. That the 'normal and reasonable needs' of the wage earner as referred to in the statutory definition of 'living wage' are not to be ascertained by reference to what may be deemed a possible scale of wages in industries passing through a period of abnormal depression due to world-wide influences.

"4. That, with respect to industries of the kind just referred to, the State Industrial Court will adhere to its frequently reiterated policy of bringing parties together in order that they may discuss the desirability of carrying on for the time being, and if so, the question of ways and means by agreement of the parties.

"5. That although a previously declared living wage during some time that it has been in operation may have become ineffectual to maintain the standard of normal and reasonable needs owing to a rapid increase in the cost of living due to world-wide causes, the duty of the Board as indicated by the Industrial Code is simply to declare a living wage for the future on such evidence as it has before it.

"6. That for the purpose of such declaration, while actually current

prices at a particular moment of time are relevant, average prices extending over at least a quarterly period should in general have a *prima facie* preference whether prices appear to be likely to ascend or descend in the near future.

"7. That the subject of the expediency of admitting of more frequent adjustments when prices are unstable is one for the consideration of Parliament, especially in view of the statement in the recent declaration of the Board that elasticity of adjustment in times of descending world prices is desirable in the interests of employers, employees, and the general community.

"8. That the question whether a prior estimate of a living wage should be reaffirmed or varied should not be answered without some reference to the date at which, and the general scope of the evidence upon which, the prior estimate was given.

"9. That increases or reductions in wages in other parts of the world, whilst relevant even in an investigation with respect to the living wage, must be viewed in relation to the industries in which, and the circumstances under which, such increases or reductions have been made. [In the *Labor Gazette*, June, 1921, prepared and edited at the office of the Ministry of Labor, London, many illustrations of both increases and decreases, but mostly of decreases, are given. For example, as regards decreases, 'Iron and steel manufacture — Fitters, turners, electricians, blacksmiths, and patternmakers employed on maintenance work at blast-furnaces (members of the Amalgamated Engineers' Union): — Decrease, under sliding scale of 60 per cent. on standard rate, leaving wages 215 per cent. above standard. Rate after change — 41s. 6d. per week, plus 215 percent.']

"10. That the duty of the Board is to interpret 'normal and reasonable needs' by reference to the evidence before it, and to form its own conclusion, even though (as in the case of the recent declaration of the Board with regard to the living wage for adult males) such conclusions may mean a lower wage than is enforced both by other State Industrial tribunals in Australia, and by the Commonwealth Court of Conciliation and Arbitration (to which last-mentioned Court both public and private employees of this State have a right of access).

"11. That, while the national production and income are relevant for the purpose of considering what wage may be considered a living wage, the duty of the Board in respect to women workers is to apply the standard of needs as distinct from the standard of the relative value of the work of men and women employees respectively.

"12. That, in the interpretation of the needs of the unskilled woman worker, the sum implicit in the declaration of the living wage for adult

males for the maintenance of the woman who works in the home as wife and mother, though not conclusive, is yet relevant for consideration.

"While the Board hesitates to state assumptions of which most may seem to be mere truisms, the statement seems desirable for two reasons. In the first place, if the assumptions are not in accord with facts, or with the legislative intent, or with the public welfare, the error can be corrected by legislative enactment. In the second place, there appears to exist a curious illusion that when prices fall a pre-existing nominal wage should be reduced, irrespective of the time at which the nominal wage was declared, and irrespective of the general scope of the evidence upon which that nominal wage was declared."

The foregoing extract illustrates some of the difficulties of the process of adjustment during a post-war period. The average employee naturally does not like to see nominal wages reduced. Many employers, on the other hand, would reduce wages straight away, irrespective of the date at which such nominal wages were fixed. The psychological influences at work are illustrated by a recent and prolonged controversy in the State of South Australia with respect to copper-mining operations. An industrial agreement between employers and employees had been made during a period of high prices. When the price of metals fell materially, the employers alleged that it was impossible for them to continue to carry on under the scheme of wages previously agreed to. On the other hand, the employees, most of whom were members of a very large union extending throughout Australia, elected to treat the case as a test case. They alleged a conspiracy of employers throughout Australia to beat down wages. They maintained, as matters of principle, that they could not give way without prejudicing employees elsewhere, and that in any case, if the company should incur some loss in continuing operations, such loss ought to be balanced against profits made in the preceding years when the prices of metals were high. For several months my learned colleague, Mr. Deputy President Webb, made endeavors to secure a settlement. Ultimately his efforts were successful. The men went back to work, under materially reduced wages, by agreement of parties, and without any award of the court. The apparent optimism of the Commonwealth Basic Wage Commission, the embarrassment under which employers labor through the existence of dual jurisdictions, and the difficulties of adjusting wages in

times of trade depression or falling prices, have combined to put a severe test upon the systems of compulsory arbitration now in force in Australia. At the imperious summons of realities, multitudinous questions arise for consideration. Has too much been attempted? Will a system of public regulation of industrial conditions work under conditions of falling prices, etc., etc.?

#### THE NEED FOR REORIENTATION

In a judgment which I gave in June, 1921, in *The Trading Bank Clerks Case*,<sup>2</sup> I reviewed the whole industrial position. I remarked:

"(1) Recent legislation has greatly increased the responsibilities of the Court and the ambit of those amenable to its jurisdiction. The fact has to be viewed in relation to what may be called the problem of national solvency, in view of the access which Government employees now have to the Industrial Court. (2) The present case is the first in which I have been called upon to decide whether a claim properly before the Court should be dismissed on the grounds that '*in the public interest further proceedings by the Court are not necessary or desirable.*' (3) The application for a dismissal of the claim is made at a time when catastrophic conditions, world wide, are calling for adjustments in prices and wages and a reorientation with respect to the functions and even the value of public institutions for the regulation of the conditions of employment. No one can take up his morning's paper without finding from day to day some new and perplexing problem which presents itself for solution. One is irresistibly compelled to ask what is the duty of Industrial Courts which have to face the questions of how best to protect employers from unfair competition, and employees from exploitation."<sup>3</sup>

As the judgment occupies forty-four pages, I limit myself in the present article to a brief statement of its general tenor. The present drift in Australia is undoubtedly towards a class war. A large proportion of employers are so confident of their "economic strength" and of the embarrassments which result from circumstances already stated, that they would like to get back to *laissez-faire*. A large proportion of employees will be satisfied with nothing less than Marxian Socialism. The general object of my declaratory judgment in *The Trading Bank Clerks Case* was to indi-

<sup>2</sup> 4 S. A. I. R. 181.

<sup>3</sup> *Ibid.*, 184-185.

cate a way between the Scylla of excessive public regulation and the Charybdis of *laissez-faire*.

#### DIAGNOSIS

Naturally, the first essential is a clear and reasonably comprehensive diagnosis of existing industrial ills. From the point of view of symptoms, it is obviously unnecessary to-day to dwell on the forms and results of industrial unrest, the friction, worry, and insensate dissipation of energy — a general inefficiency in the working of the economic machine which, though more apparent and menacing since the war, was becoming evident long before the war began. In order to determine in what ways industrial courts may extend the Rule of Law to industry without doing more harm than good, we must proceed from symptoms to causes. Modern industrial unrest is a phase of, and in many respects is indistinguishable from, social unrest — a disturbance in the mental equilibrium of citizens due to such causes as new and undigested knowledge, new wealth divorced from a sense of responsibility, and the multiplication of new pleasures, of which the enjoyment is ill distributed, often abused, and seldom brought into harmony with a reasoned scheme of individual life. New knowledge, new wealth, and the multiplication of pleasures, are phases of human progress; but the process of adjustment of the minds of men and women to-day to the new conditions and new responsibilities of human life has been most conspicuous in creating uncertainty and discontent. It will be apparent that the operation of the causes just stated involves many problems with which an industrial court is not concerned. But in so far as the causes contribute to industrial instability, their existence has to be recognized if a court is to avoid the fatal danger of tinkering with symptoms.

Three specific causes of industrial unrest are more obviously related to the work of an industrial court. The first is the war, with its aftermath. The second is the mechanical character of much of the work which has to be done in an age of machinery. The third specific cause, though existing before the war, has been very greatly emphasized as a result of the war. I allude to the coëxistence of political democracy with industrial autocracy. The apparent assumption is that, although every citizen has intelligence enough to choose and criticize those who shall govern the country,

he has not intelligence enough, or he has not good will enough, to be entrusted with a voice in the direction of a trade, industry, or business, save within the modest limits suggested by legislation for the regulation of industrial conditions. The average laborer, though he has a voice in the destiny of the nation, has come to regard himself in industry as little more than a cog in a merciless mechanism for grinding out profits. Whether this view be sound or not I need not now discuss. It is enough for immediate purposes to insist upon the felt disharmony between ideas accepted in citizenship — ideas which involve self-determination and a conscious community of interest and responsibility — and the ideas reflected in the organization of industrial enterprises.

#### THE "WANTS OF THE WORKER"

The subject of diagnosis may be approached from the point of view of those "wants of the worker," the non-satisfaction of which is most apparently provocative of industrial discontent: (1) A higher standard of living, or at least a greater purchasing power. (2) A closer approximation to a just proportion between services rendered and reward or remuneration received. (3) A reasonable security of employment. (4) An interest in the work. With respect to the last mentioned, the average employee compares unfavorably with the craftsman of the middle ages, or the "professional" classes of our own time. The chief problem of our day is to discover means to give to the worker a real interest in his work, whether such interest has its source in the character of the work done, or in a communal control, or in a community of interest and responsibility in results achieved, or again, in some variation or combination of these. Since we live in an age of machinery it is idle to ignore the need for other forms of realization of self-interest than have in time past proved sufficient. The problem of industrial life to-day is not to destroy machinery, but to adapt the mechanism of production in its wide sense to the insistent demand of men for some form of self-expression. The most apparent form of self-expression is the consciousness that the success or failure of a particular trade, manufacture, or process is in some way or other as much the concern of the employee as the employer.

## INDUSTRIAL COURTS AND BOARDS

Neither wages boards nor industrial courts have proved, or ever can prove, a complete solution of the problem of industrial unrest. Yet it is worth while to consider both their value and their limitations. Though they are in the nature of a sequel to the Factory Acts of the last century, they have been freely criticized. While many employees urge that they are attempts to solve a problem which can only be solved by radical measures of a more or less revolutionary character, many employers contend that the institutions, though "theoretically" admirable, have proved in practice to be meddlesome, irritating, and conducive to inefficiency. A few extracts from recent expressions of opinion in the Australian press deserve quotation, if only to show a failure to realize the purposes and the inevitable limitations of the institutions criticized. "Industrial courts were constituted to prevent strikes. Why have they not done so?" "Why have industrial courts failed to do justice to the toilers?" "Why have industrial courts been so consistently unfair to employers?" "Industrial courts were constituted to put an end to the industrial strife and unrest of our time; but they have augmented these evils." It should be apparent that the criticisms, if not partisan, at least display a failure to realize the complexus of the causes of social and industrial unrest. Adam put the blame on Eve. "The old Adam survives." An ever increasing censoriousness is one of the prevailing traits of our time. One half of the criticism of modern democratic institutions might be summarized in a single question, "Why does not Parliament make men virtuous?" True, the question is not put in this terse form. But the fact remains that man, being human, possesses, among other qualities, the very human quality of "shifting the blame." An existing order or institution, being in the nature of things an abstraction, and so incapable of suing for slander, is most convenient for the purpose.

I have referred to some criticisms of industrial courts in an article on "Industrial Courts in Australia."<sup>4</sup> Therein<sup>5</sup> I pointed out the value of wages boards, and the need to supplement their action by a judicial tribunal which, instead of acting

<sup>4</sup> *JOUR. COMPARATIVE LEGIS.*, p. 169 (October, 1920).

<sup>5</sup> *Ibid.*, p. 171.



in a sectional way, should view industry at large. I referred<sup>6</sup> to the fact that publicly unregulated freedom of competition would justify conditions reminiscent of "The Song of the Shirt," and suggested<sup>7</sup> the psychological advantage of having a judicial authority, to which industrialists might appeal, both as an alternative to industrial anarchy, and as a protection to average employers from unfair competition. In the same article<sup>8</sup> I discussed the question whether, making allowance for inevitable adverse conditions of long standing or recent growth, industrial courts in Australia have been as successful as might have been reasonably anticipated. I enlarged<sup>9</sup> upon the need in a country like Australia, with a single fiscal system, for an industrial appellate tribunal to harmonize the awards of commonwealth and state courts. Later<sup>10</sup> I referred to the contention that industrial courts are a legalization of class warfare, and pointed out that such courts do not create the warfare, in so far as it exists, but are essentially a means for coping with it in accordance with reasoned principles. I referred<sup>11</sup> to the moral value and effect of industrial awards. I also touched<sup>12</sup> upon those agencies of social betterment, which are complementary to the judicial regulation of industry.

The above references cover too wide a field for immediate discussion. But I desire to refer to certain subjects:

(1) *The failure to suggest workable alternatives to the schemes of industrial regulation by public authority.*—There are, of course, suggestions for a radical change in the present economic order. But such suggestions do not appear to admit of adoption in the present or near future. I had this in mind when I said in a judgment in *The Living Wage (Printing Trades) Case*:<sup>13</sup>

"Every gain or loss in this world has to be regarded in the light of alternatives. In industrial matters, the alternative has been, and remains, either justice in accordance with reasoned principles, or the turbulence of an industrial strife, and the rule of might. Both employers and employed have to gain in the long run by the adoption of the former of these alternatives. Speaking of South Australia, I have no hesitation in saying that those who deny that the activities of this

<sup>6</sup> JOUR. COMPARATIVE LEGIS., p. 172 (October, 1920).

<sup>7</sup> *Ibid.*, p. 178.

<sup>8</sup> *Ibid.*, p. 180.

<sup>9</sup> *Ibid.*, p. 181.

<sup>10</sup> *Ibid.*, p. 187.

<sup>11</sup> *Ibid.*, p. 185.

<sup>12</sup> *Ibid.*, pp. 170, 187, 188.

<sup>13</sup> 3 S. A. I. R. 215, 225-226 (1920).

Court have exercised on the whole a steadying influence upon industry in this State must be blind to the sum total of facts. They are unable to see the wood for the trees. They are so obsessed by this or that case of 'industrial burglary' that they cannot see the industry of the community as a whole."

(2) *The futility of relying on "the free play of economic forces."* — It ought not to be necessary in these days to say anything in refutation of those who talk about what they describe as the "inexorable law of supply and demand." But, as Leslie Stephen remarked, exploded fallacies live long after their brains have been knocked out. In the judgment just referred to I remarked:<sup>14</sup>

"While economic tendency cannot be ignored, the 'free play' is apt to grind to powder. The operation of economic forces can, within limits, be controlled, qualified, and in a measure directed. The history of civilization is a long record in illustration. . . . I cannot refrain from adding that it is strange to me that the 'unrestricted operation of economic forces' should be urged at a time when we have come to realize, though imperfectly, the need for international regulation in order to prevent the desolation of war. In the life of each nation, no less than in that of the society of nations, the need for socially regulated order exists, and that need extends as much to what are called industrial matters as to what are called civil and criminal matters. The sooner the fact is recognized by employers and employees alike, the sooner shall we reach a better order."

More recent events in the world of trade and commerce suggest a further remark. At the very moment that employers invoke unrestricted supply and demand as a criterion of wage justice, many of them are deeply concerned to prevent, by artificial means, supply and demand from operating in respect to the price of commodities or services. I have not in mind oppressive corners and combines, seeking every occasion to exploit. It is sufficient for my purposes to point out combinations of suppliers who seek governmental aid, with the object of tiding over periods when a temporary surplus of supply might leave producers at the mercy of speculators on the market. The object is legitimate, but not more so than the public regulation of industrial conditions. The fact that there are necessary limits to wise action in both cases need not

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<sup>14</sup> 3 S. A. I. R. p. 229.

blind us to the inconsistency of those who would entrust conditions of employment to unrestricted supply and demand, while appealing for public control to prevent a *débâcle* in the price of commodities or services.

(3) *The limitation of the value of collective bargaining.* — It is a common cry, expressed in different camps according to circumstances, "Let employers and employees agree among themselves." At the very opening of this article I have tried to show how large is the field for agreement between employers and employees. But one has to face the fact that sometimes disputants will not agree even on fundamentals; that sometimes they may agree on standards which cause discontent and dislocation in other industries; that at times employers may be strong enough to impose intolerable conditions on the workers; or again, that the employees, as a result of a scarcity of labor, strong organization, or strategic position, may be able to impose unfair conditions on employers. It is idle to speak of such possibilities as "academic." They actualize in every-day experience. The practice in the South Australian Industrial Arbitration Court has been already outlined. My immediate point is that the settlement of industrial disputes in the ways indicated is something different from collective bargaining as ordinarily understood. It is a settlement arrived at after mediation and suggestion by a public official, and inevitably subject to an anticipation of what the award of the court would be if the case were proceeded with by way of a formal hearing, conducted with due regard to principles expressed in reasoned judgments of the court in previous cases.

(4) *The public regulation of industry during the war and post-war periods.* — The experience of the public regulation of industry by boards or courts during recent years goes to show, not that such regulation is valueless, but that its value is qualified by time and circumstance. Dean Inge has expressed the present situation, as regards England, in graphic if impressionistic terms:

"We are no longer united as a nation; we are a mass of helpless individuals, plundered by gangs of conspirators, honeycombed with treason . . . Many persons appear to have made fortunes out of the calamities of their country, and to wish their neighbors to know that they have made them. Organized labor has thrown off the mask, and is frankly setting up a new privileged class, blackmailing the public by their monopoly

of one or other of the necessities of civilized life. We all know how we are being treated by the miner and the bricklayer; nothing more scandalous, and nothing as ruinous, was ever done by the captains of industry in the days before the Factory Acts."

To what extent either America or Australia is better than England I leave to others to say. I do, however, express the opinion that the public regulation of industrial conditions has greatly mitigated the evils of industrial strife in Australia during a trying period. We suffer, of course, from defects in the public machinery. Those defects, however, are remediable. But the most perfect public machinery will assure neither industrial peace nor industrial efficiency unless such machinery is supported by public opinion and supplemented by private agencies. Further, the proved possibilities of coöperation between employer and employed have a direct bearing upon the terms in which, or the conditions upon which, awards of this court should be made. "The principle of private justice, as embodied in such an institution as the vendetta," writes Dr. Marett, "deserves full credit at the hands of the historical jurist for the part it has played in stimulating the State lawyer to invent an improved substitute for it."<sup>15</sup> If my preceding argument be sound, the industrial strife of our time provides a stimulus to state action; but the "improved substitute" calls for hard thinking and judicious action on the part of both the legislative and the judicial organs of the modern community. Specifically, so far as industrial courts are concerned, the term "judicious action" has a negative as well as a positive implication. Too much as well as too little may be done. I conceive of "the harmonious code for the governance of industrial relations" as limited in scope, just as law in general is limited to the governance of human relations in so far as they are proper for enforcement in legal tribunals. It has never been the ideal of the jurist to cover the whole field of morality. It ought not to be the ideal of industrial courts to cover the whole field of industrial relations. The fact is so obvious that I should not refer to it but for a quite natural though indefensible disposition, which has been displayed by large classes of employers and employees alike, to expect industrial courts to draw up a complete bill of the conditions of employment in a particular industry.

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<sup>15</sup> *JOUR. COMPARATIVE LEGIS.*, p. 39 (January 1921).

I have heard an employer say, under examination: "If our employees are to have access to tribunals, then, of course, the present concessions which they enjoy must be abolished." It would be just as logical for a citizen to say: "If my neighbor is to have the right of access to legal tribunals, then my moral obligations are defined, and he must not expect me to recognize any other obligations than those imposed by law." We have outgrown this attitude so far as law in general is concerned, if, indeed, such an attitude ever existed. But the novelty of industrial arbitration has served temporarily, at least, to develop an exaggerated expectation of the possibilities of such arbitration.

#### PRIVATE AGENCIES

In *The Trading Bank Clerks Case*,<sup>16</sup> I refer to the proved possibilities of private agencies supplementary to, or even independent of, public regulation. For decades there has been much writing and talking about coöperative enterprise. In recent years some extraordinary results have been attained which go to show that theories about coöperation can be put into practical operation. Special reference is made in the judgment cited to the recent book of Mr. Leitch, "Man to Man." In many and varied businesses the claim is made that the application of common-sense methods of business organization, made and carried out by Mr. Leitch in conjunction with employers and employees, achieved the following results: (1) Strikes abolished; (2) output increased from 30 to 300 per cent.; (3) profits larger, wages higher, and employment more secure; (4) labor antagonism and dissatisfaction practically eliminated. Mr. Leitch's methods afford an illustration of the value and possibilities of the self-government of the business unit. As the result of ingenious systems of profit-sharing, of common control and responsibility under wise leadership, employees were given a new interest in their work, and a new sense of power and responsibility. I do not accept the results as proving either that the millennium is at hand, or even that the time has yet arrived when the interests of employers, of employees, or of the general community, can be safely entrusted to "the beneficent operation of private agencies." What some employers have done is no guarantee of

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<sup>16</sup> 4 S. A. I. R. 181, 200.

what will be generally done. In the case cited, I dwell at length on the obstacles in the way of industrial betterment along the lines of autonomy of the business unit. These considerations support the conclusion at which I have arrived, after a careful consideration of the present industrial situation, that the next step forward, which is at once practicable and to the advantage of everybody, is to supplement the operation of public regulation of industry, whether by industrial boards or by courts, by the formation of private boards or councils for a particular business concern. So far as private agencies acting alone are concerned, it is only necessary to reflect how the psychological factor stands in the way of social betterment. Many employers may be accused of inertia, of conscious or unconscious go-slowism, of seeking to maintain artificial prices, of exploiting piecework, of undue secrecy as regards profits, and of a traditional class opinion with its reflection in a class organization which easily lends itself to perverse and immoral purposes, seeking to defeat labor rather than coöperate with it. On the other hand, many employees may be accused of impossible idealism, of conscious or unconscious go-slowism, of an obsession as regards high nominal wages, of "direct action," of a desire to get much while giving little, and even of doing everything and anything to make an existing order unworkable, without any clear consciousness of the nature of the new order to be substituted, or the cost to be paid in establishing the new order, or the means of bringing it into operation. Such accusations, and many others, may be made without attempting to apportion the blame as between employers and employees. In any case, they can be made with apparent justice. The fact goes to show at least a provisional need for arbitration, conciliation, or suggestion by public authority. But, if my argument in this article be sound, the near future suggests no prospects of radical improvement unless employers and employees combine to supplement public regulation by an intelligent appreciation of the conditions under which common interests may be promoted. The main obstacle to reform is ignorance. The spirit of autocracy in some, the combative instinct in others, are less serious in the range of influences which play a part than is the misunderstanding of the ways in which a true self-interest may be realized without sacrifice of the common interest.

## THE DUTY OF AN INDUSTRIAL COURT

In the principal case, I summarize my own views as to the extent to which, and the modes in which, a court of compulsory arbitration may contribute to the solution of the problems of industry. Several conclusions are stated: (1) The social and economic *milieu* conditions the methods of efficient action by an industrial tribunal. (2) Both world and local conditions suggest that the pathway toward industrial betterment in the near future lies in a combination of public and private agencies. (3) An industrial tribunal must not ignore the danger of stifling, by excessive regulation, the free development of private agencies. (4) The terms of an award of an industrial tribunal may be framed so as to give a new incentive to private agencies; for example, by express provision for coöperative councils in the nature of enterprise boards (as distinguished from industrial boards for an industry as a whole), solely constituted of representatives of a particular employer and of employees immediately affected. The more important reasons for this limitation of ambit are that an award provides for an industry as a whole; that what is needed is a supplementing by private agreement of the terms of the award; and that if the parties to such private agreement were to include a large variety of concerns, the net result would probably be the lowest common measure rather than the highest common good, if not, indeed, a conspiracy to exploit the consumer. The chief functions of the coöperative councils would be: (a) To adapt an award made by the court to the special conditions of a particular enterprise; (b) to consider disputes that might arise as to the terms of an award; and (c) to consider and determine upon proposals relative to the conditions of employment not inconsistent with the award. The last mentioned function is by far the most important. It extends to such matters as the best means of increasing efficiency (in respect of quality, output, or services), the terms of any bonus that may be agreed on as supplementary to the award in respect of prices, profits, or output (so as to make the wage earner a dividend sharer), and generally to the discovery and application of means for the expression of that community of interest and responsibility between employer and employee which is far more important in range than those surface

antagonisms which are so apt to obsess the minds of parties in argument before a court.

Here is a clear, definite and practicable policy. It is, however, pertinent to refer to some of the more obvious objections which may be urged against such a process of industrial emancipation, because a judicious combination of public and private agencies is impossible of realization if employers are autocratic or employees destructive. We were once told by an eminent statesman to *think imperially*. In a world of ubiquitous expectancies of evils to come, the need to think imperially may remain. But in any case, we live in an age when we must *think industrially*; and to think industrially means to *think coöperatively*. To this end, it is worth while to refer to objections which just because they are obvious are also dangerous. The objection that such councils as I have suggested could not work has been disproved in many countries, and even in Australia, though they have functioned there to a very limited extent and in imperfect forms. The objection that the councils do not go far enough — the most common objection to nearly all proposed reforms and the most dangerous, because it serves to divide reformers and to render their efforts futile — implies a rejection of a present good on the assumption of the possibility of attaining some other good at a more or less remote future. The objection that the councils may prove disruptive of authority betrays a medieval conception of the meaning of authority, quite incompatible with the trend of modern thought. The objection that the councils may weaken the strength of the trade unions must be viewed in the light of the fact that the trade union exists for the welfare of its members, and in any case would necessarily continue to have most important functions to discharge, not to speak of the new function of protecting sub-groups of its members. The objection that the councils may dethrone "capitalism" has to be viewed in the light of the fact that what the community really needs is more wealth, better distribution of wealth or income, and a more intelligent appreciation of the conditions of producing wealth or income in a modern democratic community. In the present article I can only refer to such objections. They have a common basis in the assumption of the incapacity of man to adapt himself to new conditions of environment. The most obvious and comprehensive answer to such objections as I have stated is, apart from actual



achievement in many countries, that coöperation between employers and employees is not impracticable for the simple reason that it has become necessary.

Though I do not venture to anticipate other than a gradual adoption of such methods of coöperation as I suggest, I must confess to a confidence that the average democratic citizen has intelligence enough to realize that exhibitions of primitive combativeness must end in chastisement, in a world where the operation of international competition, though perhaps qualified by protective tariffs, is an overshadowing influence. If, as I maintain, coöperative enterprise has become a necessity, the recognition of that necessity is a mere matter of time. The sooner and the more general the recognition, the less will be the price paid for emancipation from the ills we now suffer. The immediate difficulty is for men to understand that, while mutual aid is an ancient and approved means for attaining good results, the institutions, the forms of organization, or the modes of expression of mutual aid, are conditioned by circumstances of time and place. If to-day we are to have less fighting and more remuneratively productive work, if we are to have less hostility, hate, suspicion, worry, or fuss, and more efficiency in the complex processes of remunerative production, we must think hard about such means of industrial reorganizations as are immediately possible and of proved efficacy. Two obsessions must be got rid of — one, the obsession of distribution as a sort of end in itself; the other, the obsession of production by methods which cannot command the allegiance of the average citizen of to-day. The emancipation from such obsessions should come at the same time. Failure in the process of emancipation may mean a temporary triumph for employers or employed as the case may be; but such a triumph is likely to be gained at the cost of a grave and perhaps irreparable loss to the community, if not of moral bankruptcy. Extremists in either camp may repudiate such a conclusion. I believe that, so far as Australia is concerned, the average citizen will subscribe to the following: First, that coöperation has become an imperative necessity; second, that coöperation (at any rate for the time being, and in a freedom-loving community with a preference for evolution as distinct from revolution, a tradition in favor of law and order, and an amenability to reason and discussion) is most practicable of realization by a frank and unreserved adoption of the principle of

autonomy or self-determination in the organization of the business enterprise. The forms or degrees of autonomy must vary, not merely in accordance with the infinitely varying conditions of particular enterprises, but also in accordance with the extent to which intelligence and good will predominate. I assume an autonomy not independent of, but supplementary to, the public regulation of the conditions of employment. The compulsory terms of an award should be limited to such minimum conditions of employment as are in the interests of employers and employees throughout the industry. In particular businesses something more, and something far better, is possible. That "something more" depends, as I have just said, upon the extent to which intelligence and good will predominate. Despite all inflammatory talk I must confess to a conviction that the immediate lack is less a good will than an intelligence to find forms for its expression. Notwithstanding the turbulent antagonisms which disturb economic life, I believe that the great body of employers and employees in Australia desire to be fair, and are not unconscious of what I may call the logic of time and circumstance. But the desire and consciousness are thwarted because of a failure to discover or apply the best means for being fair which admit of immediate practical application. In proportion as such means are discovered other means will become apparent. For the present it is enough to say that the day for merely talking about the value of coöperation is past. The time has come for employers and employees to put their cards on the table and to get down to business on right lines. This undoubtedly involves high adventure. To ignore the difficulties would be unpardonably "academic." To suggest that an employer should step down from a pedestal in order to convince employees that he is out for a square deal all round may seem to ask much. But it is not to ask too much of the average employer. Nor, again, is it asking too much of the average employee to distinguish between the practicable and the ideal — between that achievement which is here and now possible, and the vision of some new and better order which may be in time to come. All honor to ideals! They inspire hope, courage, and endurance. They afford an objective. But that objective has always to be brought to the test of practicability in circumstances of time and place. Otherwise we make of our ideals a stumbling-block. There are limits to the extent to which courts, or even

parliaments, can save employees or employers from the natural result of unconscionable folly. Such folly (on the part of either those who call themselves employers or those who call themselves employees) spells revolution — a thing not difficult to start under present conditions of unrest, but always most difficult to stay or direct, and often leading to miserable reaction. Of course there may be a revolution under the form of law. But no revolution of any kind can secure for the people of a modern state a high standard of living without a high standard of well-directed effort both of brain and of muscle. I desire to gloss over no difficulties. I hope I have made it clear that real progress is an uphill business, not a joy-ride. At any rate, so far as the near future is concerned, I have as little hope of an immediate leap to a high standard of living throughout the whole community as I have of a new heaven and a new earth to be born miraculously of a general election. But I do hope for a progressive realization of that form of intelligent conservatism which, while conserving as far as may be possible what is good of the past, is yet responsive to the call for incessant adaptation to the changing conditions of our social and economic life. If this hope is to be justified, the community must succeed in turning to good the results of industrial strife — results which may be good or evil according as we have or have not intelligence and sympathy enough to deal with them.

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## THE PERMANENT COURT OF INTERNATIONAL JUSTICE

A WORLD tribunal for the adjudication of international disputes is at last a reality! On 30 January, 1922, the eleven judges of the Permanent Court of International Justice are scheduled to meet at The Hague, and their assembling will crown the success of a whole generation of determined effort. The ideal of such a tribunal has been stirring in the minds and hearts of men for centuries. A Frenchman, Pierre Dubois, suggested it in 1305.<sup>1</sup> Another Frenchman, Emeric Crucé, in *Le Nouveau Cynée* published in 1623, gave it definition and direction. And through a long succession of schemes for world organization the aspiration gathered strength and support, until in the nineteenth century it became the definite goal of statesmen and found place in the policies of their governments.

### STATUS OF OTHER COURT PROJECTS

The conspicuous successes in international arbitration in the latter half of the nineteenth century,<sup>2</sup> more particularly the Geneva arbitration of 1872, made it possible for the Hague Conference of 1899 to establish the Permanent Court of Arbitration. Since its organization in 1900, this court has proved a useful panel from which judges "of known competence in international law" could be selected by disputant states desiring to submit their differences to arbitration. When the second Hague Conference met in 1907, four tribunals had been formed from the panel and their experience was capitalized for modifying and strengthening the convention establishing the court. But opinion had moved on in the interim

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<sup>1</sup> Dr. Vesnitch states that Article 23 of the Hague Convention for the Pacific Settlement of International Disputes follows the plan of Dubois almost textually. VESNITCH, *DEUX PRECURSEURS FRANÇAIS DU PACIFISME* (1911), p. 29. See also Vesnitch, "Cardinal Alberoni: An Italian Precursor of Pacifism and International Arbitration," 7 *AM. JOUR. INT. L.* 51.

<sup>2</sup> Of one hundred and thirty-six arbitrations during the nineteenth century, as listed by Professor John Bassett Moore in 14 *HARV. L. REV.* 182-183, only nineteen occurred before 1850.

between the two conferences, and delegates to the second conference gave their chief interest to the proposals for establishing a Court of Arbitral Justice, to exist alongside the Permanent Court of Arbitration, as a tribunal for adjudication by permanent judges as differentiated from arbitration by judges selected *ad hoc*. The American delegates took a leading rôle in the efforts to establish the Court of Arbitral Justice, and it was only the inability of the delegates at the second Hague Conference to agree upon a scheme for selecting the judges which caused the failure. The conference did recommend a plan for such a court,<sup>3</sup> but later efforts to have the plan adopted proved likewise fruitless.<sup>4</sup> Nor was the Hague Convention of 1907 for establishing an International Prize Court ever ratified by the signatory states, though resort to a system of rotation enabled an agreement to be reached on the method of selecting the judges of such a court.

When the five Central American republics met at a peace conference in Washington in 1907, they succeeded in setting up the Central American Court of Justice, which functioned very successfully during the ten years of its existence and adjudicated no less than nine cases.<sup>5</sup> But the work of this court may be regarded as an experiment in federalism, in view of the history of the efforts to unite the Central American peoples into a single state.

#### ORGANIZATION OF THE NEW COURT

The outbreak of war in 1914 served to increase in some quarters the appreciation of the need for an international court which would exercise more authority than the Permanent Court of Arbitration. The appreciation grew, also, with the progress of the war,<sup>6</sup> and when the Paris Peace Conference assembled in January, 1919, it was generally taken for granted that some attempt would

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<sup>3</sup> The plan was promulgated as an annex to the first *voeu* of the 1907 Conference, the text of which is given in SCOTT, *HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907*, p. 31.

<sup>4</sup> On 18 October, 1909, Secretary Knox proposed that the International Prize Court should also be utilized as the Court of Arbitral Justice. 4 *AM. JOUR. INT. L.*, Supp., p. 102. See also SCOTT, *AN INTERNATIONAL COURT OF JUSTICE* (1916).

<sup>5</sup> A list of the matters which came before this court is contained in "The New Pan-Americanism," *WORLD PEACE FOUNDATION* (pamphlet series), Vol. VII, p. xiii.

<sup>6</sup> See, for instance, *REPORTS OF THE NEW YORK STATE BAR ASSOCIATION*, 1915, p. 76; 1917, p. 104; 1918, p. 90.

be made to establish such a world court. But when the consideration of definite proposals for a league of nations was begun, the Italian delegates were the only ones to present any precise plans for an international court, and their suggestions followed very closely the Hague conventions.<sup>7</sup> All drafts of the Covenant discussed in the Commission on the League of Nations contained a general provision recognizing the necessity for an international court but leaving its precise nature to future determination.<sup>8</sup> The first published draft seemed to envisage the international court as an arbitration tribunal.<sup>9</sup> But Article 14 of the final Covenant directed the Council of the League of Nations to formulate plans for a court which would be "competent to hear and determine any dispute of an international character which the parties thereto submit to it," and which might "give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly" of the League of Nations.

Soon after the Treaty of Versailles came into force, the Council of the League of Nations invited a Committee of Jurists to draw up plans for such a court.<sup>10</sup> When this Committee met at The

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<sup>7</sup> The Italian suggestion is reprinted in a volume of DOCUMENTS PRESENTED TO THE COMMITTEE OF JURISTS AT THE HAGUE IN 1920, p. 55. This is one of three volumes dealing with the Permanent Court of International Justice, published by the League of Nations Secretariat, in 1921.

<sup>8</sup> President Wilson's earlier drafts provided for arbitration, but did not expressly refer to an international court. See SENATE HEARINGS ON THE TREATY OF PEACE WITH GERMANY, 66 Cong., 1 Sess., Document 106, pp. 256, 1167, 1172, 1216, and 1222. But the draft which he submitted to the League of Nations Commission on 3 February, 1919, referred to it expressly. *Ibid.*, p. 1228.

<sup>9</sup> Article 14 of the draft published by the Preliminary Peace Conference on 14 February, 1919, reads:

"The Executive Council shall formulate plans for the establishment of a Permanent Court of International Justice and this Court shall, when established, be competent to hear and determine any matter which the parties recognize as suitable for submission to it for arbitration under the foregoing article."—*Preliminary Peace Conference, Protocol No. 3, Annex A.*

<sup>10</sup> The Treaty of Versailles came into force as between certain of the signatories on 10 January, 1920. The Council's first session in Paris, 16 January, 1920, was largely formal. At the second session in London, 13 February, 1920, a brilliant report on the court was presented by M. Leon Bourgeois, who had been chairman of the third commission in the Hague Conference of 1899 and of the first commission in the Hague Conference of 1907. See LEAGUE OF NATIONS OFF. JOUR., March, 1920, pp. 33-37.

Hague,<sup>11</sup> numerous suggestions were laid before it, some of which represented the results of the work begun by neutral European governments before the end of the war.<sup>12</sup> After five weeks of deliberation,<sup>13</sup> a draft scheme was prepared and presented to the Council as the result of the Committee's labors. It was studied by the Council at two different sessions,<sup>14</sup> and several modifications were introduced into a revised draft which the Council submitted to the Assembly of the League of Nations. In the Assembly the Council's draft was referred to a committee on which all the members of the League — forty-two at that time — were represented. This committee entrusted a sub-committee of jurists<sup>15</sup> with the preliminary study of the scheme, and after prolonged discussions a number of amendments were agreed upon in both the sub-committee and the committee.<sup>16</sup> Thus amended, the plenary Assembly finally adopted the scheme with but one additional amendment.<sup>17</sup>

As it was unanimously approved by a resolution of the Assembly on 13 December, 1920, the statute of the court was "adjoined" to

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<sup>11</sup> The Council's invitation was accepted by the following jurists: Adatci, Japan; Altamira, Spain; Descamps, Belgium; Fernandes, Brazil; Hagerup, Norway; de Lapradelle, France; Loder, Netherlands; Phillimore, Great Britain; Ricci-Busatti, Italy; Root, United States. Dr. James Brown Scott assisted at the meetings of the Committee, as legal adviser to Mr. Root.

<sup>12</sup> The draft scheme framed by a conference of the representatives of Denmark, Netherlands, Norway, Sweden, and Switzerland was a notable contribution to the work of the Committee of Jurists. See DOCUMENTS PRESENTED TO THE COMMITTEE OF JURISTS, p. 301.

<sup>13</sup> The Committee held thirty-five meetings, 16 June–24 July, 1920. The *procès-verbaux* have now been published by the League of Nations Secretariat. The draft scheme of the Committee of Jurists was published in 14 AM. JOUR. OF INT. L., Supp., p. 371.

<sup>14</sup> At the eighth session at San Sebastian, 5 August, 1920, and at the tenth session at Brussels, 27 October, 1920. See LEAGUE OF NATIONS OFF. JOUR., September, 1920, p. 318; *Ibid.*, November-December, 1920, p. 12.

<sup>15</sup> The sub-committee consisted of: Adatci, Japan; Doherty, Canada; Fernandes, Brazil; Fromageot, France; Hagerup, Norway; Hurst, British Empire; Huber, Switzerland; Loder, Netherlands; Politis, Greece; Ricci-Busatti, Italy.

<sup>16</sup> The *procès-verbaux* of the ten meetings of the committee, 17 November–16 December, 1920, are published in RECORDS OF THE FIRST ASSEMBLY, Meetings of Committees, I, pp. 275–329. The *procès-verbaux* of the eleven meetings of the sub-committee, 24 November–10 December, 1920, are published in *Ibid.*, pp. 333–403.

<sup>17</sup> For tracing the origin of the provisions of the final statute, and for comparing the drafts of the Committee of Jurists, the Council, and the Assembly, see the DOCUMENTS PUBLISHED BY THE LEAGUE OF NATIONS SECRETARIAT, Vol. II, pp. 54–60, 214–

the protocol of 16 December, 1920,<sup>18</sup> which was opened to be signed by the members of the League of Nations and the other states named in the annex to the Covenant. The Assembly's resolution provided that "as soon as this protocol has been ratified by the majority of the Members of the League, the Statute of the Court shall come into force." When the second Assembly convened on 5 September, 1921, the protocol had been signed by representatives of forty-two members of the League, and ratified by twenty-nine of them,<sup>19</sup> so that the existence of the court was no longer conditioned by anything except the election of the judges.

#### SELECTION OF THE JUDGES

The statute of the new court provides for a membership of eleven judges and four deputy judges, elected "regardless of their nationality," possessing the "qualifications required in their respective countries for appointment to the highest judicial offices," or being "jurisconsults of recognized competence in international law." The difficulty of determining how they should be elected, which wrecked the attempts to establish the Court of Arbitral Justice at the second Hague Conference, was met by an ingenious suggestion made by Mr. Root to the Committee of Jurists at The Hague.<sup>20</sup> Inspired by the success of the framers of the Constitution of the United States in dealing with the principle of equality of states, Mr. Root suggested that the Assembly and Council of the League might collaborate in the election of judges, who would thus become the choice of both large and small states. In accepting the suggestion,<sup>21</sup> the committee proposed that the new court

<sup>18</sup> The text of the Assembly resolution is given in *RECORDS OF THE FIRST ASSEMBLY*, Plenary Meetings, p. 500; and the text of the protocol in *Ibid.*, p. 468.

<sup>19</sup> The following had ratified: Albania, Australia, Austria, Belgium, Brazil, British Empire, Bulgaria, Canada, Czecho-Slovakia, Denmark, France, Greece, Haiti, Holland, India, Italy, Japan, Norway, New Zealand, Poland, Roumania, Serb-Croat-Slovene State, Siam, South Africa, Spain, Sweden, Switzerland, Uruguay, Venezuela. This information is taken from the *LEAGUE OF NATIONS OFF. JOUR.*, October, 1921, p. 809. The ratifications of China, Cuba, and Portugal were later announced to the second assembly. *JOUR. OF THE SECOND ASSEMBLY*, pp. 93, 278, 303.

<sup>20</sup> See the *PROCÈS-VERBAUX OF THE COMMITTEE OF JURISTS*, p. 109.

<sup>21</sup> A member of the League may participate in the election of judges though it has not signed or ratified the protocol establishing the court.

The new states which have been set up since 1907 — Czecho-Slovakia and Poland — and which are not represented on the Permanent Court of Arbitration, will



should be linked with the Permanent Court of Arbitration by giving to the national groups in the latter the function of nominating the persons from among whom the judges should be chosen by the Assembly and Council acting independently. The world had made some progress since 1907 and the existence of the two political bodies of the League of Nations thus made it possible to advance the organization of judicial machinery.

But it still remained to be seen whether the elaborate scheme adopted for electing the judges would work in practice. The list of nominees as presented to the second Assembly included the names of eighty-nine persons, of whom four formally declined to be considered as candidates for election. On 14 September, 1921, the Assembly and Council proceeded to the election with representatives of forty-two members of the League participating. The Assembly's list of eleven judges was completed in five ballots, and comparison with the Council's first list revealed that the two lists had nine names in common. A sixth ballot in the Assembly and a comparison of second lists resulted in the choice of two more judges. After three more ballots in the Assembly and a comparison of third lists, three of the deputy judges were chosen. The Assembly and Council then entrusted the selection of a fourth deputy judge to a joint conference committee as provided by the court statute (Art. 12), whose choice was at once accepted by both bodies.<sup>22</sup> So that the first election, completed within three days, resulted in the selection of the following judges to serve for a term of nine years:<sup>23</sup> Altamira (Spain), Anzilotti (Italy), Barboza (Brazil), de Bustamante (Cuba), Finlay (Great Britain), Huber (Switzerland), Loder (Netherlands), Moore (United States), Nyholm (Denmark), Oda (Japan), Weiss (France). The deputy judges selected are: Beichmann (Norway), Negulesco (Roumania), Wang Chung-Hui (China), Yovanovitch (Serb-Croat-Slovene State). All the persons elected accepted immediately, so that the constitution of the court will be completed at its first meeting.

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participate in the nomination of judges through "national groups appointed for this purpose . . . under the same conditions as those prescribed for members of the Permanent Court of Arbitration."

<sup>22</sup> This account of the election is based upon the *JOUR. OF THE SECOND ASSEMBLY*, pp. 84-107.

<sup>23</sup> This list is taken from the *LEAGUE OF NATIONS OFF. JOUR.*, October, 1921, Supp., p. 41.

### RELATION OF THE NEW COURT TO THE HAGUE TRIBUNALS

Like the Court of Arbitral Justice proposed at The Hague in 1907, the new court is not intended to replace the Permanent Court of Arbitration. The statute provides (Art. 1) that it "shall be in addition to the Court of Arbitration organized by the conventions of The Hague of 1899 and 1907, and to the special Tribunals of Arbitration to which States are always at liberty to submit their disputes for settlement." No attempt has been made to circumscribe the usefulness of the work of the Hague Conferences. The Permanent Court of Arbitration may still have some functions to perform, even though the new court begins its work immediately. The national groups composing the former will serve as nominators of the judges of the new court.<sup>24</sup> All of the states which ratified the Hague Conventions for the Pacific Settlement of International Disputes have not become members of the League of Nations and do not participate therefore in the election of the judges of the new court. Some of them, moreover, have not been invited to sign the protocol establishing the statute of the new court;<sup>25</sup> and of those to which the protocol is open for signature, eight have not signed.<sup>26</sup> It is quite possible that such states will resort to the Permanent Court of Arbitration, rather than seek access to the new court. And even the states which have ratified the protocol may in some instances desire to choose their own arbitrators from the Hague panel, rather than employ the new court with its fixed personnel; so that the continuation of the Permanent Court of

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<sup>24</sup> But this in itself would hardly be a sufficient reason for continuing the Permanent Court of Arbitration, since the statute of the new court provides that states not represented on it may appoint national groups with the same qualifications to serve as nominators.

<sup>25</sup> Thus the Dominican Republic, Germany, Hungary as a part of Austria-Hungary, Mexico, Russia, and Turkey, which were parties to the Hague Convention, are not members of the League and are not named in the annex to the Covenant. Montenegro was also a party to the Hague Convention, but her independent existence now seems to have come to an end.

<sup>26</sup> Six members of the League had not signed the protocol on 5 September, 1921 — Argentina, Chile, Guatemala, Honduras, Nicaragua, and Peru. Other states, signatories to the Hague Convention and invited to sign the protocol, which have not signed, are Ecuador and the United States of America.

Arbitration was not seriously questioned at any stage in the establishment of the new court. As no conflict between the two is likely to arise, a great serviceability may still lie before the Permanent Court of Arbitration.

The differences are very marked between the old Hague Court of Arbitration and the new Court of Justice. Being only a panel, of course the members of the former never met as a body; the judges of the latter will come together at least once a year. The fact that governments may count upon a session of the new court in June of every year, and upon the constant presence of the court's president at the Hague, may have a great deal to do with their willingness to make use of it. Both the old and the new bodies are called "permanent." The Court of Arbitration is "permanent" in the sense that a panel is always in existence, from which arbitrators may at any time be chosen; the Court of Justice is "permanent" in the sense that eleven definite judges are always ready to sit, without any necessity of their being specially selected after a dispute arises. The difference means more than the saving of time — it may just tip the scales in favor of a willingness to appeal to orderly processes in preference to force. There is great advantage, also, in giving to picked individuals the opportunity and encouragement to grow in judicial experience and capacity. In the seventeen cases before tribunals formed from the Permanent Court of Arbitration,<sup>27</sup> there has been a decided tendency for the same persons to be chosen as arbitrators. For the seventeen arbitrations (three of which may be counted as a single arbitration) only twenty-four persons were employed, out of a total panel of (about) one hundred and thirty-five; two arbitrators acted five times, one acted four times, and three acted three times.<sup>28</sup> In the new court, the eleven judges or some of the four deputies will be sitting in every case. The possibility of building up a continuous and harmonious system of international law, therefore, seems more promising through the new court than through the Permanent Court of Arbitration. The essential advantages of "permanence" have at last been achieved.

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<sup>27</sup> As listed in the *RAPPORT DU CONSEIL ADMINISTRATIF DE LA COUR PERMANENTE D'ARBITRAGE*, 1920, p. 37.

<sup>28</sup> See *DOCUMENTS PRESENTED TO THE COMMITTEE OF JURISTS AT THE HAGUE*, p. 35.

## ARBITRATION AND ADJUDICATION

The new tribunal differs from the old panel, also, in that it professes to be a Court of Justice and not merely a Court of Arbitration. The distinction between the process of arbitration and that of adjudication has been greatly stressed during the period of propaganda for a new court. It proceeds on the notion that arbitration involves compromise, which seems to mean in some minds adding up the claims on both sides of a dispute and dividing the sum by two; while judicial settlement involves merely the application of definite and certain principles without any accommodation between the parties. The prevalent conceptions of arbitration may be the result, to some extent, of the meaning of the term in private law;<sup>29</sup> but the criticism of some of the awards of tribunals formed from the Permanent Court of Arbitration has also contributed to forming them. A remark of Dr. Lammasch that the North Atlantic Fisheries award "contained elements of a compromise" has been widely quoted, though it was later explained that it was not meant that the award itself was a compromise.<sup>30</sup> The refusal of the arbitrators in the *Pious Fund Case* to recognize a doctrine of prescription in international law has been severely criticized as an instance where compromise prevailed.<sup>31</sup> The award in the *Savarkar Case* has been similarly attacked.<sup>32</sup> But such criticism of the awards of the Hague tribunals is no more severe than the common criticism of domestic courts.<sup>33</sup> Decisions of the latter are frequently denounced as compromises. If compromise involves the splitting of differences, or the bargaining with extraneous matters, it is of course objectionable. In truth, neither international law nor municipal law is a "brooding omnipresence in the sky." Both have to be made. Neither is found full-blown. The process in both cases is one of balancing competing interests —

<sup>29</sup> Cf. COHEN, *COMMERCIAL ARBITRATION AND THE LAW* (1918), pp. 10 *et seq.*

<sup>30</sup> 6 AM. JOUR. OF INT. L. 178.

<sup>31</sup> WEHBERG, *PROBLEM OF AN INTERNATIONAL COURT OF JUSTICE*, 1918, p. 30.

<sup>32</sup> By Dr. van Hamel in 13 *REVUE DE DROIT INTERNATIONAL* (2d ser.), 370, 376.

<sup>33</sup> Mr. William Cullen Dennis, in an able article on "Compromise — the Great Defect of Arbitration," 11 *COLUMBIA L. REV.* 493, 501, found six of the Hague awards to be judicial decisions as against three "affected by the spirit of compromise." Mr. Jackson H. Ralston found that members of arbitral tribunals "have always treated international law as a rule of guidance." RALSTON, *INTERNATIONAL ARBITRAL LAW AND PROCEDURE*, 1910, § 127.

more patently so when states are contending parties, as a result of the present condition of international law. Perhaps a sounder distinction could be drawn between arbitration or judicial settlement on the one hand and diplomatic negotiation on the other. There is no inherent quality of lawlessness in arbitration.<sup>34</sup> And whether an international tribunal be called a court of arbitration or a court of justice it will probably travel along very much the same roads to reach its conclusions. Its task does not differ greatly from that of the United States Supreme Court in interpreting the Constitution.<sup>35</sup>

The Hague Convention for the Pacific Settlement of International Disputes declared the object of international arbitration to be the settlement of disputes between states "by judges of their own choice and on the basis of respect for law."<sup>36</sup> The statute of the new court is more explicit. It provides (Art. 38) that the court shall apply

"1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

"2. International custom, as evidence of a general practice accepted as law;

"3. The general principles of law recognized by civilized nations;

"4. . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

This greater explicitness is to be welcomed, though it seems doubtful whether it will make the work of the new court essentially different from that of the Hague tribunals. Some of the latter professed to follow "the principles of international law,"<sup>37</sup> and "the principles of international law and the maxims of justice."<sup>38</sup> But

<sup>34</sup> This is apparent in Justice Higgins' articles, "A New Province for Law and Order," 29 HARV. L. REV. 13; 32 *Ibid.*, 189; 34 *Ibid.*, 105.

<sup>35</sup> As described in Mr. Felix Frankfurter's article on "The Constitutional Opinions of Justice Holmes," 29 HARV. L. REV. 683.

<sup>36</sup> Article 15 of the 1899 Convention; Article 37 of the 1907 Convention. Dr. Wehberg's conclusion "that the words of the Hague Convention which speak of a decision 'on the basis of respect for law' must be regarded as a delusion," seems very extreme. See WEHBERG, *THE PROBLEM OF AN INTERNATIONAL COURT OF JUSTICE*, 1918, p. 39.

<sup>37</sup> The Pious Fund Case, WILSON'S HAGUE ARBITRATION CASES, p. 9.

<sup>38</sup> The Preferential Claims Case (Venezuela), WILSON'S HAGUE ARBITRATION CASES, p. 36.

if the provision in the Hague convention that disputes are to be settled "on the basis of respect for law" does not differ substantially from the direction to the new court to apply "the general principles of law recognized by civilized nations," the statute of the latter clearly distinguishes between decisions based on strictly legal grounds and decisions of a generally equitable nature. It provides (Art. 38) that the directions to the court as quoted "shall not prejudice the power of the Court to decide a case *ex aequo et bono*,"<sup>39</sup> if the parties agree thereto."<sup>40</sup> This relaxation must mean that with the consent of the parties the court may consciously legislate *ad hoc* to settle a particular case, may apply its general notions of equity and justice. It furnishes some basis for saying that the new court has been invested with extra-judicial functions.<sup>41</sup>

#### WHAT LAW WILL THE NEW COURT APPLY

The body of conventional law which may be applied by the new court has grown very rapidly since the end of the war. The peace treaties and their numerous supplementary agreements are in themselves very extensive. The creation of the new states and other changes wrought by the war have necessitated the revision of many of the pre-war treaties of a general nature, and with the establishment of the League of Nations and the annual meetings of the Assembly it seems probable that more effort will be given to keeping the general treaties up to date. The output of the International

<sup>39</sup> "The Roman conception involved in *aequum et bonum* or *aequitas* is identical with what we mean by 'reasonable,' or very nearly so." POLLOCK, *EXPANSION OF THE COMMON LAW*, p. 111. Cf. VOIGHT, *JUS NATURALE, AEQUUM ET BONUM UND JUS GENTIUM DER RÖMER* (1856); RALSTON, *INTERNATIONAL ARBITRAL LAW AND PROCEDURE* (1910), § 128.

<sup>40</sup> This part of Article 38 was framed by the sub-commission of the third committee of the first Assembly, 7 December, 1920. M. Politis (Greece) had proposed that the court should apply "the general principles of law and with the consent of the parties, the general principles of justice recognized by civilized nations." The *procès-verbal* states that "after some discussion, M. Fromageot (France) proposed to meet M. Politis' point by adding the provision in question." See *RECORDS OF THE FIRST ASSEMBLY, Meetings of Committees*, I, p. 403.

<sup>41</sup> This view is strengthened also by the peculiar wording of Articles 12, 13, and 15 of the Covenant, which though they distinguish between arbitration and inquiry by the Council or Assembly of the League, fail to distinguish between arbitration before special tribunals and adjudication before the Permanent Court of International Justice. The second Assembly has promulgated amendments which if ratified will clarify these articles of the Covenant. See *LEAGUE OF NATIONS OFF. JOUR.*, October, 1921, Spec. Supp., No. 6, pp. 13-14.

Labor Conference and other technical organizations of the League promises to be very large.

The end of the war has been followed also by a revival of interest in the codification of international law. The preamble to the Covenant of the League of Nations envisages "the firm establishment of the understandings of international law as the actual rule of conduct among Governments," and it has increased the desire that these understandings be more clearly formulated. The Committee of Jurists which drafted the court statute expressed a *vœu* that a new interstate conference should be called, to carry on the work of the Hague Conferences of 1899 and 1907, in formulating and re-establishing and clarifying international law.<sup>42</sup> But the suggestion met considerable opposition. Lord Robert Cecil declared that we have not "arrived at sufficient calmness of the public mind to undertake that [codification] without very serious results to the future of international law," and this view prevailed in the first Assembly of the League of Nations.<sup>43</sup>

Since the judges of the new court are to write reasoned opinions, the decisions themselves should furnish in time a body of international law which the court may apply. Perhaps this will prove to be the greatest advantage of having a permanent international judiciary, instead of arbitrators chosen *ad hoc*. The same persons sitting as judges in a number of cases must of necessity rely to some extent on their opinions as expressed in previous decisions. They will doubtless do so, even though they may deny that the court's decisions are formally binding as precedents.<sup>44</sup> The framers of the statute were careful to provide (Art. 59) that "the decision of the Court has no binding force except between the parties and in respect of that particular case."<sup>45</sup> This seems to involve more than a statement of the Anglo-American principle of *res judicata*. It seems to forbid the court's adoption of the alleged practice of the English House of Lords, that previous decisions will not be over-

<sup>42</sup> PROCÈS-VERBAUX OF THE COMMITTEE OF JURISTS, p. 747.

<sup>43</sup> RECORDS OF FIRST ASSEMBLY, Plenary Meetings, p. 745.

<sup>44</sup> Though the French Code forbids judges "to decide a case by holding that it was governed by a previous decision," many jurists now admit that the provision has failed of effect. POUND, *SPIRIT OF THE COMMON LAW* (1921), p. 180.

<sup>45</sup> This provision originated in the Council though it had been implicit in the original draft of the Committee of Jurists. See DOCUMENTS, II, p. 50.

ruled.<sup>46</sup> But it would not seem to preclude the court's following the Anglo-American doctrine of *stare decisis*<sup>47</sup> and giving to its decisions the force as precedents which will weave them into a body of case law. The object of the framers of this clause was to obviate the necessity of a third state's intervening whenever its interests might be involved in a case.<sup>48</sup> *Res judicata* takes care of such cases; and the statute itself provides (Arts. 62-63) for the intervention of a state which "has an interest of a legal nature which may be affected" by a decision, or which is a party to a convention which is being construed by the court. But whatever the effect of the statute with reference to *stare decisis* as a legal doctrine, the psychological fact of *stare decisis* — the tendency of the same men's minds to follow the same paths to the same conclusions — should insure that the court will make a great contribution to the international law of the future.

Another factor in determining whether the court's decisions will gradually build up a new body of international law may be the nationality of its judges. In the tribunals formed from the Permanent Court of Arbitration, nationals of disputant states were named as arbitrators in eleven out of seventeen cases — ten out of twenty-nine arbitrators were such nationals. As the Convention for the Pacific Settlement of International Disputes provides (Art. 45) that only one of the two arbitrators named by a disputant state may be a national, it is practically impossible for more than two of the five members of a tribunal to be nationals of the parties. In the new court (Art. 31), "judges of the nationality of each contesting party shall retain their right to sit in the case before the Court," and a litigant state whose nationality is not possessed by any of the judges may choose a special judge to sit on its case. This provision undoubtedly detracts from the formally impartial character of the court. But as its decisions may be rendered by a majority vote and as not more than two judges of thirteen (possibly nine) will usually be nationals of contesting states,<sup>49</sup> it seems improbable that the court's decisions will lose any

<sup>46</sup> London Street Tramways Co. v. London County Council, [1898] A. C. 375.

<sup>47</sup> On *stare decisis* in international arbitration, see RALSTON, INTERNATIONAL ARBITRAL LAW AND PROCEDURE (1910), pp. iii, 74.

<sup>48</sup> See DOCUMENTS, II, p. 50.

<sup>49</sup> If more than two states are parties, and if all have nationals among the judges, the proportion may be larger. Article 31 of the statute is not clear on this point.



impartiality for this reason. Moreover, the judges are elected in such a way as to be quite independent of their own governments. There is some advantage, too, in having on the court nationals from states whose systems of law may be unfamiliar to some of the judges, especially when such states are parties before the court.<sup>60</sup> At any rate, the new court is an improvement on the Hague tribunals which were likely to be more largely composed of nationals, and its decisions ought to contribute more effectively to the development of international law.

#### THE JURISDICTION OF THE NEW COURT

The Permanent Court of International Justice is to be quite strictly an interstate tribunal. It will be open only to states, and to other political units such as the British Dominions which have achieved membership in the League of Nations. No suits by individuals will be entertained;<sup>61</sup> recent efforts to make it possible for individual representatives of racial, religious, or linguistic minorities to hale an oppressing government before the court have failed. Nor will the court necessarily be open to all states. A state not a member of the League of Nations and not named in the annex to the Covenant, *e. g.*, the Dominican Republic, Germany, Hungary, Mexico, Russia, and Turkey, can have access to the court as plaintiff only on the conditions which may be laid down by the Council of the League; but these conditions are not to be such as would "place the parties in a position of inequality before the Court" (Art. 35). The limitation does not preclude the court's being, in reality as well as in name, a world tribunal.

More difficulty was encountered by the framers of the statute in determining the conditions on which the court might exercise jurisdiction over defendant states. In the popular consideration of the plans in America, the question of so-called "compulsory jurisdiction" has been much discussed.<sup>62</sup> In the original draft, the Committee of Jurists suggested that the court should have jurisdic-

<sup>60</sup> The electors are directed by the statute (Art. 9) to bear in mind that the whole body of judges "should represent the main forms of civilization and the principal legal systems of the world."

<sup>61</sup> The experience which led to the eleventh amendment to the Constitution of the United States may be thought to furnish some justification for this limitation.

<sup>62</sup> See ANNALS, AM. ACAD. OF POL. AND SOC. SCIENCE, for July, 1921, pp. 98-137.

tion, as between members of the League of Nations, of all "cases of a legal nature, concerning (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature and extent of reparation to be made for the breach of an international obligation; (e) the interpretation of a sentence passed by the Court." And the committee proposed that it should be left to the court itself to decide whether a certain case fell within these categories. Such a large competence would have constituted a very wide departure from the Hague system, or even from the Court of Arbitral Justice proposed in 1907. Opposition to the proposals developed in many quarters, and the Council of the League seized upon the phraseology of Article 14 of the Covenant as necessitating their rejection.<sup>53</sup> The Assembly decided that the basis of the court's jurisdiction should be an agreement between the parties submitting the dispute,<sup>54</sup> but it included in the final statute (Art. 36) provision for an optional clause in the protocol by signing which states may declare that they "recognize as compulsory, *ipso facto* and without special agreement" the jurisdiction of the court as outlined by the Committee of Jurists. This declaration may be made "unconditionally or on condition of reciprocity," or "for a certain time," and it need not be made at the time of signing the protocol. Such a declaration has been made by eighteen states, apparently "on condition of reciprocity" in each case.<sup>55</sup>

The court may also have "compulsory jurisdiction" conferred upon it by treaty, or it may be utilized under existing treaties providing for compulsory arbitration, such as the Danish-Italian treaty of 1905.<sup>56</sup> In a number of the recent treaties, provision has

<sup>53</sup> Article 14 of the Covenant provides that "the Court shall be competent to hear and determine any dispute of an international character *which the parties thereto submit to it*." The Council also relied on the doubtful use of the word "arbitration" in Articles 12, 13, and 15. See DOCUMENTS, II, p. 47.

<sup>54</sup> Professor de Lapradelle's report for the Committee of Jurists states: "There is an immutable law, in the evolution of legal institutions, which shows that an optional jurisdiction has always sooner or later been followed by a definite compulsory jurisdiction." PROCÈS-VERBAUX OF THE COMMITTEE OF JURISTS, p. 694.

<sup>55</sup> LEAGUE OF NATIONS, MONTHLY SUMMARY, November, 1921, p. 159. The texts of some of the declarations are published in a memorandum by the Secretary-General. LEAGUE OF NATIONS OFF. JOUR., October, 1921, pp. 808-809.

<sup>56</sup> 99 BRITISH AND FOREIGN STATE PAPERS, 1035.

been made for the obligatory reference of disputes to the court. Thus the peace treaties with Germany, Austria, Hungary, and Bulgaria confer on the new court jurisdiction with reference to the ports, waterways, and railways clauses and the enforcement of international labor conventions, and the peace treaties with Austria, Hungary, and Bulgaria give it jurisdiction with reference to the protection of racial, religious, and linguistic minorities.<sup>57</sup> This jurisdiction is obligatory as to all the signatories of the peace treaties. The special treaties for the protection of minorities, concluded by the Principal Allied and Associated Powers with Czechoslovakia, Greece, Jugo-Slavia, Poland, and Roumania, and by the Principal Allied Powers with Armenia, give the court obligatory jurisdiction,<sup>58</sup> also, and may become the basis on which it will build extensively. The Convention on Liquors in Africa (Art. 8), the Convention Revising the Berlin Act (Art. 12), and the Arms Traffic Convention of St. Germain (Art. 34), all dated 10 September, 1919, refer to tribunals of arbitration which may be the Permanent Court of International Justice. The statute annexed to the Convention on Freedom of Transit (Art. 13) and the statute annexed to the Convention on Navigable Waterways (Art. 22), both of which were promulgated by the Barcelona Conference on Communications and Transit, confer obligatory jurisdiction on the court. Altogether, the field in which the court may function without the special *ad hoc* consent of the defendant may be very large.

#### WHAT WILL THE NEW COURT HAVE TO DO

Speculation as to the amount of business which will come before the court during its earlier years is, however, a very different

<sup>57</sup> Treaty of Versailles, Arts. 336, 337, 386, 415-420, 423; Treaty of St. Germain, Arts. 69, 297, 298, 327, 360-365, 368; Treaty of Trianon, Arts. 60, 281, 282, 310, 343-348, 351; Treaty of Neuilly, Arts. 57, 225, 226, 277-282. Corresponding articles are included in the unratified Treaty of Sevres, Arts. 346, 402-407, 416. Some of the articles dealing with ports, waterways, and railways, refer to a "tribunal instituted by the League of Nations" which might not be the Permanent Court of International Justice. But the court statute provides (Art. 37) that "when a treaty or convention in force provides for the reference of a matter to a tribunal to be instituted by the League of Nations, the Court will be such tribunal."

<sup>58</sup> The Polish Minority Treaty of 28 June, 1919, which is the model on which the others were drafted, provides (Art. 12):

"Poland further agrees that any difference of opinion as to questions of law or fact arising out of these Articles between the Polish Government and any one of the Princi-

matter. When the Central American Court of Justice was inaugurated, the United States Commissioner stated that "an entire absence of business for the court would be the highest justification for its creation."<sup>59</sup> In the present state of the world, perhaps few persons would take the same view of this new court. Yet it may be months, or even years, before any contested cases are brought before it. When the United States Supreme Court first met in February, 1790, it had no business to transact except the reading of the five justices' commissions and the promulgation of four simple rules of procedure; it met again in August, 1790, and again in February, 1791, without business of any kind. In August, 1791, and February, 1792, three motions were heard and one was granted. Not until August, 1792, did it have a contested case; and the first important case, *Chisholm v. Georgia*, did not arise until February, 1793.<sup>60</sup> So, also, the Permanent Court of Arbitration, organized in 1900, was not utilized until the *Pious Fund Case* between the United States and Mexico was referred to it in 1902. Similarly, the new Permanent Court of International Justice may not be presented with a crowded docket for some time to come.

But it may at any time be called upon to give an advisory opinion to the Assembly or Council of the League. So many questions are arising before these bodies that some such activity for the court seems quite probable. If the court had been in existence, it would undoubtedly have been used in the dispute between Finland and Sweden concerning the Aaland Islands. Finland maintained that the dispute arose out of a matter which by international law was solely within her domestic jurisdiction. The Council found it necessary to set up a special commission of jurists to deal with the question, declaring that it "would have been placed . . . before the Permanent Court of International Justice for its advisory

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pal Allied and Associated Powers or any other Power, a Member of the Council of the League of Nations, shall be held to be a dispute of an international character under Article 14 of the Covenant of the League of Nations. The Polish Government hereby consents that any such dispute shall, if the other party thereto demands, be referred to the Permanent Court of International Justice. The decision of the Permanent Court shall be final and shall have the same force and effect as an award under Article 13 of the Covenant."

<sup>59</sup> William I. Buchanan, in *UNITED STATES FOREIGN RELATIONS* (1908), p. 247.

<sup>60</sup> The record of the early terms of the United States Supreme Court is in 2 Dall. (U. S.), 399 ff.

opinion, had that body already been established."<sup>61</sup> In June, 1921, when the Council was asked to pass upon the competence of the courts of the Free City of Danzig in the case of *Puffel v. Deutsche Bauern Bank*,<sup>62</sup> the assistance of the court might have been sought, also. And the second Assembly might have asked for the opinion of the court on the question of the Assembly's competence to revise the Peace Treaty of 1904 between Bolivia and Chile, instead of referring the question to a special jurists' committee.<sup>63</sup> These three cases indicate a possible usefulness for the court in the task of completing the organization of the League, as well as in the functioning of its political bodies.

Though numerous legal questions are continually arising in connection with the execution of the treaties of peace, the signatories have shown a disposition to effect practical arrangements which obviate the necessity for court interpretation and adjudication. But it will doubtless become more difficult to effect such arrangements as the control of the Allied Powers diminishes, and as time goes on, the aid of the court may be sought in the construction of the voluminous treaties. In its first meetings, the agenda of the court may be confined, however, to the election of a president and a registrar; to the preparation of a list determining the order in which the deputy judges will be called upon; to the appointment of special "chambers" or divisions for summary procedure, for labor questions, and for questions relating to transit and communications; and to the promulgation of rules of procedure.

#### PROCEDURE IN THE NEW COURT

When a case comes before the court, at least nine judges must sit, and there will usually be eleven or more. The French and English languages will be used, and the court may at the request of the parties authorize the use of some other language.<sup>64</sup> The

<sup>61</sup> LEAGUE OF NATIONS OFF. JOUR., July-August, 1920, p. 249.

<sup>62</sup> LEAGUE OF NATIONS OFF. JOUR., September, 1921, p. 669.

<sup>63</sup> JOUR. OF THE SECOND ASSEMBLY, 27 September, 1921, p. 218.

<sup>64</sup> On the use of languages in the Hague tribunals, see Dennis, "The Orinoco Steamship Company Case," 5 AM. JOUR. OF INT. L. 35, 59. Cf. also RALSTON, INTERNATIONAL ARBITRAL LAW AND PROCEDURE, § 280.

The French and English texts of the court protocol are both authentic; this provision in the protocol presumably applies also to the French and English texts of the statute.

procedure, so far as it is prescribed by the statute, follows in broad outline the procedure before the Hague tribunals. It will consist of written "cases, and counter-cases, and if necessary replies;"<sup>65</sup> and an oral hearing of witnesses, experts, agents, counsel, and advocates.<sup>66</sup> Service of notice on individuals in any country may be effected through the government of that country. The hearing will be opened to the public unless the court decides or the parties demand that it be private. In line with current conceptions of court procedure in England and America,<sup>67</sup> it is left to the court itself to promulgate its rules of pleading, practice, and evidence. It is a great advantage that these rules may be laid down and known in advance; the *ad hoc* procedure before the Hague tribunals had to be established either in the *compromis* or after the reference of the case, with the frequent result pointed out by Mr. Dennis that "when the parties actually face one another across the counsel-table at The Hague, everything is chaotic so far as procedure is concerned."<sup>68</sup> The court has power to order a discovery. It may avail itself of the assistance of experts. It may conduct an inquiry through agents of its own selection; when it is considering questions concerning labor or transit and communications, "assessors" will sit with the judges, but without power to vote. The decisions of the court will be taken by a majority of the judges sitting, and a judge who dissents from a judgment in whole or in part may deliver a separate opinion. Pending a final decision, the court may indicate "provisional measures which ought to be taken to reserve"<sup>69</sup> the respective rights of either party," though this would

<sup>65</sup> On the meaning of similar provisions in the Hague Convention, see Dennis, "The Necessity for an International Code of Arbitral Procedure," 7 AM. JOUR. OF INT. L. 285, 290; RALSTON, INTERNATIONAL ARBITRAL LAW AND PROCEDURE, § 273.

<sup>66</sup> The provision for hearing witnesses was not explicit in the Hague Convention.

<sup>67</sup> See Hudson, "The Proposed Control of Procedure by Rules of Court in Missouri," 13 LAW SERIES, MISSOURI BULL. 5.

<sup>68</sup> Dennis, "The Necessity for an International Code of Arbitral Procedure," 7 AM. JOUR. OF INT. L. 285, 292.

<sup>69</sup> This word was "preserve" in the original draft of the Committee of Jurists — see the *Procès-verbaux*, p. 681; and in the sub-committee's report to the third committee of the First Assembly — see RECORDS OF THE FIRST ASSEMBLY, Meetings of Committees, I, p. 545. Nor was a change in wording discussed when the article was adopted by the third committee. *Ibid.*, p. 307. So that the change in the third committee's report to the First Assembly may have originated in a typographical slip. *Ibid.*, p. 576. This conclusion is fortified by the fact that the word was "preserve" in the Bryan treaties, from which the provision is taken. See the Treaty between the United

seem to stop short of power to issue an *interim* injunction.<sup>70</sup> The provision for default judgments against states which fail to appear or defend, will hardly be invoked except in the instances of obligatory jurisdiction.

The statute fails to make any provision for the enforcement of either *interim* or final judgments, and the only "sanctions" behind the court are those contained in the Covenant;<sup>71</sup> and if any state should fail to abide by a decision, it will be for the Council of the League to "propose what steps should be taken to give effect thereto." Like the Supreme Court of the United States, the Permanent Court of International Justice may depend for its authority in the last analysis upon the political bodies with which it is affiliated.

#### INTERNATIONAL JUSTICE ACCORDING TO LAW

The task of creating machinery for dealing with disputes with which the world has been so occupied now for a generation seems to have been performed, for the time being. The existing machinery now seems fairly adequate. For disputes of a juridical nature, we have, in addition to the special arbitral tribunals which states may set up as occasion arises, the Permanent Court of Arbitration with its achievement of successful functioning in seventeen instances, and the Permanent Court of International Justice with its permanent, professional judges, paid adequate salaries,<sup>72</sup> ready to devote "their entire time to the trial and decision of international causes

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States and Sweden of 13 October, 1914, 38 STAT. AT L., 1872; RECORDS OF THE FIRST ASSEMBLY, Meetings of Committees, I, p. 368; PROCÈS-VERBAUX OF THE COMMITTEE OF JURISTS, p. 735. The French text of the statute reads: "*mesures conservatoires du droit de chacun doivent être prises à titre provisoire.*"

<sup>70</sup> Interlocutory decrees were issued by the Central American Court of Justice. See 2 AM. JOUR. OF INT. L. 838.

<sup>71</sup> It has been generally admitted that a decision of the court is an "award" which the members of the League agree in Article 13 of the Covenant to "carry out in full good faith." See RECORDS OF THE ASSEMBLY, Plenary Meetings, p. 491. The Minority treaties expressly provide that the decisions of the court "shall have the same force and effect as an award under Article 13 of the Covenant." See Treaty of St. Germain, Art. 69. The Second Assembly has promulgated an amendment to the Covenant which if adopted will leave no doubt on this point. See LEAGUE OF NATIONS, OFF. JOUR., October, 1921, Supp., p. 13.

<sup>72</sup> Salaries and other court expenses are to be borne by the League of Nations. Costs of litigation are to be borne by the parties.

by judicial methods and under a sense of judicial responsibility."<sup>73</sup> For disputes of a political nature, fifty-one peoples have agreed to have resort to the Council or Assembly of the League of Nations before going to war.<sup>74</sup> Machinery itself is important. If there is such a thing in political science as a useful invention — the establishment of the United States Supreme Court and the rôle played by Lord Durham's report in the development of the British Empire encourage the belief that political science is not unlike physical science in this respect — the builders of the new court would seem to have made a valuable contribution to the integration of international society.

But machinery and the intelligent use of it will not insure the world against departures from justice according to law. The will for peaceful adjustment is needed, and its creation depends upon the deeper mainsprings of national life.

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## (APPENDIX)

### *Statute of the Permanent Court of International Justice*<sup>75</sup>

ARTICLE 1. A Permanent Court of International Justice is hereby established, in accordance with Article 14 of the Covenant of the League of Nations. This Court shall be in addition to the Court of Arbitration organised by the Conventions of The Hague of 1899 and 1907, and to the special Tribunals of Arbitration to which States are always at liberty to submit their disputes for settlement.

## CHAPTER I

### ORGANISATION OF THE COURT

ART. 2. The Permanent Court of International Justice shall be composed of a body of independent judges, elected regardless of their

<sup>73</sup> See Secretary Root's Instructions to the American Delegates to The Hague Conference of 1907, 2 SCOTT, HAGUE CONFERENCES, p. 191.

<sup>74</sup> The Treaty of Washington of 13 December, 1921, contains an additional provision for conferences to consider disputes as to the Pacific insular possessions of the signatories.

<sup>75</sup> This English text is reprinted from RECORDS OF THE FIRST ASSEMBLY, Plenary Meetings, p. 468. The French text is also authentic.



nationality from amongst persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognised competence in international law.

ART. 3. The Court shall consist of fifteen members: eleven judges and four deputy-judges. The number of judges and deputy-judges may hereafter be increased by the Assembly, upon the proposal of the Council of the League of Nations, to a total of fifteen judges and six deputy-judges.

ART. 4. The members of the Court shall be elected by the Assembly and by the Council from a list of persons nominated by the national groups in the Court of Arbitration, in accordance with the following provisions.

In the case of members of the League of Nations not represented in the Permanent Court of Arbitration, the lists of candidates shall be drawn up by national groups appointed for this purpose by their Governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of The Hague of 1907 for the pacific settlement of international disputes.

ART. 5. At least three months before the date of the election, the Secretary-General of the League of Nations shall address a written request to the members of the Court of Arbitration belonging to the States mentioned in the Annex to the Covenant or to the States which join the League subsequently, and to the persons appointed under paragraph 2 of Article 4, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court.

No group may nominate more than four persons, not more than two of whom shall be of their own nationality. In no case must the number of candidates nominated be more than double the number of seats to be filled.

ART. 6. Before making these nominations, each national group is recommended to consult its Highest Court of Justice, its Legal Faculties and Schools of Law, and its National Academies and national sections of International Academies devoted to the study of Law.

ART. 7. The Secretary-General of the League of Nations shall prepare a list in alphabetical order of all the persons thus nominated. Save as provided in Article 12, paragraph 2, these shall be the only persons eligible for appointment.

The Secretary-General shall submit this list to the Assembly and to the Council.

ART. 8. The Assembly and the Council shall proceed independently of one another to elect, firstly the judges, then the deputy-judges.

**ART. 9.** At every election, the electors shall bear in mind that not only should all the persons appointed as members of the Court possess the qualifications required, but the whole body also should represent the main forms of civilisation and the principal legal systems of the world.

**ART. 10.** Those candidates who obtain an absolute majority of votes in the Assembly and in the Council shall be considered as elected.

In the event of more than one national of the same Member of the League being elected by the votes of both the Assembly and the Council, the eldest of these only shall be considered as elected.

**ART. 11.** If, after the first meeting held for the purpose of the election one or more seats remain to be filled, a second and, if necessary, a third meeting shall take place.

**ART. 12.** If, after the third meeting, one or more seats still remain unfilled, a joint conference consisting of six members, three appointed by the Assembly and three by the Council, may be formed, at any time, at the request of either the Assembly or the Council, for the purpose of choosing one name for each seat still vacant, to submit to the Assembly and the Council for their respective acceptance.

If the Conference is unanimously agreed upon any person who fulfils the required conditions, he may be included in its list, even though he was not included in the list of nominations referred to in Articles 4 and 5.

If the joint Conference is satisfied that it will not be successful in procuring an election, those members of the Court who have already been appointed shall, within a period to be fixed by the Council, proceed to fill the vacant seats by selection from amongst those candidates who have obtained votes either in the Assembly or in the Council.

In the event of an equality of votes amongst the judges, the eldest judge shall have a casting vote.

**ART. 13.** The members of the Court shall be elected for nine years. They may be re-elected.

They shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun.

**ART. 14.** Vacancies which may occur shall be filled by the same method as that laid down for the first election. A member of the Court elected to replace a member whose period of appointment had not expired will hold the appointment for the remainder of his predecessor's term.

**ART. 15.** Deputy-judges shall be called upon to sit in the order laid down in a list.

This list shall be prepared by the Court and shall have regard firstly to priority of election and secondly to age.

**ART. 16.** The ordinary members of the Court may not exercise any

political or administrative function. This provision does not apply to the deputy-judges except when performing their duties on the Court.

Any doubt on this point is settled by the decision of the Court.

ART. 17. No member of the Court can act as agent, counsel or advocate in any case of an international nature. This provision only applies to the deputy-judges as regards cases in which they are called upon to exercise their functions on the Court.

No member may participate in the decision of any case in which he has previously taken an active part, as agent, counsel or advocate for one of the contesting parties, or as a member of a national or international Court, or of a Commission of enquiry, or in any other capacity.

Any doubt on this point is settled by the decision of the Court.

ART. 18. A member of the Court cannot be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfil the required conditions.

Formal notification thereof shall be made to the Secretary-General of the League of Nations, by the Registrar.

This notification makes the place vacant.

ART. 19. The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities.

ART. 20. Every member of the Court shall, before taking up his duties, make a solemn declaration in open Court that he will exercise his powers impartially and conscientiously.

ART. 21. The Court shall elect its President and Vice-President for three years; they may be re-elected.

It shall appoint its Registrar.

The duties of Registrar of the Court shall not be deemed incompatible with those of Secretary-General of the Permanent Court of Arbitration.

ART. 22. The seat of the Court shall be established at the Hague.

The President and Registrar shall reside at the seat of the Court.

ART. 23. A session of the Court shall be held every year.

Unless otherwise provided by rules of Court, this session shall begin on the 15th of June, and shall continue for so long as may be deemed necessary to finish the cases on the list.

The President may summon an extraordinary session of the Court whenever necessary.

ART. 24. If, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall so inform the President.

If the President considers that for some special reason one of the members of the Court should not sit on a particular case, he shall give him notice accordingly.

If in any such case the member of the Court and the President disagree, the matter shall be settled by the decision of the Court.

ART. 25. The full Court shall sit except when it is expressly provided otherwise.

If eleven judges cannot be present, the number shall be made up by calling on deputy-judges to sit.

If however, eleven judges are not available, a quorum of nine judges shall suffice to constitute the Court.

ART. 26. Labour cases, particularly cases referred to in Part XIII (Labour) of the Treaty of Versailles and the corresponding portions of the other Treaties of Peace, shall be heard and determined by the Court under the following conditions:

The Court will appoint every three years a special chamber of five judges, selected so far as possible with due regard to the provisions of Article 9. In addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit. If the parties so demand, cases will be heard and determined by this chamber. In the absence of any such demand, the court will sit with the number of judges provided for in Article 25. On all occasions the judges will be assisted by four technical assessors sitting with them, but without the right to vote, and chosen with a view to ensuring a just representation of the competing interests.

If there is a national of one only of the parties sitting as a judge in the chamber referred to in the preceding paragraph, the President will invite one of the other judges to retire in favour of a judge chosen by the other party in accordance with Article 31.

The technical assessors shall be chosen for each particular case in accordance with rules of procedure under Article 30 from a list of "Assessors for Labour cases" composed of two persons nominated by each Member of the League of Nations and an equivalent number nominated by the Governing Body of the Labour Office. The Governing Body will nominate, as to one-half, representatives of the workers, and as to one-half, representatives of employers from the list referred to in Article 412 of the Treaty of Versailles and the corresponding Articles of the other Treaties of Peace.

In Labour cases the International Labour Office shall be at liberty to furnish the Court with all relevant information, and for this purpose the Director of that Office shall receive copies of all the written proceedings.

ART. 27. Cases relating to transit and communications, particularly cases referred to in Part XII (Ports, Waterways and Railways) of the Treaty of Versailles and the corresponding portions of the other Treaties

of Peace shall be heard and determined by the Court under the following conditions:

The Court will appoint every three years a special chamber of five judges, selected so far as possible with due regard to the provisions of Article 9. In addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit. If the parties so demand, cases will be heard and determined by this chamber. In the absence of any such demand, the Court will sit with the number of judges provided for in Article 25. When desired by the parties or decided by the Court, the judges will be assisted by four technical assessors sitting with them, but without the right to vote.

If there is a national of one only of the parties sitting as a judge in the chamber referred to in the preceding paragraph, the President will invite one of the other judges to retire in favor of a judge chosen by the other party in accordance with Article 31.

The technical assessors shall be chosen for each particular case in accordance with rules of procedure under Article 30 from a list of "Assessors for Transit and Communications cases" composed of two persons nominated by each member of the League of Nations.

ART. 28. The special chambers provided for in Articles 26 and 27 may, with the consent of the parties to the dispute, sit elsewhere than at the Hague.

ART. 29. With a view to the speedy dispatch of business, the Court shall form annually a chamber composed of three judges who, at the request of the contesting parties, may hear and determine cases by summary procedure.

ART. 30. The Court shall frame rules for regulating its procedure. In particular, it shall lay down rules for summary procedure.

ART. 31. Judges of the nationality of each contesting party shall retain their right to sit in the case before the Court.

If the Court includes upon the Bench a judge of the nationality of one of the parties only, the other party may select from among the deputy-judges a judge of its nationality, if there be one. If there should not be one, the party may choose a judge, preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.

If the Court includes upon the Bench no judge of the nationality of the contesting parties, each of these may proceed to select or choose a judge as provided in the preceding paragraph.

Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point is settled by the decision of the Court.

Judges selected or chosen as laid down in paragraphs 2 and 3 of this Article shall fulfil the conditions required by Articles 2, 16, 17, 20, 24 of this Statute. They shall take part in the decision on an equal footing with their colleagues.

ART. 32. The judges shall receive an annual indemnity to be determined by the Assembly of the League of Nations upon the proposal of the Council. This indemnity must not be decreased during the period of a judge's appointment.

The President shall receive a special grant for his period of office, to be fixed in the same way.

The Vice-President, judges and deputy-judges, shall receive a grant for the actual performance of their duties, to be fixed in the same way.

Travelling expenses incurred in the performance of their duties shall be refunded to judges and deputy-judges who do not reside at the seat of the Court.

Grants due to judges selected or chosen as provided in Article 31 shall be determined in the same way.

The salary of the Registrar shall be decided by the Council upon the proposal of the Court.

The Assembly of the League of Nations shall lay down, on the proposal of the Council, a special regulation fixing the conditions under which retiring pensions may be given to the personnel of the Court.

ART. 33. The expenses of the Court shall be borne by the League of Nations, in such a manner as shall be decided by the Assembly upon the proposal of the Council.

## CHAPTER II

### COMPETENCE OF THE COURT

ART. 34. Only States or Members of the League of Nations can be parties in cases before the Court.

ART. 35. The Court shall be open to the Members of the League and also to States mentioned in the Annex to the Covenant.

The conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Council, but in no case shall such provisions place the parties in a position of inequality before the Court.

When a State which is not a Member of the League of Nations is a party to a dispute, the Court will fix the amount which that party is to contribute towards the expenses of the Court.

ART. 36. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in Treaties and Conventions in force.

The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the protocol to which the present Statute is adjoined, or at a later moment, declare that they recognise as compulsory, *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning:

- (a) The interpretation of a Treaty;
- (b) Any question of International Law;
- (c) The existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) The nature or extent of the reparation to be made for the breach of an international obligation.

The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain Members or States, or for a certain time.

In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

ART. 37. When a treaty or convention in force provides for the reference of a matter to a tribunal to be instituted by the League of Nations, the Court will be such tribunal.

ART. 38. The Court shall apply:

- 1. International conventions, whether general or particular, establishing rules expressly recognised by the contesting States;
- 2. International custom, as evidence of a general practice accepted as law;
- 3. The general principles of law recognised by civilised nations;
- 4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

### CHAPTER III

#### PROCEDURE

ART. 39. The official languages of the Court shall be French and English. If the parties agree that the case shall be conducted in French, the judgment will be delivered in French. If the parties agree that the case shall be conducted in English, the judgment will be delivered in English.

In the absence of an agreement as to which language shall be employed, each party may, in the pleadings, use the language which it prefers;

the decision of the Court will be given in French and English. In this case the Court will at the same time determine which of the two texts shall be considered as authoritative.

The Court may, at the request of the parties, authorise a language other than French or English to be used.

ART. 40. Cases are brought before the Court, as the case may be, either by the notification of the special agreement, or by a written application addressed to the Registrar. In either case the subject of the dispute and the contesting parties must be indicated.

The Registrar shall forthwith communicate the application to all concerned.

He shall also notify the Members of the League of Nations through the Secretary-General.

ART. 41. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to reserve the respective rights of either party.

Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the Council.

ART. 42. The parties shall be represented by agents.

They may have the assistance of counsel or advocates before the Court.

ART. 43. The procedure shall consist of two parts: written and oral.

The written proceedings shall consist of the communication to the judges and to the parties of cases, counter-cases and, if necessary, replies; also all papers and documents in support.

These communications shall be made through the Registrar, in the order and within the time fixed by the Court.

A certified copy of every document produced by one party shall be communicated to the other party.

The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel and advocates.

ART. 44. For the service of all notices upon persons other than the agents, counsel and advocates, the Court shall apply direct to the Government of the State upon whose territory the notice has to be served.

The same provision shall apply whenever steps are to be taken to procure evidence on the spot.

ART. 45. The hearing shall be under the control of the President or, in his absence, of the Vice-President; if both are absent, the senior judge shall preside.

ART. 46. The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted.



ART. 47. Minutes shall be made at each hearing, and signed by the Registrar and the President.

These minutes shall be the only authentic record.

ART. 48. The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.

ART. 49. The Court may, even before the hearing begins, call upon the agents to produce any document, or to supply any explanations. Formal note shall be taken of any refusal.

ART. 50. The Court may, at any time, entrust any individual, body, bureau, commission or other organisation that it may select, with the task of carrying out an enquiry or giving an expert opinion.

ART. 51. During the hearing, any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court in the rules of procedure referred to in Article 30.

ART. 52. After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents.

ART. 53. Whenever one of the parties shall not appear before the Court, or shall fail to defend his case, the other party may call upon the Court to decide in favour of his claim.

The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

ART. 54. When, subject to the control of the Court, the agents, advocates and counsel have completed their presentation of the case, the President shall declare the hearing closed.

The Court shall withdraw to consider the judgment.

The deliberations of the Court shall take place in private and remain secret.

ART. 55. All questions shall be decided by a majority of the judges present at the hearing.

In the event of an equality of votes, the President or his deputy shall have a casting vote.

ART. 56. The judgment shall state the reasons on which it is based.

It shall contain the names of the judges who have taken part in the decision.

ART. 57. If the judgment does not represent in whole or in part the unanimous opinion of the judges, dissenting judges are entitled to deliver a separate opinion.

ART. 58. The judgment shall be signed by the President and by the Registrar. It shall be read in open Court, due notice having been given to the agents.

ART. 59. The decision of the Court has no binding force except between the parties and in respect of that particular case.

ART. 60. The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

ART. 61. An application for revision of a judgment can be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

The proceedings for revision will be opened by a judgment of the Court expressly recording the existence of the new fact, recognising that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.

The application for revision must be made at latest within six months of the discovery of the new fact.

No application for revision may be made after the lapse of ten years from the date of the sentence.

ART. 62. Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene as a third party. It will be for the Court to decide upon this request.

ART. 63. Whenever the construction of a convention to which States other than those concerned in the case are parties is in question the Registrar shall notify all such States forthwith.

Every State so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.

ART. 64. Unless otherwise decided by the Court, each party shall bear its own costs.

FEDERAL EQUITY RULES<sup>1</sup>

THE Federal Equity Rules are giving general satisfaction to the bench and bar. As applied by the courts, they are sufficiently flexible to meet the varying local conditions in the different districts. The numerous reported decisions<sup>2</sup> enable an industrious practitioner to ascertain with reasonable accuracy how they are interpreted in most districts.

Where there is lack of uniformity of administration of the rules, it is generally due to the extremely overcrowded condition of court calendars; the ever increasing burdens placed upon federal judges in certain of the districts; the necessity in some districts for a single judge holding one or more terms of court each year in a number of divisions in his district; and to the real or fancied need of disregarding or modifying the rules to meet these conditions.

The large number of conflicting decisions on rules of vital importance indicate that there could be more uniformity of practice under the rules if the Supreme Court should provide some simple and inexpensive way of bringing any rule, concerning which there is conflict of opinion of judges in the same district or in different districts, before it for interpretation or modification. This could probably be done by an additional rule.

At the last meeting of the American Bar Association, Chief Justice Taft made an informal address in support of certain pending bills, providing for additional district judges. These bills as revised<sup>3</sup> provide for an annual meeting, of the Chief Justice of the Supreme Court and the senior circuit judges, for planning or mapping out judicial procedure and thereby introducing "into our

<sup>1</sup> See for earlier treatments of this subject articles by the same author, "One Year under the New Federal Equity Rules," 27 HARV. L. REV. 629; "Working under Federal Equity Rules," 29 HARV. L. REV. 55.—ED.

<sup>2</sup> The new Equity Rules have been interpreted about five hundred times in reported decisions concerning them since their enactment in 1913. (Unreported decisions are more numerous.)

<sup>3</sup> H. R. Bill 9103 passed House Dec. 10, 1921, and now before Senate.

judicial system an executive principle to secure effective team work." If this bill is passed and annual meeting held under it, much may be accomplished in the way of unifying the interpretation of the rules, and in enabling beneficial changes to be made in them. If there is no such legislation, the Chief Justice of the Supreme Court, either directly or through the intermediary of the various courts of appeals, might select a number of lawyers from each circuit having largely to do with federal equity practice, who should confer with the federal judges located in the circuit where they reside and later submit suggestions to the justices of the Supreme Court as to any necessary changes or modifications.

"Most of the preliminary questions arising under these rules never reach the Supreme Court for final determination. It is therefore most desirable that something should be done to require the District Judges to act almost to a mathematical exactness and always in accord, save in those cases where that discretion which is always reposed in the breast of the Chancellor ought to be exercised in the interest of justice." (Judge Carpenter, Chicago.)

A large number of the clerks of the United States circuit courts of appeals and the clerks of the district courts have furnished me much of the data for this article. Such of the federal judges as I have had opportunity to talk with or reach through correspondence have very kindly expressed their views concerning the rules. I heartily appreciate the kindness and courtesy of those busy judges and the clerks of the courts who have interrupted their work and responded to the request for information.

There is a wide variance in practice in different districts under the rules concerning the placing of cases on the calendar; pleadings; evidence to be taken in open court; dismissal of causes of action within the time required by the rules; reference of matters other than accountings to masters; interrogatories, and the preparation of records for appeal.

It is interesting that a very large percentage of the courts approve and heartily endorse the equity rules after nine years of experience with them.<sup>4</sup>

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<sup>4</sup> The following are fairly illustrative of what judges say about these rules:

"Generally speaking I think the present equity rules have worked exceedingly well" and regarding "trials in open court, from the experience here we would not go back to the other method. The open court method has resulted in decreased record,

The rule requiring equity causes to be tried in "open court" and requiring the court to pass upon the admissibility of all evidence (Rule 46) is generally conceded to be most beneficial, and seems to meet with wide approval by the courts.

Presiding Circuit Judge Baker in a recent unreported decision involving a patent on computing scales, speaking for the Court of Appeals of the Seventh Circuit, expresses in a striking way his approval of the trial of equity cases in open court, which summarizes and epitomizes the statements of many judges concerning the practice, and emphasizes the importance of the change from deposition proofs to the open court trials.<sup>6</sup>

in more helpfully shaping the litigation below and in enabling the judge, especially in difficult patent cases, to understand the controversy as it unfolds. It is a highly satisfactory method." (Judge Mayer, C. C. A., 2d Circ.)

"The new Equity Rules have enabled the court to bring suits in equity to hearing promptly and at great reduction of costs. . . . They are a marked improvement in practice over the old rules." (Judge Connor, North Carolina.)

"On the whole I believe the new equity rules are working out well. The simplification of the bill and answer and the abolition of demurrer and plea have produced no unsatisfactory conditions, but on the whole are working out well. One great improvement is the open court hearing." (Judge Westenhaver, Ohio.)

"There is no question that they (the federal equity rules) are of great value." (Judge Hale, Maine.)

"I am impressed with the general efficacy of the Equity Rules and their helpfulness in the administration of justice, both in the simplification of procedure and in the hearings themselves. I am of opinion that the rule requiring the evidence, generally speaking, to be taken and heard in open court is of great benefit." (Judge Sanford, Tennessee.)

"The hearing of cases in open court is a great improvement." (Judge Morton, Massachusetts.)

<sup>6</sup> In *The Computing Scale Company v. Toledo Computing Scale Company*, October Term and Session, 1921 (not yet reported), Judge Baker says (p. 35):

"Under the old rules, the court in reaching the permanent injunction was helpless to control the proofs. Depositions were loaded with hearsay, with immeasurable masses of irrelevant matter, with controversies of counsel, with counsel's directions to witnesses not to answer, with experts' analyses of hundreds of prior patents when six would have been more than enough, with experts' interlarding of their opinions of facts with their opinions of the law of the case, etc., etc. We conjecture that in our clerk's vaults there are tons of paper which were pure waste. We leave it at conjecture because we have no computing scales on which to weigh the more important matters, the clients' exhaustion of patience and resources, the lawyers' mutual infliction of unnecessary labors, and the efforts of the courts to find the three grains of wheat in the bushel of chaff. But those evils are gone. Under the new rules, when the chancellor hears a patent suit as he does other injunction suits in open court, he can and does control the proofs, exclude hearsay and irrelevancies, restrain counsel, compel witnesses to answer proper questions, limit the number of prior patents, and bridle the experts. Records on appeals now show the gratifying difference."

The court in this same opinion criticizes proceedings before masters, the reference to whom under the Federal Equity Rules is being seriously objected to by those having largely to do with federal equity practice. Master proceedings need consideration. This is not because of any misunderstanding of the rules, but because of the abuses in the practice under them. Some federal judges, who express a preference for hearing the evidence, refer cases to masters out of a desire to clear their crowded calendars.

No rules can be devised to eliminate the ever increasing congestion of the dockets of the federal courts in many jurisdictions. Relief must come through the providing of additional judges by legislative enactment.<sup>6</sup>

#### JUDICIAL INTERPRETATIONS OF THE EQUITY RULES AND ADDITIONAL DISTRICT COURT RULES GOVERNING THE PRACTICE IN DIFFERENT DISTRICTS IN EQUITY CASES

Such decisions on the equity rules as are thought to be most pertinent, which have been rendered since 1913, are cited in the footnotes under the rule to which they relate. Reference is also made to some of the more important additional local rules<sup>7</sup> and regulations adopted by district courts in different districts. The large number of reported decisions prevents a full discussion or digest of them. There is still such divergence in the interpretation of the rules in different districts that attorneys must familiarize themselves with local interpretations of many of the rules, and with the local additional rules made by the courts for the trial of equity causes.

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<sup>6</sup> The striking increase in cases filed in the federal courts, and the necessity for additional judges, was well brought out by Senator Spencer, of Missouri, who when speaking on the subject in the United States Senate said that "One of the questions with which we shall soon have to deal seriously is the crowded condition of the dockets of the federal courts." He showed that this is due to the expansion of the country; the growth of business; and all sorts of legislation requiring their attention such as the Sherman Law; the Clayton Act; the Mann Act; the income and excess profits tax laws, and the legislation designed to carry out the Eighteenth Amendment to the Federal Constitution. The printed report of Senator Spencer's remarks contains statistics, taken from the Attorney General's office, showing that the number of new cases brought in the United States district courts was 64,963 in 1916, while in 1921 this number was 104,000.

<sup>7</sup> Adopted under Rule 79.

*Rules 1 and 2, Court and Clerk's Office Open; Rule 3, Clerk's Books; Rule 4, Notice of Orders; Rule 5, Motions Grantable of Course; Rule 6, Motion Day.* — Rules requiring the District Court and the clerk's office to be always open, and books to be kept by the clerk, notice of orders to be given by the clerk,<sup>8</sup> motions grantable of course by him, and providing for a motion day not less than once each month, have not been strictly adhered to, and counsel cannot rely upon receiving from the clerk notice of orders entered in his absence in all instances, and a great many of the courts have not established any regular motion day.

*Rule 7, Process; Rule 8, Enforcement Decrees; Rule 9, Writs of Assistance; Rule 10, Deficiency Decrees; and Rule 11, Process — not Parties.* — Rules relating to process, mesne and final; enforcement of final decrees; writs of assistance; deficiency decrees and process in behalf of and against persons not parties, have been liberally interpreted<sup>9</sup> and supplementary proceedings permitted in aid of execution and for supplementary and deficiency decrees.

*Rules 12, 13, 14, and 15, Subpoenas, their Issue and Service.* — These rules relating to subpoenas, their issue and service, have been before the courts in a number of cases.<sup>10</sup> It has been held that state statutes relating to service are not binding upon the federal courts;<sup>11</sup> that a decree *pro confesso* may not be entered where, after service and before twenty days have run, the suit abates by the bankruptcy of the plaintiff, and no answer in such case is required until a plaintiff has been substituted by order of the court;<sup>12</sup> that no prayer for process is necessary because it is not issued by order of the court, but by the clerk under Rule 12;<sup>13</sup> and that the service of a summons in an action at law in the United States court need not be made by the United States Marshal, Equity Rule 15 applying only to equity causes.<sup>14</sup>

<sup>8</sup> 240 Fed. 155 (Conn.). [The names of the cases tabulated are omitted to save space.]

<sup>9</sup> 211 Fed. 172, 180 (Ark.); 218 Fed. 134, 137 (Iowa); 228 Fed. 273 (C. C. A., 5th Circ.); 238 Fed. 938 (Penn.); 239 Fed. 360 (N. Y.); 262 Fed. 918 (C. C. A., 8th Circ.).

<sup>10</sup> N. S. Snyder *et al.* v. Brast Hotel Co. *et al.*, West Virginia, unreported; 204 Fed. 736 (C. C. A., 5th Circ.); 255 Fed. 726 (C. C. A., 8th Circ.).

<sup>11</sup> 255 Fed. 726 (C. C. A., 8th Circ.).

<sup>12</sup> 267 Fed. 550 (C. C. A., 5th Circ.).

<sup>13</sup> 222 Fed. 950 (Penn.).

<sup>14</sup> 223 Fed. 805 (N. Y.).

*Rules 16 and 17, Default, Pro Confesso Decrees.* — Defaults and decrees *pro confesso* have been discussed in recent cases.<sup>15</sup> The Court of Appeals of the Second Circuit holds under Rule 17 that even though entry of a decree *pro confesso* is not erroneous, the trial court had inherent power to set it aside.<sup>16</sup>

*Rule 18, Pleadings; Rule 19, Amendments.* — These rules abolishing technical forms of pleadings and authorizing the court to permit amendments or supplementary pleadings at any time have been frequently construed by the courts. While some courts are much stricter than others in regard to amendments, the following show the general tendency.

The Court of Appeals of the Fifth Circuit sent a case back to the trial court and gave plaintiff-appellant leave to amend its bill. Judge Walker said:<sup>17</sup>

"The bill as it was framed was rendered substantially defective by its failure to state facts relied on to support the claims made. It may be that facts exist which are sufficient to support such claims in whole or in part. If so, no harm would result, and it appears probable that it would be in furtherance of justice, to afford to the plaintiff the opportunity to disclose such facts by granting leave to it to amend its bill by making a better statement of the nature of its claim."

Judge Dayton (W. Va.) permitted an amendment to a bill under Rule 19 although the matter introduced was known to plaintiff when the original bill was filed.<sup>18</sup>

Circuit Judge Dodge (Mass.) in permitting an amendment to a bill under Rule 19 to set up additional facts relative to the issue of the patent sued upon, said:<sup>19</sup>

"None of the defects claimed to exist in this bill for infringement of a patent seem to me jurisdictional in the sense contended for by the defendant. If they exist, I cannot regard them as requiring dismissal of the bill without leave to amend in view of equity rule 19."

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<sup>15</sup> 204 Fed. 736 (C. C. A., 5th Circ.); 267 Fed. 550 (C. C. A., 5th Circ.); 273 Fed. 520 (C. C. A., 2d Circ.).

<sup>16</sup> 273 Fed. 520 (C. C. A., 2d Circ.). See also 267 Fed. 858 (N. Y.).

<sup>17</sup> 238 Fed. 36 (C. C. A., 5th Circ.).

<sup>18</sup> 238 Fed. 980 (West Va.).

<sup>19</sup> 243 Fed. 924 (Mass.).



The court permitted an amendment to a bill brought under the Sherman Act to assert relief under the Clayton Act.<sup>20</sup>

*Rule 20, Further and Particular Statement in Pleadings; Rule 21, Scandal and Impertinence.* — The recent decisions under these rules are largely cumulative of those referred to in an earlier article in this publication.<sup>21</sup> Some courts adopt the practice of dismissing the bill until a sufficient statement is made by amendment;<sup>22</sup> others order the additional ultimate facts to be stated, including the names and residences of parties intended to be joined as parties plaintiff,<sup>23</sup> and order that unless the amendment is made within a certain time therein named, the bill will be dismissed. Judge Westenhaver has modified the practice theretofore prevailing in the Northern District of Ohio under Rule 20, by holding that opinions or conclusions as to the similarity between the claims of a patent in suit and the machine charged to infringe need not be specified under this rule.<sup>24</sup> The extent to which further and particular statements in pleadings are required is shown by the reported cases.<sup>25</sup> These show that Rule 25 has been considered in connection with Rule 20 and the pleader is generally held to a statement of "ultimate" facts.

Statements of law and argumentative expressions are condemned under the rule relating to scandal and impertinence as illustrated by a recent decision where the Court of Appeals of the Fifth Circuit said:

"The statements of the matters just enumerated were out of place in a pleading, the function of which is to raise or meet

<sup>20</sup> 258 Fed. 732 (Mass.). Other cases under Rule 19 are: 206 Fed. 478 (Ill.); 211 Fed. 544 (N. D. Ohio); 206 Fed. 295 (N. Y.); 208 Fed. 378 (Penn.); 208 Fed. 899 (So. Car.); 211 Fed. 544 (N. D. Ohio); 215 Fed. 8 (C. C. A., 9th Circ.); 215 Fed. 1000 (W. D. N. Y.); 208 Fed. 899 (S. Carolina); 235 Fed. 880 (C. C. A., 9th Circ.); 238 Fed. 980 (W. Va.); 238 Fed. 441 (Mass.); 240 Fed. 631 (C. C. A., 5th Circ.); 243 Fed. 924 (Mass.); 249 Fed. 736 (C. C. A., 9th Circ.); 255 Fed. 442 (C. C. A., 1st Circ.); 261 Fed. 714 (Mich.); 264 Fed. 528 (Del.); 271 Fed. 403 (Del.).

<sup>21</sup> 29 HARV. L. REV. 55, 63.

<sup>22</sup> 238 Fed. 36 (C. C. A., 5th Circ.).

<sup>23</sup> 238 Fed. 980 (West Va.).

<sup>24</sup> 243 Fed. 399 (N. D. Ohio).

<sup>25</sup> 205 Fed. 515 (N. Y.); 215 Fed. 1000 (W. D. N. Y.); 217 Fed. 318 (Penn.); 219 Fed. 533 (C. C. A., 2d Circ.); 234 Fed. 127 (Mo.); 238 Fed. 225 (N. Y.); 238 Fed. 980 (W. Va.); 240 Fed. 631 (C. C. A., 5th Circ.); 249 Fed. 502 (Penn.); 225 Fed. 622 (Tenn.); 249 Fed. 538 (C. C. A., 4th Circ.); 251 Fed. 634 (Del.).

issues of law or of fact. Much, if not all, of it could properly have been stricken out as redundant or impertinent matter.”<sup>26</sup>

*Rule 22, Transfer from Equity to Law Side of Court.* — Whenever a suit is erroneously started on the equity side of the court the usual practice of defendants is to move to dismiss the bill, instead of asking to have it transferred to the law side of the court, with the result that a hearing is usually had in which the plaintiff either opposes the motion to dismiss or moves to have the case transferred to the law side. While some trial courts have dismissed such causes instead of transferring to the law side, such courts of appeals as have had occasion to pass on this subject have held that where a plaintiff has an adequate remedy at law and the suit was started in equity, its decision does not require the dismissal of the suit, but merely transfer to the law side.<sup>27</sup> The Court of Appeals of the Fourth Circuit holds that Equity Rule 22 does not authorize a transfer from the law to the equity side of the court.<sup>28</sup>

The Supreme Court of the United States holds, in a case brought on the equity side of the court in the District of Columbia, that the case cannot be transferred to the law side under Rule 22 for the reason that that rule has no application to such a case,<sup>29</sup> and that when a case is transferred to the law side of the court under Rule 22, even though amended at the time of the transfer, such action does not constitute the beginning of a new suit or action.<sup>30</sup> The foregoing but illustrate the many interesting points raised under this rule.<sup>31</sup>

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<sup>26</sup> 250 Fed. 199 (C. C. A., 5th Circ.).

<sup>27</sup> 225 Fed. 769 (Penn.); 245 Fed. 254 (C. C. A., 5th Circ.); 249 Fed. 415 (C. C. A., 8th Circ.); 250 Fed. 327 (C. C. A., 2d Circ.); 248 Fed. 487 (C. C. A., 8th Circ.); 255 Fed. 806 (C. C. A., 8th Circ.); 268 Fed. 487 (C. C. A., 8th Circ.).

<sup>28</sup> 231 Fed. 654 (C. C. A., 4th Circ.).

<sup>29</sup> 232 U. S. 633.

<sup>30</sup> 247 U. S. 207.

<sup>31</sup> 204 Fed. 299 (Ark.); 205 Fed. 377, 379 (Penn.); 206 Fed. 234 (Oreg.); 206 Fed. 534, 539 (N. C.); 208 Fed. 821 (Utah); 216 Fed. 904, 911 (N. Y.); 216 Fed. 382, 383 (Penn.); 219 Fed. 996 (Ga.); 221 Fed. 178 (C. C. A., 8th Circ.); 221 Fed. 402 (C. C. A., 4th Circ.); 218 Fed. 822 (C. C. A., 5th Circ.); 226 Fed. 653 (C. C. A., 7th Circ.); 227 Fed. 199 (Wis.); 231 Fed. 882 (C. C. A., 8th Circ.); 233 Fed. 329 (Del.); 238 Fed. 782 (C. C. A., 5th Circ.); 239 Fed. 65 (C. C. A., 4th Circ.); 245 Fed. 219 (N. Y.); 251 Fed. 242 (C. C. A., 5th Circ.); 251 Fed. 559 (C. C. A., 1st Circ.); 252 Fed. 144 (C. C. A., 8th Circ.); 256 Fed. 822 (C. C. A., 5th Circ.); 257 Fed. 918 (C. C. A., 6th Circ.); 266 Fed. 145 (C. C. A., 9th Circ.); 272 Fed. 456 (C. C. A., 4th Circ.).

*Rule 23, Matters Determinable at Law when Arising in Equity Suit to be Disposed of Therein.* — The Act of Congress of March 3, 1915,<sup>32</sup> providing for amendments in pleadings in a case brought on the law side of the court needs to be considered in connection with this rule. The purpose of this Act is well stated by Judge Clayton (Alabama) in a recent case:<sup>33</sup>

"The paramount idea carried in the Act is that courts are established and maintained for the administration of justice, and not to furnish a forum chiefly for the exhibition of the skill of intellectual gladiators — sometimes forgetful of the rights of the parties litigant to have justice administered. So this act, just referred to, provides that if a party has brought his suit at law, whereas it should have been in equity, or vice versa, the cause may, upon application, be transferred to the proper side of the docket, law or equity, as the case may be, the pleadings properly reformed, and the cause proceeded with."

Under this rule it is held that,

"If the issues under the plaintiff's claim are legal issues, they may be sent to a jury to determine at the proper time under Rule 23."<sup>34</sup>

See also the cases cited in the footnote,<sup>35</sup> for variations in the workings of the rule.

*Rule 24, Signatures of Counsel.* — Treating the signature of counsel as a certificate that there is good ground for the pleading to which his name is signed; that there is no scandalous matter in it; and that it is not interposed for the purposes of delay, has saved considerable annoyance to the practitioner. Circuit Judge Ward says of it:<sup>36</sup>

"The purpose of this rule is to insure good faith. It does not in any respect vary the relation of counsel to client. It does not make counsel who signs the bill a counsel of record, who cannot be changed except on terms, as is the case with the solicitor of record."

<sup>32</sup> Section 274, A JUDICIAL CODE; 38 STAT. AT L. 956; 5 FED. STAT. ANNOTATED, 1059.

<sup>33</sup> 235 Fed. 578 (Ala.).

<sup>34</sup> 238 Fed. 225 (N. Y.); 215 Fed. 377 (N. J.); 219 Fed. 266 (Tenn.).

<sup>35</sup> 216 Fed. 382 (Penn.); 221 Fed. 178 (C. C. A., 8th Circ.); 225 Fed. 769 (Penn.); 225 Fed. 293 (Penn.); 233 Fed. 329 (Del.); 248 Fed. 487 (C. C. A., 8th Circ.); 250 Fed. 985 (C. C. A., 5th Circ.); 252 Fed. 144 (C. C. A., 8th Circ.); 257 Fed. 918 (C. C. A., 6th Circ.); 266 Fed. 145 (C. C. A., 9th Circ.).

<sup>36</sup> 222 Fed. 249 (C. C. A., 2d Circ.).

In Massachusetts, Circuit Judge Bingham holds that a defendant is not required to sign his answer individually, nor need it be verified by his oath, nor that of any person in his behalf.<sup>37</sup>

*Rule 25, Bill of Complaint.* — Previous articles in this publication<sup>38</sup> have fully discussed the rule relating to the contents of a bill of complaint and stated the present situation under it. A recent case, however, has held that a bill not complying with the rules as to conciseness, accuracy, and clearness, will be dismissed until amended.<sup>39</sup>

Letters from a number of federal judges, the clerks of both the courts of appeals and the district court, indicate that this rule has very materially simplified the bill and proved both advantageous and satisfactory. Some of the courts indicate that it is advisable to state the facts fully, but without repetition or prolixity.<sup>40</sup>

Good practice has not been changed by this rule.<sup>41</sup>

There are other cases indicating that too great brevity is inadvisable where speed is desired, while others encourage extreme brevity. An amendment to this rule could easily be made which would materially lessen the prolixity in pleading and reconcile the opinions of the courts concerning what is necessary to be included in the bill of complaint.<sup>42</sup>

<sup>37</sup> 238 Fed. 441 (Mass.).

<sup>38</sup> See 27 HARV. L. REV. 634; 29 HARV. L. REV. 69.

<sup>39</sup> 274 Fed. 104 (Del.). See also 205 Fed. 158 (Mich.).

<sup>40</sup> Judge Augustus N. Hand (New York) says: "Under the less technical requirement than formerly of new equity rule 25, it may be unnecessary to pray specifically for relief against infringement to which the facts pleaded would show a right, but it would be safer for the complainant to amend its bill in this respect, though the bill contains a prayer for general relief." *Tesla v. Marconi*, 227 Fed. 903 (N. Y.).

<sup>41</sup> Judge Learned Hand (New York) says: "Since the new rules went into effect, some difference of opinion has arisen. . . . I cannot see that the new rules can have changed the pleading at all. They only incorporate what was the practice of every good pleader before. The equity bar got into verbose habits, but those habits were never proper, except for the fact that, by loading the bill with 'proper charges,' the discovery could be made more specific. It therefore was necessary to put much evidence in the bill. That requirement has been eliminated by the rule, so that the bill is now, what it always ought to have been, a mere pleading, and not a 'charge' of evidence to be answered. But the rules did not and could not change the necessity of a statement by the party having the affirmative, of the 'ultimate facts' on which his right depends. Nevertheless, I hope we shall not return to the old idle verbiage, which incumbered a bill for infringement. Whether we do or not depends upon the instinct of workmanship of the bar." *Bayley v. Braunstein*, 237 Fed. 671 (N. Y.).

<sup>42</sup> 205 Fed. 160 (Wash.); 205 Fed. 158 (Mich.); 205 Fed. 515 (N. Y.); 206 Fed. 736 (N. J.); 206 Fed. 478 (Ill.); 207 Fed. 111 (N. Y.); 215 Fed. 791 (Penn.); 215

*Rule 26, Joinder of Causes of Action.* — There is apparent conflict as to what causes of action cognizable in equity may be joined in one bill.<sup>43</sup> A short analysis shows the general ruling under this rule. A plaintiff may join a cause of infringement of a patent with an action relative to the cancellation of interfering patents under Revised Statutes 4918.<sup>44</sup> A bill for the foreclosure of two mortgages is not multifarious under Rule 26.<sup>45</sup> The District Court did not abuse its discretion in denying to plaintiff-appellant the right to join the whole dental profession as defendants in one suit under this rule.<sup>46</sup> A bill for unfair competition where diversity of citizenship exists may be properly joined with the charge of infringement of patents.<sup>47</sup> It is no objection to a bill that it joined several causes of action if all are cognizable in equity and are between the same parties.<sup>48</sup> An Ohio citizen sought an injunction against the Governor preventing him from transmitting to the general assembly of the state certain proposed constitutional amendments, and the plaintiff joined as co-plaintiffs all the citizens of the United States. The court dismissing the bill held that Rule 26 did not permit such joinder.<sup>49</sup> Three corporations may be joined as defendants in a suit under the Sherman Anti-trust Act and Clayton Act where the transactions involved related to conducting the same business and were so interwoven that three suits instead of one would cover substantially the same ground.<sup>50</sup> Independent causes of action are not permitted to be joined in one bill of complaint

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Fed. 1000 (W. D. N. Y.); 218 Fed. 902 (Conn.); 219 Fed. 896 (Ga.); 220 Fed. 174 (N. Y.); 222 Fed. 950 (Penn.); 238 Fed. 980 (West Va.); 241 Fed. 270 (Penn.); 243 Fed. 924 (Mass.); 243 Fed. 399 (Ohio); 232 Fed. 570 (C. C. A., 2d Circ.); 237 Fed. 671 (N. Y.); 245 Fed. 824 (C. C. A., 6th Circ.); 248 Fed. 944 (N. Y.); 249 Fed. 502 (Penn.); 262 Fed. 163 (Penn.); 271 Fed. 12 (Del.); 272 Fed. 442 (C. C. A., 3d Circ.); 272 Fed. 821 (C. C. A., 2d Circ.).

<sup>43</sup> In general see: 210 Fed. 687, 688 (N. Y.); 219 Fed. 266 (Tenn.); 205 Fed. 295 (N. Y.); 215 Fed. 377 (N. J.); 219 Fed. 266 (Tenn.); 241 Fed. 129 (Penn.); 241 Fed. 472 (C. C. A., 7th Circ.); 255 Fed. 235 (Penn.); 263 Fed. 437 (N. Y.); 265 Fed. 791 (Penn.); 266 Fed. 546 (Penn.); 269 Fed. 306 (N. Y.); 244 Fed. 463 (Penn.); 272 Fed. 176 (Penn.); 238 U. S. 254.

<sup>44</sup> 227 Fed. 903 (N. Y.).

<sup>45</sup> 233 Fed. 961 (C. C. A., 9th Circ.).

<sup>46</sup> 236 Fed. 544 (C. C. A., 7th Circ.).

<sup>47</sup> 242 Fed. 515 (C. C. A., 2d Circ.).

<sup>48</sup> 244 Fed. 192 (Penn.); 244 Fed. 463 (Penn.); 255 Fed. 235 (Penn.).

<sup>49</sup> 257 Fed. 334 (S. D. Ohio).

<sup>50</sup> 258 Fed. 732 (Mass.).

by different persons having separate and distinct claims against one defendant.<sup>51</sup>

**Rule 27, Stockholders' Bill.** — A large number of suits have been started under Rule 27, a general discussion of which is entirely outside the scope of the present article. The general doctrine announced in the various decisions under this rule is that a stockholder's bill relates to such bills as are founded on rights which may be properly asserted by the corporation, and does not apply to a bill by a stockholder attempting to assert rights of his own against the corporation, or to enjoin it from doing any illegal act.<sup>52</sup>

**Rule 28, Amendments of Bill as of Course.** — Amendments to a bill are liberally permitted under this rule. (It has been interpreted in connection with Rules 18 and 19, *supra*.<sup>53</sup>)

**Rule 29, Defenses — Motions to Dismiss.** — The abolishment of demurrers and pleas relieves the practitioner from giving different names to the document by which he proposed to assail pleadings. Motions to dismiss have been used to attack the whole, as well as various parts of bills in equity, and the courts generally encourage their use. The extent to which motions to dismiss have been sustained under this rule by the trial courts and affirmed by the courts of appeals, shows that this reform is valuable in expediting the trial of cases and lessening the cost thereof.<sup>54</sup>

<sup>51</sup> 258 Fed. 28 (Conn.); 265 Fed. 791 (Penn.)

<sup>52</sup> 235 U. S. 635; 206 Fed. 736 (N. J.); 218 Fed. 966 (Penn.); 219 Fed. 313 (N. Y.); 237 Fed. 942 (C. C. A., 8th Circ.); 257 Fed. 789 (Del.); 221 Fed. 529 (C. C. A., 6th Circ.); 224 Fed. 254 (Ga.); 225 Fed. 723 (C. C. A., 8th Circ.); 226 Fed. 557 (C. C. A., 4th Circ.); 227 Fed. 337 (C. C. A., 6th Circ.); 235 Fed. 542 (Wash.); 237 Fed. 942 (C. C. A., 8th Circ.); 238 Fed. 980 (West Va.); 243 Fed. 264 (N. D. Ohio); 244 Fed. 61 (C. C. A., 2d Circ.); 249 Fed. 538 (C. C. A., 4th Circ.); 250 Fed. 160 (C. C. A., 6th Circ.); 260 Fed. 396 (C. C. A., 3d Circ.); 259 Fed. 961 (R. I.); 269 Fed. 537 (C. C. A., 8th Circ.); 274 Fed. 326 (C. C. A., 2d Circ.).

<sup>53</sup> 242 Fed. 561 (Ga.); 219 Fed. 719 (C. C. A., 4th Circ.).

<sup>54</sup> 204 Fed. 681 (Me.); 205 Fed. 160 (Wash.); 205 Fed. 515 (N. Y.); 206 Fed. 478 (Ill.); 206 Fed. 736 (N. J.); 207 Fed. 111 (N. Y.); 209 Fed. 717 (Tenn.); 211 Fed. 776 (N. Y.); 212 Fed. 156 (C. C. A., 2d Circ.); 214 Fed. 495 (Penn.); 215 Fed. 791 (Penn.); 215 Fed. 1000 (W. D. N. Y.); 217 Fed. 294 (Penn.); 218 Fed. 902 (Conn.); 218 Fed. 966, 970 (Penn.); 219 Fed. 996 (Ga.); 228 Fed. 174 (N. Y.); 220 Fed. 994 (N. Y.); 225 Fed. 535 (C. C. A., 2d Circ.); also 230 Fed. 449 (C. C. A., 2d Circ.); 222 Fed. 590 (Maine); 225 Fed. 769 (Penn.); 226 Fed. 797 (N. J.); 227 Fed. 1010 (N. J.); 230 Fed. 965 (C. C. A., 8th Circ.); 231 Fed. 183 (N. D. Ohio); affirmed

There are numerous local rules as to motions in different districts which must be looked into whenever a suit is filed. The following are illustrative. In a number of districts a motion will not be considered unless it is accompanied by a brief of authorities in support thereof. In the Western District of Pennsylvania a motion to dismiss may be made by a defendant at the conclusion of the plaintiff's proofs.<sup>55</sup>

These are but illustrative of a number of local rules in different districts made by the district courts under Rule 29.

*Rule 30, Answer, Contents, and Counterclaim.* — What may be set up in the answer by way of counterclaim has continuously been the subject of judicial debate since the enactment of the Federal Equity Rules. Some judges are adhering to a strict interpretation of this rule, and holding that any affirmative relief asked for in the answer must be germane to or arise out of the original proceedings. The present predominance of opinion, however, permits a defendant to plead in its answer affirmative matters entirely independent of and not in any way arising out of the cause of action set up in the bill.

The numerous and conflicting decisions under this rule,<sup>56</sup> and the controversies arising out of it between different district judges,

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246 Fed. 695 (C. C. A., 6th Circ.); 232 Fed. 570 (C. C. A., 2d Circ.); 232 Fed. 95 (C. C. A., 6th Circ.); 233 Fed. 329 (Del.); 233 Fed. 322 (Penn.); 233 Fed. 861 (C. C. A., 8th Circ.); 234 Fed. 191 (Del.); 234 Fed. 375 (Wash.); 235 Fed. 458 (N. J.); 238 Fed. 441 (Mass.); 242 Fed. 951 (N. Y.); 243 Fed. 264 (N. D. Ohio); 240 Fed. 135 (N. Y.); 241 Fed. 875 (C. C. A., 6th Circ.); 241 Fed. 964 (N. Y.); 242 Fed. 809 (C. C. A., 6th Circ.); 242 Fed. 951 (N. Y.); 243 Fed. 405 (Ohio); 244 Fed. 463 (Penn.); 247 Fed. 782 (C. C. A., 1st Circ.); 249 Fed. 538 (C. C. A., 4th Circ.); 250 Fed. 160 (C. C. A., 6th Circ.); 252 Fed. 613 (N. C.); 257 Fed. 445 (Conn.); 260 Fed. 220 (Mich.); 261 Fed. 492 (C. C. A., 8th Circ.); 264 Fed. 589 (Del.); 265 Fed. 572 (C. C. A., 1st Circ.); 265 Fed. 817 (C. C. A., 3d Circ.); 269 Fed. 995 (Minn.); 270 Fed. 593 (Mass.); 273 Fed. 560 (La.).

<sup>55</sup> District Court, Rule 7, Section 1, Western District of Pennsylvania, provides: "If the Judge upon the close of plaintiff's evidence shall be of opinion that the case laid in the bill has not been sustained, and if the answer contains no matter of set-off or counter-claim, he shall have power to enter a decree of dismissal without hearing evidence on behalf of the defendant. Such decree shall have the effect of a non-suit at law, and a refusal of the court, after motion and argument, to change the decree shall be considered a final decree for all purposes."

<sup>56</sup> The following is a citation of cases permitting a defendant to set up by counter-claim matter independent of and not arising out of the cause of action set up in the bill: 208 Fed. 419 (N. Y.); 208 Fed. 156 (Conn.); 208 Fed. 416 (N. J.); 209 Fed. 876 (N. Y.); 212 Fed. 776 (Wash.); 215 Fed. 377 (N. J.); 216 Fed. 186 (Wis.); 217

sometimes in the same circuit, show the necessity for the Supreme Court determining what it means, or so changing it as to make its meaning entirely clear. If the Supreme Court would do this with the few rules on which there is real conflict, tremendous expense to litigants and much time of court and counsel would be saved.

The necessity of remedying this situation is aptly stated in a letter from Judge Carpenter, of the Northern District of Illinois, in a letter of December 20, 1921.

"Much of the time of the judges nowadays is spent in discriminating between opposing decisions of their fellows with reference to the various rules. This really is intolerable. The rules should not be subject to canons of construction. Decided cases tell us that rules of construction are never invoked by the courts when there is nothing to construe. There should be no room for construction as to the equity rules promulgated by the Supreme Court.

For example, Rule 30, as to counter-claim and cross-suit, has been constantly under discussion, and radically different constructions have been applied in different jurisdictions. This is quite wrong. The same is true as to the matter of answering interrogatories under Rule 58."

A recent case announced that if a defendant has a counterclaim arising out of the subject matter of the suit, and fails to assert it in the answer, it is waived.<sup>57</sup>

*Rules 31 and 32, Reply, Answer to Amended Bill.* — No reply to an answer is necessary unless the answer asserts a set-off or counterclaim. Extensions of the ten days' time for answering counterclaims is usually granted by the courts upon proper showing. The rule as to answers to amended bills has provoked little discussion.

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Fed. 91 (Ill.); 222 Fed. 528 (Idaho); 232 Fed. 609 (N. Y.); 233 Fed. 322 (Penn.); 234 Fed. 868 (C. C. A., 7th Circ.); 237 Fed. 646 (N. Y.); 244 Fed. 192 (Penn.); 245 Fed. 556 (C. C. A., 6th Circ.); 247 Fed. 200 (Mich.); 247 Fed. 256 (C. C. A., 2d Circ.); 257 Fed. 918 (C. C. A., 6th Circ.); 274 Fed. 275 (C. C. A., 6th Circ.).

The following is a citation of cases holding that affirmative relief sought by counterclaim must be germane to or arise out of the original proceedings: 204 Fed. 103 (Mass.); 205 Fed. 375 (N. Y.); 206 Fed. 295 (N. Y.); 208 Fed. 566 (Wis.); 210 Fed. 347 (Wis.); 207 Fed. 111 (N. Y.); 212 Fed. 452 (Mass.); 214 Fed. 841 (Conn.); 223 Fed. 316 (C. C. A., 8th Circ.); 227 Fed. 378 (C. C. A., 8th Circ.); 230 Fed. 518 (Conn.); 235 Fed. 531 (Mass.); 235 Fed. 808 (Penn.); 243 Fed. 629 (Ohio); 250 Fed. 985 (C. C. A., 5th Circ.); 251 Fed. 1 (C. C. A., 6th Circ.).

<sup>57</sup> 251 Fed. 1 (C. C. A., 6th Circ.); see also 221 Fed. 669 (Ohio); 239 Fed. 484 (Iowa); 232 Fed. 470 (Penn.); 222 Fed. 950 (Penn.); 243 Fed. 405 (Ohio); 243 Fed. 157 (C. C. A., 4th Circ.); 267 Fed. 435 (Mo.); 273 Fed. 67 (C. C. A., 2d Circ.); 271 Fed. 226 (C. C. A., 6th Circ.); 268 Fed. 985 (Fla.).



Courts are lenient in granting extensions of time prescribed for filing these.<sup>58</sup>

*Rule 33, Testing Sufficiency of Defense; Rule 34, Supplemental Pleadings; Rule 35, Bills of Revivor, and Supplemental Bills; Rule 36, Officers before Whom Pleadings are Verified.* — There has been little difficulty in the interpretation of any of these rules. Decisions as to the testing of sufficiency of defense<sup>59</sup> are quite consistent with each other. The scope of supplemental pleadings has been defined,<sup>60</sup> the courts holding that if plaintiff's original bill is sufficient to entitle him to one kind of relief, and facts subsequently occur to entitle him to other and more extensive relief, he may have it by setting up the new matter in the form of a supplemental bill, even though the nature of the suit would in effect be changed thereby.

*Rule 37, Parties Generally — Intervention; Rule 38, Representative of Class; Rule 39, Absence of Persons who Would Be Proper Parties; Rule 40, Nominal Parties; Rule 41, Suits to Execute Trusts of Will; Rule 42, Joint and Several Demands; Rules 43 and 44, Defect of Parties; Rule 45, Death of Party — Revivor.* — Courts exercise wide discretion under these rules. Under Rule 37 the court is liberal in permitting intervention<sup>61</sup> and permits the manufacturer of an article to intervene in a suit against his dealer for alleged infringement of patent by the article.

The interpretation of Rule 38 has caused little difficulty,<sup>62</sup> and

<sup>58</sup> 250 U. S. 39; 208 Fed. 566 (Wis.); 229 Fed. 702 (C. C. A., 5th Circ.); 230 Fed. 514 (Conn.); 235 Fed. 898 (Penn.); 237 Fed. 484 (Iowa); 249 Fed. 296 (C. C. A., 2d Circ.); 268 Fed. 985 (Fla.); 215 Fed. 377 (N. J.); 268 Fed. 887 (Penn.).

<sup>59</sup> 214 Fed. 841 (Conn.); 229 Fed. 702 (C. C. A., 5th Circ.); 233 Fed. 322 (Penn.); 233 Fed. 470 (Penn.); 237 Fed. 484 (Iowa); 243 Fed. 399 (N. D. Ohio); 268 Fed. 985 (Fla.).

<sup>60</sup> Federal Equity Rule 34. See 204 Fed. 103 (Mass.); 206 Fed. 295 (N. Y.); 211 Fed. 544 (Ohio); 211 Fed. 544 (N. D. Ohio); 216 Fed. 267 (Penn.); 235 Fed. 719 (Wash.); 250 Fed. 160 (C. C. A., 6th Circ.); 264 Fed. 528 (Del.).

<sup>61</sup> 210 Fed. 347 (Wis.); 208 Fed. 378 (Penn.); 228 Fed. 895 (C. C. A., 2d Circ.); 229 Fed. 297 (N. Y.); 231 Fed. 292 (Cal.); 231 Fed. 571 (C. C. A., 9th Circ.); 231 Fed. 950 (C. C. A., 6th Circ.); 242 Fed. 561 (Ga.); 252 Fed. 965 (C. C. A., 8th Circ.); 255 Fed. 235 (Penn.); 256 Fed. 238 (N. Y.); 256 Fed. 714; 261 Fed. 646; 262 Fed. 56 (C. C. A., 9th Circ.); 264 Fed. 340 (N. C.); 266 Fed. 828 (C. C. A., 8th Circ.); 269 Fed. 796 (Del.). *Contra*, 274 Fed. 487 (Del.); 255 U. S. 356.

<sup>62</sup> 208 Fed. 605 (Wash.); 240 U. S. 369; 219 Fed. 273 (Ariz.); 219 Fed. 719 (C. C. A., 4th Circ.); 231 Fed. 292 (Cal.); 231 Fed. 521 (Ga.); 233 Fed. 1010 (Ga.); 230 Fed. 702 (Mich.); 237 Fed. 219 (Del.); 253 Fed. 246 (Fla.); 257 Fed. 334 (S. D. Ohio); 264 Fed. 247 (Ind.); 271 Fed. 12 (Del.); 231 U. S. 646, 248 U. S. 215.

it has been held that as the Constitution gives the federal court jurisdiction involving non-federal cases only when the parties are of diverse citizenship, its jurisdiction on behalf of this class is limited to instances where the parties reside in different states. The court has held jurisdiction of suits in which there was an absence of persons who would be proper parties.<sup>63</sup>

The other rules under this heading, except that as to revivor,<sup>64</sup> have provoked no particular discussion. Under the latter rule, the Supreme Court has held that a substitution formerly effected by a bill of revivor or a bill of that nature, may now be ordered by motion under new Equity Rule 45.<sup>65</sup>

*Rule 46, Trial — Testimony Taken in Open Court; Rule 47, Depositions — To be Taken in Exceptional Cases.* — Judges quite generally agree that a great saving and many advantageous results are obtained by strict adherence to the rule compelling witnesses to testify in open court, and where that practice is pursued much favorable comment is made concerning it. A number of courts, however, refer cases to masters for their findings of fact and conclusions of law on the evidence adduced before such masters. Other courts permit depositions to be taken of witnesses who reside within one hundred miles of the place of trial and could be compelled to testify in open court, and in effect treat most equity cases as "exceptional" if the counsel for the litigants agree to such procedure. Even these courts which permit such reference to a master will usually, on the insistence of either party, require such witnesses as can be reached, to be examined before it. In some districts the courts strictly enforce the rule that testimony of all witnesses within the reach of subpoenas be given in open

<sup>63</sup> 204 Fed. 681 (Me.); 231 Fed. 521 (Oreg.); 233 Fed. 1010 (Ga.); 243 Fed. 621 (R. I.); 247 Fed. 256 (C. C. A., 2d Circ.); 249 Fed. 538 (C. C. A., 4th Circ.); 252 Fed. 248 (Oreg.); 257 Fed. 69 (C. C. A., 3d Circ.); 264 Fed. 247 (Ind.); 264 Fed. 546 (N. C.).

<sup>64</sup> Circuit Judge Hough (then District Judge) has pointed out the efficacy of this rule as follows: "Prior to the passage of this rule the opinion was widely entertained that there was no method of reviving an equity suit, except by bill of revivor. . . . Bills of revivor are cumbrous survivals of antiquity and in my judgment rule 45 was intended to regulate the method of penalizing a failure to revive; i. e., to make simple motions applicable to both contingencies." *Spring v. Webb*, 227 Fed. 481 (1915); 267 Fed. 551 (C. C. A., 5th Circ.).

<sup>65</sup> 246 U. S. 128; 227 Fed. 481 (Vt.); 223 Fed. 41 (C. C. A., 8th Circ.); 222 Fed. 950 (Penn.); 255 Fed. 235 (Penn.).

court, as the judges indicate that they prefer to hear and see the witnesses on the stand and that they benefit by such procedure.<sup>65</sup>

In some districts the courts will not recognize agreements to take any evidence which can be taken in open court in other manner.

The unreported decisions on these rules are more numerous than those reported.<sup>67</sup>

The question has been raised as to whether the statutory right to take depositions *de bene esse* is regulated by the new Equity Rules. It seems clear that Rules 46 and 47 have to do only with situations where the Revised Statutes 863-867 do not apply, and are merely regulatory as to the matter of time of taking depositions under the statutes. Indeed, Rule 54 seems to indicate the absolute statutory right to take these depositions within the times prescribed by the rules.<sup>68</sup>

*Rule 48, Testimony of Expert Witnesses.* — The rule permitting the court to order that the testimony in chief of expert witnesses, directed to matters of opinion as to the validity or scope of patent or trade-mark, be set forth in affidavits and filed, is not extensively used. In fact, long expert depositions are becoming very much

<sup>65</sup> Judge Rose (Maryland), in order to hear witnesses orally, occasionally sits in advance of the trial to take the evidence of some witness who may not be available at the time of trial.

<sup>67</sup> Rule 46: 207 Fed. 247 (C. C. A., 5th Circ.); 211 Fed. 544 (Ohio); 226 Fed. 202 (C. C. A., 7th Circ.); 236 Fed. 481 (C. C. A., 8th Circ.); 243 Fed. 1001 (Fla.); 244 Fed. 836 (Ga.); 270 Fed. 546 (C. C. A., 7th Circ.); 270 Fed. 388 (C. C. A., 9th Circ.). Rule 47: 203 Fed. 591 (N. Y.); 216 Fed. 634 (Ill.); 221 Fed. 676 (N. Y.); 227 Fed. 1004 (N. Y.); 243 Fed. 362 (C. C. A., 1st Circ.); 243 Fed. 1001 (Fla.); 243 Fed. 783 (N. Y.); 243 Fed. 775 (N. J.); 245 Fed. 783 (N. J.); 252 Fed. 397 (C. C. A., 9th Circ.); 274 Fed. 56 (C. C. A., 6th Circ.); 221 Fed. 676 (S. D. N. Y.).

<sup>68</sup> Former District (now Circuit) Judge Mayer, after conferring with his associates, Judge Hough, Judge Learned Hand and Judge Augustus Hand, says concerning this rule: "Finally, I am asked to pass upon a question of practice in respect of which it is said the members of the bar are somewhat in doubt. The defendant objected to the admission in evidence of certain depositions taken by plaintiff without first obtaining leave of court. These depositions were taken under section 863 of the Revised Statutes of the United States, and apparently within the time provided by equity rule 47, . . . but without an order of court. I am of opinion that equity rule 47 was not intended to vary or be a limitation upon section 863, because, of course, that section, being a legislative enactment, cannot be changed except by further legislative enactment." *Iowa Washing Machine Co. v. Montgomery Ward & Co.*, 227 Fed. 1004, 1007.

less frequent in such cases than formerly. At the present time, expert testimony is largely given on the witness stand and is materially shortened thereby. Many of the federal judges are attempting to correct the abuse of the use of experts which grew to abnormal proportions under the old rules, where counsel asked questions the answers to which might last for many days. The growing disposition on the part of courts to limit expert testimony is strikingly noticeable.<sup>66</sup>

*Rules 49, 50, 51, 52, 53, 54, and 55.* — These rules relate to the taking of evidence and securing the attendance of witnesses before masters, examiners, and stenographers, and to the filing of this evidence, and are largely restatements of previous rules.<sup>70</sup> Operation under them appears to be clearly understood.

*Rule 56, Trial Calendar; Rule 57, Continuances.* — The rules requiring a case to be placed upon the trial calendar, after the time has elapsed for taking depositions, and continued only in "exceptional cases" by order of court upon proper showing, are administered with little uniformity.<sup>71</sup> Pressure of numerous urgent cases on both the law and equity sides of the court requires that the hearing of less urgent ones be postponed. There are many other reasons preventing judges from enforcing these rules strictly. My own experience and the widely varied statements from clerks as to the constantly changing practice under these rules to meet the exigencies of court calendars in nearly every district, makes any statement concerning practice under them of little value. In order to know what is necessary to be done in any pending case, it is imperative to keep fully informed of the local situation. The following instances are sufficiently illustrative.

The clerk of the Southern District of Ohio reports that in his district, cases are placed on the trial calendar when at issue; that

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<sup>66</sup> 203 Fed. 591 (N. Y.); 206 Fed. 478 (Ill.); 216 Fed. 634 (Ill.); 217 Fed. 320 (Penn.); 243 Fed. 399 (N. D. Ohio); also many unreported cases.

<sup>70</sup> Rule 50: 245 Fed. 636 (C. C. A., 2d Circ.); Rule 51: 229 Fed. 579 (Penn.); Rule 54: 203 Fed. 591 (N. Y.); 221 Fed. 676 (N. Y.); Rule 55: 232 Fed. 784 (Vt.).

<sup>71</sup> Rule 56: 216 Fed. 1 (C. C. A., 8th Circ.); 217 Fed. 175 (N. Y.); 243 Fed. 775 (N. J.); 243 Fed. 362 (C. C. A., 1st Circ.); 245 Fed. 783 (N. J.); 274 Fed. 56 (C. C. A., 6th Circ.). Rule 57: 229 Fed. 633 (C. C. A., 4th Circ.); 243 Fed. 362 (C. C. A., 1st Circ.); 270 Fed. 289 (Ga.); 274 Fed. 56 (C. C. A., 6th Circ.); 271 Fed. 284 (C. C. A., 3d Circ.).

equity cases are disposed of promptly, and that the equity calendar is up to date.

In the District of Maryland, the court calls the equity docket about every three months, and insists upon assigning for trial every case that is then at issue.

In the Middle District of Tennessee, when neither party takes depositions the case goes on the trial calendar ninety days after the case is at issue.

In Montana, cases are placed on the calendar as soon as issue is joined.

In many jurisdictions these rules are not observed, and in such districts cases are set at the convenience of court and counsel.

In South Dakota, equity cases go upon the calendar at the term of court following the filing thereof, without notice, and if the case is not prosecuted for three terms, the practice is to dismiss the suit.

In the Northern District of Iowa, a local rule requires a trial notice in equity cases, but this practice is not uniformly carried out there.

In the Northern District of Georgia, the clerk says that the large number of law cases as compared with those filed on the equity side of the court

"has prevented the making of a calendar of equity cases. The present practice of the court is that counsel desiring an equity case heard, has such case placed on the calendar for some Saturday, after notice to opposing counsel . . . and the court devotes each Saturday to hearing equity cases and motions."

In Oregon, equity cases are set specially and hence caused "to be tried more promptly than they would be under the equity rules."

In the Northern District of Ohio and the Southern District of New York, it is necessary, in order to take depositions under the rules, to file notice of intention to take them within twenty days after the case is at issue.

*Rule 58, Interrogatories — Discovery.* — There have been many controversies over the enforcement of this rule. In some instances quite as much time of the court has been taken in hearing arguments concerning interrogatories and deciding what should or should not be answered, as is occupied in the actual trial of the

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case. This is evidenced by the numerous unreported and reported decisions thereon.<sup>72</sup> The difficulty with practice under this rule is well expressed in a letter from Judge Killits, of the Northern District of Ohio, in which he says:

"I have a horror of controversies over interrogatories, especially in intricate equity cases, and it requires the court to dip into the merits of the case several times. I believe that some modification of this rule in the direction of clarity and limitation is highly advisable."

Some courts compel discovery of wide scope under this rule; others restrict it to facts and documents clearly material to the "support or defense of the case." One great difficulty, aside from the contention that usually arises whenever interrogatories of any real scope are filed, is the fact that the answers are usually so evasive and indirect as to be of little value. Interrogatories seem to be more generally used for "fishing expeditions" than definitely to establish facts.

*Rules 59 to 68, inclusive, Reference to and Proceedings before Masters.* — The only substantial change in the rules regulating master proceedings is the first paragraph of Rule 59, which provides that

"save in matters of account, a reference to a master *shall be the exception*, not the rule, and shall be made only upon a showing that *some exceptional condition* requires it."

This change was made to bring all procedure under the rules in line with the rules requiring equity causes to be tried in open court. Under the old rules some cases were referred to masters for a complete decision of the case, subject to review only by exceptions to

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<sup>72</sup> 211 Fed. 338 (C. C. A., 7th Circ.); 216 Fed. 634 (Ill.); 217 Fed. 319 (Penn.); 221 Fed. 424 (Penn.); 221 Fed. 430 (Penn.); 222 Fed. 950 (Penn.); 225 Fed. 622 (Tenn.); 227 Fed. 948 (N. Y.); 229 Fed. 833 (Penn.); 231 Fed. 557 (N. Y.); 231 Fed. 998 (N. Y.); 232 Fed. 617 (R. I.); 233 Fed. 470 (Penn.); 234 Fed. 194 (Del.); 235 Fed. 300 (N. Y.); 235 Fed. 224 (Mass.); 235 Fed. 300 (N. Y.); 236 Fed. 544 (C. C. A., 7th Circ.); 238 Fed. 441 and 444 (Mass.); 238 Fed. 925 (Mich.); 239 Fed. 539 (C. C. A., 7th Circ.); 240 Fed. 135 (N. Y.); 241 Fed. 964 (N. Y.); 243 Fed. 399 (Ohio); 244 Fed. 825 (N. J.); 245 Fed. 603 (C. C. A., 6th Circ.); 245 Fed. 824 (C. C. A., 6th Circ.); 246 Fed. 603 (C. C. A., 6th Circ.); 247 Fed. 351 (Ill.); 248 Fed. 956 (N. Y.); 259 Fed. 597 (Cal.); 268 Fed. 205 (N. Y.); 275 Fed. 590 (Del.); 275 Fed. 624 (Cal.).

such decision. That this was never the intention of the old rules is apparent from an early Supreme Court decision.<sup>73</sup>

Some courts seem to disregard the change in Rule 59 and treat many cases as "exceptional" and require very little showing concerning this "condition" in referring cases, other than in matters of account, to masters.

The reference to a master has long been an inseparable adjunct of equity procedure, and has imposed ever increasing burdens and expense upon litigants. Abnormal records are frequently made before masters because of the practice of receiving substantially all testimony offered, whether material, relevant, competent or not. Masters are paid directly by the litigants and in many instances their compensation is necessarily out of all proportion to the costs in proceedings directly before the court. It frequently happens that the compensation of masters is much in excess of the judges who appoint them. It is extremely difficult to explain to contending parties why they should be required to pay directly the large charges necessarily made by masters when the courts are maintained and the judges paid by the government. There is always the feeling among litigants that masters' bills must be paid promptly as presented, for fear that otherwise their rights might be prejudiced. This causes an unwarranted reflection on the courts, and is detrimental to the judicial system.

Presiding Judge Baker, of the Court of Appeals of the Seventh Circuit, has recently pointed out some of these abuses before masters.<sup>74</sup>

<sup>73</sup> In *Kimberly v. Arms*, 129 U. S. 512, 524, Justice Field says: "It is not within the general province of a master to pass upon all the issues in an equity case, nor is it competent for the court to refer the entire decision of a case to him without the consent of the parties. It cannot, of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers."

<sup>74</sup> In *Computing Scale Co. v. Toledo Computing Scale Co.*, not yet reported, C. C. A., 7th Circuit, 1921: "But when it comes to rendering the money decree on a master's report, with attached evidence, counsel seem to be yet at large. Frequently they toy with the master pretty much as they did with the notaries before whom they took the depositions for use at the hearing of the merits of the bill. . . . Imagine a law court, with the single issue before it of damages for established or conceded trespasses, or the value of property wrongfully appropriated, or the value of property about to be lawfully appropriated (a condemnation case), permitting the parties to engage the attention of a jury for five years. We are not noting this case as being exceptionally Jarndyce; we are merely taking it as a text in speaking of a general situation."

These rules governing master proceedings should be given careful consideration with the view of either eliminating or radically changing them. If cases are to be referred to masters, their compensation should be fixed by statute and paid by the government in the same manner that the federal judges are paid. Many references to masters could be avoided if there were a sufficient number of federal judges to keep up with the work imposed upon them.

The decisions under these rules require no discussion.<sup>76</sup>

*Rule 69, Petition for Rehearing; Rule 70, Suits by or Against Incompetents.* — Rule 69 has been discussed in at least three reported cases.<sup>76</sup>

*Rules 71 and 72, Form of Decree and Correction of Mistakes in Orders and Decrees.* — The reported and unreported decisions under these rules relate to the procedure under them.<sup>77</sup>

*Rule 73, Preliminary Injunction and Restraining Orders; Rule 74, Injunction Pending Appeal.* — Temporary restraining orders have been granted under these rules without notice in some instances where it appears that immediate and irreparable loss or damage would result to the applicant before the matter could be heard on notice, and in many instances injunctions pending appeal have been suspended upon terms by the court who decided the case.<sup>78</sup>

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<sup>76</sup> Rule 59: 211 Fed. 751 (Me.); 234 Fed. 952 (Penn.); 238 Fed. 948 (Penn.); 243 Fed. 1003 (Fla.); 244 Fed. 980 (Penn.); 245 Fed. 354 (Cal.); 249 Fed. 757 (Ga.). Rule 60: 227 Fed. 1008 (N. Y.); 229 Fed. 579 (Penn.); 245 Fed. 354 (Cal.). Rule 61: 245 Fed. 354 (Cal.). Rule 62: 204 Fed. 334 (N. Y.); 225 Fed. 883 (Penn.); 245 Fed. 354 (Cal.); 250 Fed. 798 (Cal.); 255 Fed. 560 (C. C. A., 8th Circ.). Rule 63: 203 Fed. 45 (C. C. A., 7th Circ.); 207 Fed. 848 (Wis.); 205 Fed. 983 (Iowa); 207 Fed. 848 (Wis.); 225 Fed. 883 (Penn.); 234 Fed. 949 (Penn.); 237 Fed. 380 (N. Y.); 238 Fed. 938 (Penn.); 244 Fed. 881 (Conn.); 255 Fed. 560 (C. C. A., 8th Circ.). Rule 66: 210 Fed. 389 (Wash.); 217 Fed. 736 (C. C. A., 8th Circ.); 225 Fed. 776 (N. Y.); 227 Fed. 325 (Mass.); 244 Fed. 838 (Texas); 245 Fed. 354 (Cal.); 253 Fed. 410 (Fla.); 258 Fed. 454 (Iowa). Rule 67: 228 Fed. 576 (Penn.); 245 Fed. 354 (Cal.); 247 Fed. 625 (C. C. A., 6th Circ.); 248 Fed. 508 (Mo.). Rule 68: 227 Fed. 1008 (N. Y.); 235 Fed. 1021 (Penn.); 245 Fed. 354 (Cal.); 252 Fed. 100 (C. C. A., 9th Circ.).

<sup>76</sup> 211 Fed. 544 (N. D. Ohio); 232 Fed. 619 (Cal.); 238 Fed. 441 (Mass.).

<sup>77</sup> 246 Fed. 834 (C. C. A., 2d Circ.); 271 Fed. 838 (C. C. A., 8th Circ.).

<sup>78</sup> 209 Fed. 938 (Penn.); 212 Fed. 143 (C. C. A., 3d Circ.); 228 Fed. 26 (C. C. A., 4th Circ.); 240 Fed. 256 (C. C. A., 1st Circ.); 244 Fed. 385 (C. C. A., 1st Circ.); 258 Fed. 346 (C. C. A., 8th Circ.); 259 Fed. 314 (Penn.); 266 Fed. 726 (Ala.).



*Rules 75, 76, and 77, Record on Appeal — Reduction and Preparation — Correction of Admissions and Agreed Statements.* — Perhaps none of the Federal Equity Rules has been more discussed, condemned, and praised than the rules relating to records on appeal.<sup>79</sup> In some cases the expense of reducing to narrative form or abstracting the record made in the trial court, and the inconvenience to court and counsel incident thereto, have resulted in the courts permitting the complete transcript in question and answer form to be used as the record on appeal. It is sometimes necessary to secure the approval of both the trial and appellate courts before this leave is granted. So far as can be ascertained, all courts agree that such matters as counsel for both parties find immaterial and inconsequential should be eliminated, and many of the trial judges approve, and some of the courts of appeals prefer appellate records containing the evidence in question and answer form.

The First, Second, Third, Seventh, Eighth and Ninth Circuit Courts of Appeals have allowed appellate records containing the evidence of witnesses in question and answer form, especially if they are not too voluminous, and some express a very decided preference for such a record. The Court of Appeals of the Sixth Circuit has condemned this practice, although it has approved some such records where both parties and the trial court agreed that there was a saving to litigants. Some district judges are of opinion that the narrative form should be used, and cite as reasons for it that the Court of Appeals is saved much labor thereby, and that more credit is given to the findings of the trial court when such form is used.

The opinions of those who believe that these rules relative to records on appeal should be either eliminated or radically changed are confirmed by what some judges and clerks of courts say concerning them.

<sup>79</sup> 208 Fed. 409 (C. C. A., 5th Circ.); 215 Fed. 95 (C. C. A., 7th Circ.); 18 Equity Rule 75, 222 Fed. 884 (C. C. A., 6th Circ.); 208 Fed. 989 (C. C. A., 6th Circ.); 231 U. S. 703; 235 Fed. 891 (C. C. A., 6th Circ.); 235 U. S. 383; 238 U. S. 1; 240 U. S. 442; 230 Fed. 541 (Penn.); 233 Fed. 609 (C. C. A., 6th Circ.); 242 Fed. 267 (C. C. A., 6th Circ.); 250 Fed. 30 (C. C. A., 5th Circ.); 254 Fed. 522 (C. C. A., 9th Circ.); 258 Fed. 811 (C. C. A., 2d Circ.); 261 Fed. 170 (C. C. A., 6th Circ.); 269 Fed. 247 (C. C. A., 9th Circ.). Also many unreported decisions of judges.

**Circuit Judge Mayer (New York):**

"Equity Rule 75. The provision as to 'narrative form' is in my opinion undesirable. It puts an unnecessary and heavy burden upon counsel and where counsel do not agree, the court also is burdened in respect of a case the details of which may have escaped it. Thus, the court may be compelled to read part of the record in order to determine whether the narrative is correct or to determine whether the testimony shall be reproduced in the exact words of the witness. In the first place, the narrative form rarely, if ever, gives a true picture of the trial. Where a witness has been evasive, the exact reproduction of his testimony is the only method of displaying to the appellate court what occurred below and sometimes even that is not effective in a cold record. I am very strongly in favor of that part of the rule which provides for 'all parts not essential to the decision of the questions presented by the appeal being omitted.' This responsibility, however, should rest upon counsel and I think counsel are not sufficiently alive to this responsibility."

**Judge Killits (Ohio):**

"The rule requiring condensation of the record is, I think, a mistake. Often we spend an extraordinary amount of time in endeavoring to settle questions whether there has been a proper abstracting, and usually the matter comes at a time when the court is embarrassed by having failed to retain in mind the atmosphere of the case when on trial. It puts additional work on us and of course in the employment of attorneys and agents to do the abstracting and presentation of controversies to the court there must be additional expense, more than counterbalancing the expense of printing the enlarged record. . . . To put a second mind (that of the abstractor) between the witness and the reviewing judge doubles and more than doubles the chances for wrong impressions of the actual testimony."

**Judge Morton (Massachusetts):**

"Expressing my own views as to the abstracting of testimony, it does not work well. In the first place it is more expensive; the abstracting costs more than the printing of the complete record in most cases. I remember one case which took two or three days to hear in which the counsel quarreled over the condensation of the record. They must have taken much longer to settle the record than to try the case. It is quite true that question and answer testimony reproduces much better the attitude and meaning of the witness."

Arthur I. Charron (clerk of the Court of Appeals for the First Circuit):

"It is my belief that the judges in the appellate court much prefer the evidence presented in this form" (question and answer).

William Parkin (clerk of the Court of Appeals for the Second Circuit):

"From the outset the judges expressed a preference to have the records in equity cases come up in the form of question and answer. A stipulation is made by the parties that the record be so prepared and this stipulation is usually so ordered by the trial judge, though this formality is sometimes omitted."

Ex-Judge William L. Day (Ohio), in a paper before the American Bar Association,<sup>80</sup> well expresses the disadvantage of abstracting and filing appellate records in narrative form.

With evidence in question and answer form an appellate court has a much better picture of the trial, and the supreme and appellate courts frequently quote from such testimony in reviewing trial courts.<sup>81</sup>

In view of the added burdens and expense of abstracting records without compensating advantage, should not these rules be revised?

*Rules 78, 79, 80, and 81.* — These rules relate to an affirmation in lieu of an oath; additional rules to be made by the district courts in their respective districts for regulating practice not inconsistent with the Federal Equity Rules (which has been referred to heretofore); that when the time prescribed by these rules expires on Sunday or a legal holiday, such time shall extend to and include the next succeeding day. One is the rule relative to the time when these present rules became effective. They need no further comment.

Our Equity Rules on the whole are working well. The large number of judicial decisions enable lawyers to act with reasonable certainty under most of them.

<sup>80</sup> Vol. XLIII, AM. BAR ASS'N REP., 443, 446 (1918).

<sup>81</sup> N. Y. Scaffolding Co. v. Chain Belt Co., 245 Fed. 747 (C. C. A., 7th Circ.); s. c., 254 U. S. 32.

If any change or modification is contemplated, attention should be directed toward:

- (a) Rule 25, Bill of complaint.
- (b) Rule 26, Joinder of causes of action.
- (c) Rule 30, Answer, Counterclaim.
- (d) Rule 58, Interrogatories.
- (e) Rules 59-68, Master proceedings.
- (f) Rule 75, Appeal records.

The tremendous amount of time already consumed by court and counsel in interpreting and administering such of the rules as changed previous practice, makes it plain that innovations should be attempted only where a real necessity is manifest from experience over a considerable period of time.

If the Supreme Court would provide by rule some simple way of bringing before it, for interpretation or change, any rule over which there is a real difference of court opinion, or which is proving inefficient in operation, it would go a long way toward improving and unifying the practice under these Federal Equity Rules.

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CHICAGO, ILLINOIS.

## THE PROGRESS OF THE LAW, 1919-1921

## EVIDENCE

THE word "progress" is somewhat ironical when applied to the enormous outpouring of American decisions on Evidence. The best proof of progress in this branch of the law would be its virtual disappearance from our appellate courts. It is not concerned with defining human rights and duties, but with the mere mechanics of justice, which ought to have been settled long ago. Instead, a considerable portion of the time and thought of our highest courts is diverted from fundamental problems of property, contract, industrial disputes, bankruptcies, railroad rate regulation, taxes, constitutional law, in order to decide whether certain testimony is hearsay or what questions are proper on cross-examination. The American decisions on Evidence for one month require thirty double-columned pages—seven hundred and fifty headnotes—in the advance sheets of the American Digest.<sup>1</sup> The English Law Reports in twenty-one months contain on this subject twenty-five cases;<sup>2</sup> and all the headnotes on Evidence in their Digest, which are somewhat longer than our headnotes, cover for twenty-one

<sup>1</sup> September, 1921, advance sheets: "Evidence," 12½ pages; "Witnesses," 7½ pages; "Criminal Law," sub-heading "X, Evidence," 10 pages. No count is made of still other cases on Evidence under the sub-heading, "XII, Trial." Each page contains approximately twenty-five headnotes. Of course, the same point is sometimes digested under more than one key-number.

<sup>2</sup> In 1920, and the 1921 reports through October issue, the following cases relate to Evidence: *Glebe Sugar Refining Co. v. Greenock*, note 32, *infra*; *Rex v. Lovegrove*, [1920] 3 K. B. 643; *Meadows v. Ellerman Lines*, note 13; *Thomas v. Jones*, [1921] 1 K. B. 22 (C. A.); *Rex v. Wood*, [1920] 2 K. B. 179 (C. C. A.); *Rex v. Paul*, [1920] 2 K. B. 183 (C. A.); *Rex v. Stanley*, *ibid.*, 235 (C. A.); *Rex v. Biggin*, [1920] 1 K. B. 213 (C. A.); *Lyle-Samuel v. Odhams, Ltd.*, [1920] 1 K. B. 135; *O'Rourke v. Darbishire*, [1920] A. C. 581; *Percival v. Peterborough*, [1921] 1 K. B. 414; *Nesom v. Metcalfe*, *ibid.*, 400; *Ford v. Receiver*, [1921] 2 K. B. 344; *Barnett v. Cohen*, [1921] 2 K. B. 461; *Calmenon v. Merchants' Warehousing Co.*, [1921] W. N. 59 (H. L., Ir.); *Perry v. Perry*, [1920] P. 361; *The Turid*, [1920] P. 370; *In re Wright*, [1920] 1 Ch. 108; *Stokes v. Whicher*, [1920] 1 Ch. 411; *L. & N. W. Ry. v. Ashton*, [1920] A. C. 84; *Craig v. Lamoureux*, [1920] A. C. 349 (J. C.); *In re Battie-Wrightson*, [1920] 2 Ch. 330; *In re Rees*, [1920] 2 Ch. 59; *Forgione v. Lewis*, *ibid.*, 326; *Kings v. Merris*, [1920] 3 K. B. 566. Unofficial reports contain a few more cases, but the headnotes of these are included in the Digest calculation in the text.

months less than five double-columned pages. One man cannot winnow afresh the American output of the same period, and this article will be largely based on the cases which have already been selected by law reviews. The recent legislation has not been examined, but books and articles on Evidence will be noted, so that this discussion is little more than a survey of the American and English literature of the topic during the past two years.

Of English treatises, Taylor's two volumes, based largely on Greenleaf, have gone into the eleventh edition,<sup>3</sup> and Phipson, a much better text-book, into the sixth.<sup>4</sup> A third edition of the condensed Phipson has also appeared.<sup>5</sup> A similar American handbook has been based on Chamberlayne.<sup>6</sup> A notable case book has been compiled by Professor Hinton, containing many recent decisions and footnotes of great value.<sup>7</sup> No books on special topics have come to the writer's attention, either in Evidence proper or the interesting adjacent territory opened up by Wigmore's *Principles of Judicial Proof*,<sup>8</sup> which deals with the weight and significance of testimony. Mention may be made in this latter connection of a recent American review of a German publication now a few years old, *Justiz-Irrthümer*, by A. Hellwig,<sup>9</sup> giving examples of miscarriages of justice, several of which were based on confessions which proved to be false.

The war has affected the law of Evidence in two ways. First, it brought special tribunals into operation. Prize courts are charged by Baty<sup>10</sup> with unwisely discarding the rule observed in former wars, that captors' evidence shall not be received. American courts-martial had a new Code of Evidence drawn by Wigmore. Not enough has yet been written on its merits in action; and com-

<sup>3</sup> A TREATISE ON THE LAW OF EVIDENCE, etc., 11 ed., J. B. Matthews and G. F. Spear. 2 vols., London, 1920. Reviewed in 34 HARV. L. REV. 898.

<sup>4</sup> THE LAW OF EVIDENCE, 6 ed., London, 1921.

<sup>5</sup> MANUAL OF THE LAW OF EVIDENCE FOR THE USE OF STUDENTS, 3 ed., London, 1921.

<sup>6</sup> C. F. CHAMBERLAYNE, HANDBOOK ON THE LAW OF EVIDENCE, ed. A. W. Blake-man and D. C. Moore, Albany, 1919. Reviewed in 8 CAL. L. REV. 202.

<sup>7</sup> E. W. HINTON, CASES ON THE LAW OF EVIDENCE, St. Paul, 1919. Reviewed in 33 HARV. L. REV. 745; 8 CAL. L. REV. 357. T. W. HUGHES, CASES ON THE LAW OF EVIDENCE, Chicago, 1921, reached the writer too late for mention in the text.

<sup>8</sup> Boston, 1913.

<sup>9</sup> Minden (Westfalen), 1914. Reviewed in 11 J. CRIM. L. AND CRIM. 157.

<sup>10</sup> Thomas Baty, "Neglected Fundamentals of Prize Law" 30 YALE L. J. 34, 47.

parisons of it with civil trials and with French military justice would be worth while.<sup>11</sup> Secondly, in the prosecutions for the expression of opinions hostile to the war, under the Espionage Act and similar state legislation, intention to hinder the war was usually an essential element of guilt, and courts had much difficulty in determining what evidence of the defendant's mental state should be admitted, — *e. g.*, pro-German utterances before the United States was at war, socialistic speeches not specified in the indictment, conduct and language indicating loyalty. Attempts were made to get in large masses of testimony on the objects and necessity of the nation's action, such as the President's speeches, reports of eye-witnesses of the Russian Revolution, etc. In some trials the defendant was allowed to make a long unbroken statement of his political and economic views, in accordance with the continental practice in political offenses. If we are to continue to have such offenses in this country in time of peace, many interesting problems of evidence will require consideration.<sup>12</sup>

#### SIGNS OF CHANGE

The rules of Evidence improve slowly because there is so little to get excited about. They involve no class issues like injunctions in labor disputes, they have no such obvious effect on commerce as the subjects which the Commissioners of Uniform Laws have been working to put in order. To abolish one antiquated rule like the attesting witness requirement in one of the forty-eight states, demands the concerted and prolonged action of several disinterested lawyers. A reform is bound to go much faster if the pure love of improvement can annex some additional motive, more common if less altruistic; *e. g.*, a change may mean dollars and cents to many, as when the removal of the interest disqualification made it easier to collect honest debts, or it may have behind it the deep-rooted instincts of a profession like the dubious

<sup>11</sup> See D. B. Creecy, "Courts-Martial," 10 J. CRIM. L. AND CRIM. 202, 207; L. K. Underhill, "Notes on the Procedure of Courts-Martial," 10 *ibid.*, 42, 45; E. Angell, "The French System of Military Law," 15 ILL. L. REV. 545, 553.

<sup>12</sup> *State v. Townley*, 182 N. W. 773 (Minn., 1921); *Stokes v. United States*, 264 Fed. 18 (C. C. A., 8th Circ., 1920); *Pierce v. United States*, 252 U. S. 239 (1920); *Schurmann v. United States*, 264 Fed. 917 (1920), are examples. See Robert Ferrari, "The Trial of Political Prisoners Here and Abroad," 66 DIAL, 647 (June 28, 1919); Z. CHAFFE, JR., *FREEDOM OF SPEECH*, index sub "Evidence," and Bibliography, page 379.

physician's privilege. Three different attempts to modify the law of Evidence have attained some success because of such ulterior motives. These three attacks are important, not merely for their own sake, but because observation of the actual working of a new modification within a limited sphere will enable us to decide whether it may be wisely adopted as a permanent general rule.

I. *Workmen's Compensation Acts.* These statutes in several jurisdictions establish new presumptions shifting the burden of coming forward with evidence upon the defendant, in situations where the workman's right to relief is considered probable though difficult to prove, and dispense with the rules for the exclusion of testimony such as the hearsay rule. This action is obviously due, not merely to popular dissatisfaction with these rules, but to the desire that a well-defined group of persons shall obtain the compensation given them by the legislature without the technicalities, obstructions, and delays caused by contests over the admissibility of evidence. Without those rules it is easier for workmen to prove their claims, and lawyers are less necessary. Is this gain offset by a greater loss? The best argument for our law of Evidence is that by excluding testimony which is comparatively untrustworthy or which takes time out of all proportion to its value, the trial is hastened and a correct determination of the basic facts is rendered more probable. The Compensation Acts offer a useful opportunity to learn if this argument is valid. Here, where the supposed safeguards have been removed, are the proceedings interminable and the decisions frequently erroneous? P. T. Sherman in the *University of Pennsylvania Law Review*<sup>18</sup> examines the cases under the New York statute and concludes that it would have been wiser to retain the ordinary rules of Evidence. He states that the Industrial Accident Commission, supported by a minority of the judges, has taken advantage of the statute to disregard not only the legal rules making testimony inadmissible, but also the logical principles as to the weight of evidence, and has frequently given compensation because there was a little hearsay testimony on the workman's

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<sup>18</sup> "Evidence and Proof under Workmen's Compensation Laws," 68 U. PA. L. REV. 203; see also *Reid v. Automatic Electric Washer Co.*, 179 N. W. 323 (Ia., 1920), noted in 69 U. PA. L. REV. 279 (1921), with comment on various statutes. On burden of proof, see 68 U. PA. L. REV. 300; *Meadows v. Ellerman Lines*, [1920] 3 K. B. 544 (C. A.).



side though much outweighed by the defendant's evidence. Many such findings have, he says, been reversed by a majority of the judges on appeal. It may be, however, that as the tribunals become more accustomed to handling testimony which would elsewhere be inadmissible, they will be able to estimate its value with increasing accuracy. Before we decide that the experiment is a failure in these tribunals and should be abandoned, or that *a fortiori* a similar policy of the open door for evidence should not be adopted in the ordinary courts, it would be helpful to have further investigation, *e.g.*, (a) reviews like Sherman's of the decisions in other states; (b) reports by appellate judges on the merits of commission findings as seen in bulk after several years' experience; (c) reports based on commission records and actual observation of commission hearings by persons qualified to compare the workings of their liberal methods with the operation of the rules of Evidence in ordinary civil and criminal proceedings.

II. *Contracts to Alter or Waive the Rules of Evidence.* An article with this title by Wigmore in the *Illinois Law Review*<sup>14</sup> supports the validity of such contracts. A life insurance policy provides that the presumption of death after seven years' disappearance shall not operate; an accident policy, that the accidental character of the injury must be established by an eyewitness other than the policyholder, or that the privilege against corporal inspection is waived, or that a physician may disclose communications from the insured; a surety company agrees that the plaintiff's vouchers of payment shall be conclusive proof of loss.<sup>15</sup> These clauses result from the belief of business men that certain established rules of Evidence promote imposture or delay. We may uphold some of the clauses without committing ourselves to the proposition that a private contract can force a court to adopt a special rule of Evidence. For instance, if an insurance company can limit its liability to exclude deaths in war or by suicide, it can also exclude deaths by disappearance. Ordinary principles of contract allow one to promise as much or as little as he pleases. Again, privileges which

<sup>14</sup> 16 ILL. L. REV. 87 (1921), with a large collection of authorities, many very recent. For other comment on recent cases see 5 MINN. L. REV. 227, 480; 21 COLUMBIA L. REV. 192; 19 MICH. L. REV. 202; 6 ILL. L. BULL. 236.

<sup>15</sup> The conflicting decisions on the clauses are collected in the references of note 14.

may be waived at the trial may also, in reason, be waived anticipatorily in the policy. So far, the only sound limitation on the company's power is, that the clause must not be a trap for the policyholder. The surety policy meets an additional difficulty, that the provision for automatic proof without possibility of countervailing evidence ousts the courts of all substantial jurisdiction. Wigmore asks why not, if business men prefer this method to the lengthy processes of the ordinary trial. Still greater obstacles are presented by a clause agreeing to admit hearsay evidence, for the court is then forced to try the case by unusual methods, and might well refuse to do so.<sup>16</sup> The authorities are divided on all these clauses, but their frequent use in business contracts shows dissatisfaction with the law of Evidence, and whenever these clauses are upheld their operation will furnish useful data on the problem whether the rule of Evidence in question should be abolished by legislation as well as by agreement.

III. *Psychological Criticism.* Reform in the methods of settling questions of mental capacity is urged, not only by lawyers, but by alienists, psychiatrists, and psychologists. Henry W. Taft speaks for the bar in voicing dissatisfaction with medical experts in will cases.<sup>17</sup> Dr. W. A. White, Superintendent of the Government Hospital for the Insane, Washington, D. C., writing on "Expert Testimony in Criminal Procedure Involving the Question of the Mental State of the Defendant,"<sup>18</sup> recommends a statute drawn by the American Institute of Criminal Law and Criminology, which authorizes the court to summon experts who may be questioned by both sides; allows the defendant to be examined by these experts and by the state's experts; sends the defendant to a hospital for observation, where all experts shall have access to him; directs each expert to prepare a written report on which he may be cross-questioned, as a substitute for the discredited hypothetical question, which is to be abolished; and also authorizes all the experts if they see fit to prepare a joint report. The appointment of experts by the court, which need not be limited to mental experts or to criminal cases, is also recommended by a committee of the Board of Circuit

<sup>16</sup> Such a contract was, however, upheld in *Thompson v. Fort Worth, etc. Ry. Co.*, 31 Tex. Civ. App. 583, 73 S. W. 29 (1903).

<sup>17</sup> "Comments on Will Contests in New York," 30 YALE L. J. 593, 601 (1921).

<sup>18</sup> 11 J. CRIM. L. & CRIM. 499 (1921).

Judges of Wisconsin. Their report, by Judge E. Ray Stevens,<sup>19</sup> reviews the statutes of the states which already allow such experts and submits a draft statute. It is to be hoped that the Michigan decision<sup>20</sup> invalidating such a statute on the ground that the selection of witnesses is not a judicial act, represents the isolated attitude of a court which has shown itself noticeably inhospitable to modern legal methods.<sup>21</sup> The value of mental examinations of defendants in criminal cases and of juvenile delinquents has been well proved.<sup>22</sup> It suggests the possibility of similar examinations of witnesses of alleged mental defectiveness or psychopathic tendencies.<sup>23</sup> Although the law has refused to admit lay evidence that a witness's mentality is low,<sup>24</sup> except when it approaches insanity, because such evidence is too uncertain, the report of a Binet-Simon or other intelligence test would be of distinct value to a trained judge in weighing testimony, and attempts to introduce such reports have recently been made.<sup>25</sup> Undoubtedly the wide use of such tests in the army will have its influence. The difficulty is, however, that these tests of a witness will go, not to a judge, but to the jury. Hence their value is much less than for the juvenile delinquent, who gets no jury trial. The defendant in a criminal case is also likely to be a better subject of intelligence tests than a witness, if the criminologists succeed in their plan to have the jury pass only on the question whether the accused committed the criminal act with *mens rea*, leaving his mental responsibility and his

<sup>19</sup> "Expert Testimony," 10 J. CRIM. L. & CRIM. 188 (1919). See also G. W. JACOBY, *THE UNSOUND MIND AND THE LAW*, 1918; reviewed in 33 HARV. L. REV. 881.

<sup>20</sup> *People v. Dickerson*, 164 Mich. 143, 129 N. W. 199 (1910).

<sup>21</sup> *Anway v. Grand Rapids Ry. Co.*, 211 Mich. 592, 179 N. W. 350 (1920) — declaratory judgments invalid; *Wattles v. Upjohn*, 211 Mich. 514, 179 N. W. 335 (1920) — proportional representation invalid; *Atty. Gen. ex rel. Dingeman v. Lacy*, 180 Mich. 329, 146 N. W. 871 (1914) — Detroit court of domestic relations invalid.

<sup>22</sup> See, for example, T. W. Salmon, "Some New Problems for Psychiatric Research in Delinquency," 10 J. CRIM. L. & CRIM. 375 (1919); H. Olson, "The Psychopathic Laboratory of the Municipal Court of Chicago," 92 CENT. L. J. 102 (1921).

<sup>23</sup> Tom A. Williams, "Some Remarks about Testimony" (summarized from the experience of French psychiatrists and experts in legal medicine), 10 J. CRIM. L. & CRIM. 609 (1920); see also 64 SOL. L. J. 579 (1920).

<sup>24</sup> *Bell v. Rinner*, 16 Ohio St. 45 (1864).

<sup>25</sup> *State v. Wade*, 113 Atl. 458 (Conn., 1921), after use of Binet-Simon reports of the defendant's mentality, similar reports on witnesses were excluded by the trial court; held within its discretion, as a question of remoteness. The tests were applied to the defendant in *State v. Schilling*, 112 Atl. 400 (N. J., 1920).

subsequent treatment, whether in a prison, asylum, or hospital, to be determined by a board on the basis of expert recommendations. The mental capacity of a witness will always have to be left to the jury, so long as there is a jury to determine the issues of fact on which this witness testifies, and it is doubtful whether such a rough and ready instrument of justice can cut to the fine lines involved in an intelligence test. W. M. Marston<sup>26</sup> of the Massachusetts bar has experimented with blood pressure and other tests to determine the veracity of witnesses, and states that the results of these tests were corroborated by the subsequently disclosed facts, already known to the witness. Lawyers will await the results of such investigations with open minds. They cannot, of course, be substituted in courts generally for present methods of examination until their usefulness is thoroughly demonstrated. If such tests ever are adopted, it is probable that the jury system will have to be abandoned, unless education will have advanced so far that twelve men picked at random will adequately absorb blood pressures, time reactions, and intelligence quotients, and combine the mass into a just verdict. In other words, the jury might also be subjected to an intelligence test.

#### PRELIMINARY TOPICS

For convenience the various topics of Evidence will be considered in the order adopted by *Thayer's Cases*.

*Judicial Notice* has been taken of such matters of common knowledge as the increased cost of living,<sup>27</sup> the meaning of "fifty-fifty,"<sup>28</sup> and that a new Ford is worth over two hundred dollars,<sup>29</sup> but not of such controverted facts as the intoxicating qualities of Jamaica ginger<sup>30</sup> or the distance through which odors from automobiles will travel.<sup>31</sup> Certain information not generally known is used as the basis of judicial action without being put in as evidence because it is part of a judge's duty to possess or acquire such infor-

<sup>26</sup> "Psychological Possibilities in the Deception Tests," 11 J. CRIM. L. & CRIM. 551 (1921).

<sup>27</sup> *Hurst v. C. B. & Q. R. R. Co.*, 219 S. W. 566 (Mo., 1920), noted in 10 A. L. R. 179.

<sup>28</sup> *Chafin v. Main, etc. Co.*, 85 W. Va. 459, 102 S. E. 291 (1920). See "Slang or Colloquial Phrases in the Law of Evidence," 11 A. L. R. 661.

<sup>29</sup> *State v. Phillips*, 106 Kan. 192, 186 Pac. 743 (1920).

<sup>30</sup> *Commonwealth v. Sookey*, 236 Mass. 448, 128 N. E. 788 (1920).

<sup>31</sup> *Texas Co. v. Brandt*, 79 Okla. 97, 191 Pac. 166 (1920), noted in 91 CENT. L. J. 353.

mation. Thus he must know the statutes of his jurisdiction, and the House of Lords recently took judicial notice of a material section which was entirely overlooked in the lower court,<sup>32</sup> though some courts hold that a point cannot be raised for the first time on appeal. The municipal court of Chicago is required by statute to take judicial notice of the city ordinances, but the Illinois Supreme Court will not do so on appeal from the municipal court, and declares that a statute obliging it to do so would be unconstitutional.<sup>33</sup> This and the earlier refusal to take judicial notice of the rules of practice of the municipal court<sup>34</sup> show a regrettable willingness of the Illinois Supreme Court to complicate appellate procedure in a court which aims to make the settlement of small disputes simple, cheap, and speedy.

*Presumptions and Burden of Proof.* Although the existence of any given presumption and its exact nature and effect are not determined by the law of Evidence but by the policies of that portion of the substantive law to which the presumption relates, nevertheless when the presumptions are thus created it seems a task of the law of Evidence to classify and analyze them. The same is true of the rules of Burden of Proof in various situations. Consequently most of the recent material on these two topics need not be discussed here,<sup>35</sup> but a few authorities raising problems of classification and analysis are worth considering.

Presumptions may be classified according to their binding effect upon the jury into three groups. (1) Logical inferences, — if the

<sup>32</sup> *Glebe Sugar Refining Co. v. Greenock*, [1921] 2 A. C. 66, [1921] W. N. 861. See "Overlooking Statutes," 30 YALE L. J. 855.

<sup>33</sup> *Chicago v. Lost*, 289 Ill. 605, 124 N. E. 580 (1919), noted in 29 YALE L. J. 460.

<sup>34</sup> *Sixby v. Chicago City Ry. Co.*, 260 Ill. 478, 103 N. E. 249 (1913).

<sup>35</sup> Presumptions: Long absences, *Greig v. Trustees of the Widows' Fund*, [1920] 2 SCOTS L. T. 383, showing the entirely different law of Scotland. "Disposition of Life Insurance which, by terms of policy, is dependent upon survivorship, where there is no presumption or proof of survivorship," 5 A. L. R. 797, note. Legitimacy, *In re McNamara's Est.*, 181 Cal. 82, 183 Pac. 552 (1919), noted in "Presumption of Legitimacy of Child born in Wedlock," 33 HARV. L. REV. 306, 315; "Presumption of legitimacy of child born to married woman as affected by lapse of more than normal period of gestation after access by husband," 7 A. L. R. 329; *State ex rel. Burkhart v. Ferguson*, 187 Iowa, 1073, 174 N. W. 934 (1919), noted in "Presumption as to paternity of child conceived or born before marriage," 8 A. L. R. 427. Impotency, after triennial cohabitation, *Tompkins v. Tompkins*, 111 Atl. 599 (N. J. Eq., 1920), noted in 69 U. PA. L. REV. 388; "Presumption of identity of persons from identity of name in chain of title to real property," 5 A. L. R. 428, note. Foreign statutory law, Freyman

jury find A and B, they may reasonably find X, but are not obliged to do so. This is not a rule of law at all, but merely a statement of experience. The presumption of continuance of life is an example.<sup>36</sup>

(2) Rebuttable presumptions, — if the jury find A and B, they must find X, unless the presumption is rebutted by additional evidence. This is a rule for the administration of evidence, and so may be called part of the law of Evidence, though not a rule of exclusion like the hearsay rule. Thus, a promissory note is presumed to be given for consideration, but the maker may prove want of consideration. (3) Conclusive presumptions, — if the jury find A and B, they must find X, regardless of the additional evidence. This is not really a rule of Evidence or a presumption at all, but a rule of substantive law stated in evidential language. For instance, section 16 of the Negotiable Instruments Law provides, "Where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed." It makes no difference if the maker can prove that the note was stolen from him by the payee. What the statute means is that want of delivery is no defense against a holder in due course.

A subdivision of class (2) is necessary. (a) Some rebuttable presumptions have no logical core, but rest on some policy of that par-

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*v. Day*, 108 Wash. 71, 182 Pac. 940 (1919), noted in 33 HARV. L. REV. 315 (1919). "Venereal disease as evidence of adultery," 5 A. L. R. 1020, note. "Insurance: presumption and burden of proof as to accident in case of death from poison," 7 A. L. R. 1226, note. "Presumption against suicide in workmen's compensation cases," 5 A. L. R. 1680, note. Creditor's account, 29 COLUMBIA L. REV. 805. Burden of proof in Roman Law, Roscoe Pound, "The Maxims of Equity," 34 HARV. L. REV. 809, 814, note.

Burden of proof: This is also involved in several references in the preceding paragraph. Self-defense, upon accused, *State v. Mellow*, 107 Atl. 871 (R. I., 1919), noted in 33 HARV. L. REV. 609. Theft insurance, *Miller v. New Amsterdam Casualty Co.*, 110 Atl. 810 (N. J., 1920), noted in 91 CENT. L. J. 388. Mistake in receipt, on recipient, *Ill. Steel Bridge Co. v. Wayland*, 107 Kan. 532, 192 Pac. 752 (1920), noted in 19 MICH. L. REV. 347. Loss by bailee, 68 U. PA. L. REV. 179 (1920). Alteration, *Kauffman v. Logan*, 187 Iowa, 670, 174 N. W. 366 (1919), noted in 29 YALE L. J. 355; "Upon whom should the burden fall to establish the validity of an alteration in an instrument?" 68 U. PA. L. REV. 264 (1920). *Res ipsa loquitur*, in blasting, *Jeremiah Smith*, "Liability for Damage to Land by Blasting," 33 HARV. L. REV. 542, 553 (1920). Fire from locomotive sparks, *Page v. Camp Mfg. Co.*, 180 N. C. 330, 104 S. E. 667 (1920), noted in 19 MICH. L. REV. 451. See also several notes in vols. 5-13 A. L. R.

<sup>36</sup> Its binding force seems to be much greater in Scotch Law, *Greig v. Trustees of the Widows' Fund*, [1920] 2 SCOTS L. T. 383.

ticular branch of the substantive law with which they are connected. Thus, since many promissory notes are given for accommodation, the presumption of consideration rests on no great probability that a note was given for value, but on the policy of the law of negotiable instruments that the enforcement of a note should be made a simple matter. Again, the presumption that if goods are handled by several carriers, damage in transit was caused by the last carrier<sup>37</sup> is obviously based on the justice of relieving the shipper of the initial burden of investigation and putting it on some one who has facilities for doing it. Any carrier might have been chosen; the Carmack Amendment<sup>38</sup> throws the burden on the first carrier. (b) Other rebuttable presumptions rest on experience as well as policy. They do have a logical core. The fact that A and B occur, makes it more probable that X is true, and although the presentation of evidence in rebuttal relieves the jury from their binding obligation to find X, still this logical inference must be weighed in the scale against the rebutting evidence. For instance, the presumption that a letter, properly addressed, stamped, and mailed, arrives, may justify a finding of arrival even though the addressee gives some evidence to the contrary. Such a presumption is really in class (1) as well as class (2).

Consequently, it is often difficult to decide whether a particular presumption is only a logical inference or is a rebuttable presumption with a logical core. Thus in two recent prosecutions for receiving stolen goods the defendant's possession was proved. A logical inference of guilty knowledge might permissibly be drawn by the jury, but was it right for the trial judge to go further and charge that possession raised the presumption of guilt unless it was explained to the satisfaction of the jury?<sup>39</sup> The courts disagree. Another court holds that the presence of the defendant at a still ready for operation proves his possession unless rebutted.<sup>40</sup>

<sup>37</sup> See F. H. Bohlen, "The Effect of Rebuttable Presumptions of Law upon the Burden of Proof," 68 U. PA. L. REV. 307, 320 (1920).

<sup>38</sup> Act June 29, 1906, c. 3591, § 7, 34 STAT. AT L. 595, U. S. COMP. STAT., 1918, § 8604 a.

<sup>39</sup> *Pearrow v. State*, 146 Ark. 182, 225 S. W. 311 (1920), held error; *State v. Ross*, 39 N. D. 630, 179 N. W. 993 (1920), not error, by a divided court; both noted in 19 MICH. L. REV. 565, which agrees with Arkansas.

<sup>40</sup> *Barton v. United States*, 267 Fed. 174 (C. C. A., 4th Circ., 1920); 30 YALE L. J. 412, thinks there is merely a logical inference.

The necessity of further subdivision of rebuttable presumptions is maintained by F. H. Bohlen in an article, "The Effect of Rebuttable Presumptions of Law upon the Burden of Proof."<sup>41</sup> All such presumptions shift the burden of coming forward with evidence to the opponent. Bohlen thinks that some also shift the burden of establishing the issue by weight of evidence, — risk of non-persuasion, as Wigmore calls it. This is contrary to Wigmore's statement that the risk of non-persuasion never shifts.<sup>42</sup> It is hard to answer Bohlen's argument, especially when applied to presumptions which can only be rebutted by more than a preponderance of evidence.<sup>43</sup> If the presumption of legitimacy from birth in wedlock with possibility of access is urged on behalf of the party having the initial risk of non-persuasion, the burden seems to shift to the opponent to establish illegitimacy by evidence beyond a reasonable doubt.<sup>44</sup> Most presumptions, however, should not properly have this double effect, despite the confusion in the cases between the two burdens of proof.<sup>45</sup> Thus the presumption of sanity in a will case is rightly interpreted in a recent Illinois decision<sup>46</sup> to place the burden of offering evidence of the testator's mental condition upon the contestant, while the risk of non-persuasion always remains with the proponent.

The so-called presumption of innocence in criminal cases is in a class by itself. In the cases of rebuttable presumptions which have a logical core, the process of rebutting the presumption consists in taking the logical inference and weighing it against the rebutting evidence. Such a process cannot rightly be applied to

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<sup>41</sup> 68 U. PA. L. REV. 307 (1920).

<sup>42</sup> 4 TREATISE ON EVIDENCE, § 2489.

<sup>43</sup> The note in 33 HARV. L. REV. 306 agrees with Bohlen's position as to the presumption of legitimacy, but thinks it the only presumption which properly shifts the risk of non-persuasion.

<sup>44</sup> The alleged son of X, the deceased owner of Blackacre, brings ejectment against the brother of X, in possession of Blackacre. The plaintiff has the risk of non-persuasion. He proves that his mother W was the wife of X, and that he was born in wedlock, while X had access. The defendant now seems to have the burden of establishing illegitimacy beyond a reasonable doubt.

<sup>45</sup> On the confusion in Bills and Notes, see BRANNAN'S NEGOTIABLE INSTRUMENTS LAW, 3 ed., 217; Z. Chafee, Jr., "Progress of the Law, Bills and Notes," 33 HARV. L. REV. 255, 274 (1919).

<sup>46</sup> *Donovan v. St. Joseph's Home*, 295 Ill. 125, 129 N. E. 1 (1920), approved by 15 ILL. L. REV. 467.



the presumption of innocence, for it has no logical core. There is no probability that a man indicted by a grand jury is usually innocent. It is not an element of the proof in a criminal case, but only a rule of policy as to the burden of proof. When the pile of facts on the state's side, including the logical inferences in its favor, some of which may have been embodied in rebuttable presumptions, is set beside the defendant's pile of facts and inferences, the defendant must not be convicted unless the state's pile is a good deal the higher. The presumption of innocence merely expresses the measure of this distance; to regard it as also a fact in the defendant's pile would be to make it count twice.<sup>47</sup> To vary the metaphor, an Iowa case<sup>48</sup> raises the interesting problem whether the evidence against the accused should be regarded as a chain, each link of which must be proved beyond a reasonable doubt, or only as a cable, which is strong enough if it sustains the burden as a whole regardless of the strength of each strand in the testimony. The case takes the chain theory, but the cable theory seems preferable; and a Rhode Island decision goes even further, holding that the accused must establish self-defense by a preponderance of the evidence.<sup>49</sup>

If the presumption of innocence be correctly analyzed above, it has little or no place in civil proceedings, except possibly in disbarment, which imposes severe personal consequences.<sup>50</sup> Thus, if forgery is set up as a defense to a promissory note, it is enough to establish it by a preponderance of the evidence, though it is a crime, for no criminal consequences are imposed by the judgment.<sup>51</sup> In a California case,<sup>52</sup> workmen's compensation was claimed for the death of an employee in an automobile accident. The defense was, that he was exceeding the legal speed limit, and was consequently outside the scope of employment. The court held that the strong circumstantial evidence to this effect might have been

<sup>47</sup> *State v. Smith*, 65 Conn. 283, 31 Atl. 206 (1894).

<sup>48</sup> *State v. Smith*, 180 N. W. 4 (Iowa, 1920), criticized adversely by 30 YALE L. J. 542.

<sup>49</sup> *State v. Mellow*, 107 Atl. 871 (R. I., 1919), approved by 33 HARV. L. REV. 609.

<sup>50</sup> "Presumption of innocence in disbarment proceeding," 7 A. L. R. 93, note; 5 MINN. L. REV. 141.

<sup>51</sup> *Contra*, *Colby v. Richards*, 118 Me. 288, 107 Atl. 867 (1919), criticized adversely in 4 MINN. L. REV. 298.

<sup>52</sup> *U. S. Fidelity & Guaranty Co. v. Industrial Accident Comm.*, 58 Cal. Dec. 190 (1919), by a divided court; adversely criticized in 8 CAL. L. REV. 101.

outweighed by the presumption that he would not violate the law, and refused to set aside a finding of liability. It may be that if a crime incidentally involved in a civil case is heinous, its commission is improbable under the circumstances, but there ought not to be such an inference of innocence in all cases, and overspeeding is so common that an inference against it seems of no weight.

The problem of conflicting presumptions becomes much less difficult if the investigation in each case be directed to the ascertainment of the logical core of the respective presumptions, instead of the impracticable attempt to ascertain the comparative strength of conflicting rules of law. The suggested method will not remove the conflict, but it is now largely a conflict of evidence, since logical inferences are evidence, and hence the method resembles any other endeavor to ascertain the truth from opposing masses of testimony. The jury is left free to apply its reasoning powers to the evidence, subject to the same logical principles as an historian or a congressional committee. Two recent cases where a marriage was in dispute bring out the merits of this method. In *Re Hilton's Estate*,<sup>58</sup> a woman, W, claimed the right to administer as widow the estate of H, who died in 1915, alleging a marriage to H in 1881. She lived with H till 1890, but there was evidence that the intercourse was illicit. H had married X in 1896; W had married Y in 1905, and was now living with Y. The court denied her claim, on the ground that every presumption was in favor of the validity of the two later marriages. A similar presumption would seem to apply to the 1881 marriage, and the California court would have said that the nine years cohabitation was entitled to the benefit of the presumption of innocence; but her cohabitation with Y would also have to be presumed innocent. Among three presumptions of marriage and two of innocence, how can we say which is entitled to priority? The sensible solution is this: Since one of W's two marriages must be invalid in the absence of any evidence of divorce, the law should abandon the policy of upholding either of them, and test each by the weight of the evidence. The testimony in favor of the 1881 marriage was slight; the 1905 ceremony was admitted. Therefore, the decision denying her claim was right on

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<sup>58</sup> 263 Pa. 16, 106 Atl. 69 (1919); the court's reasoning is adversely criticized in 68 U. PA. L. REV. 82.

the facts. The court also introduced another complicating legal rule, that she was estopped to set up the illegality of her second marriage. Such a rule would be very objectionable if the first marriage was undisputed. A better ground for its action would be that her conduct showed she was unfit to administer H's estate, since on her own showing she was an adulteress if she was H's widow. In *Smith v. Smith*,<sup>54</sup> H sued in 1920 to annul his marriage with W, on the ground that she then had a first husband living, X. The evidence showed that X, a man of 65, married W in 1896 and deserted her one month later. He was not heard from since, except that she testified that six months after her marriage to X, she was told he was in a hospital because of a street railway accident. She married H in 1900 and bore him a child, who was still alive. The court dismissed the action, as not sufficiently established. The opinion sets up in H's favor the presumption of the continuance of X's life; and in W's favor the presumption of the validity of the second marriage and the presumption of innocence. It balances these presumptions, and concludes that the presumption of life is overborne in such conflicts, according to the authorities. The same result could be reached without applying any such scale of marking to presumptions. The presumption of marriage is a rebuttable presumption. It sometimes has a slight logical core, because the serious social and criminal penalties for illegal marriage may dissuade persons from marrying except when it is lawful. In this case, however, it has no such core, because all the evidence upon which the parties acted in 1900 is before the court, and if that does not make X's death probable, the mere fact of a ceremony adds nothing. However, the presumption also rests on a strong policy that the marriage should be upheld, unless disproved by weighty evidence, because of morality and the interests of the child, whom annulment would render illegitimate. Bohlen's theory is helpful here; the effect of the presumption is to place a heavy burden of proof on H. The situation is different from *Hilton's Estate*,<sup>55</sup> where one marriage had to be sacrificed, whatever happened, and consequently the law had no policy behind any particular marriage. Now, examine H's evidence to see whether he sustains the requisite

<sup>54</sup> *Smith v. Smith*, 185 N. Y. Supp. 558 (1920); reasoning adversely criticized in 34 HARV. L. REV. 791.

<sup>55</sup> See note 53, *supra*.

burden of proof. The principal fact in his favor is that X was alive three years before the 1900 marriage. From this X draws a presumption of the continuance of X's life until 1900. But this presumption differs entirely from the other. It rests on no social policy; it is a mere logical inference, to be judged like any other fact for what it is worth under the circumstances. In view of X's age and the reported accident, there is not a great probability that X lived three years, not enough to make H's pile of facts so high as the law requires. Therefore, H loses. On the other hand, the logical inference of continuance of life might be strong enough to defeat the claimant to an executory devise conditioned on X's death before 1900, for then the burden of proof would be the other way.

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*(To be concluded.)*

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BLUNDELL-LEIGH v. ATTENBOROUGH AND THE LAW OF PLEDGES. — A recent English case<sup>1</sup> involves two highly important questions in the law of pledges: first, what initial delivery to the pledgee or possession by him is necessary to support the creation of a pledge; and, second, what effects follow upon the separation of ownership of the pledge interest in the chattel from the debt which it secures?

Although an agreement that certain chattels of the debtor shall stand as security for a debt creates an equitable lien good against such persons as stand in no better right than the debtor,<sup>2</sup> it is the general rule that to create a pledge valid at law there must be a delivery to and a continuing in possession by the pledgee<sup>3</sup> or some one in his behalf,<sup>4</sup> and

<sup>1</sup> *Blundell-Leigh v. Attenborough*, [1921] 3 K. B. 235. For the facts of this case see RECENT CASES, *infra*, p. 344.

<sup>2</sup> *Fletcher American Nat'l Bank v. McDermid*, 128 N. E. 685 (Ind., 1920); *Pierce v. Nat'l Bank of Commerce*, 268 Fed. 487 (8th Cir., 1920).

<sup>3</sup> SEE JONES, PLEDGES AND COLLATERAL SECURITIES, 2 ed., §§ 23 *et seq.* As the pledge interest is assignable, possession by an assignee satisfies this requirement of continued possession.

<sup>4</sup> An employee of the pledgor may act as agent for such purpose. *Sumner v. Hamlet*, 12 Pick. (Mass.) 76 (1831). To allow the pledgor himself to act as such agent would practically eliminate the requirement of delivery, yet some authority seems to go to this extent. *Macomber v. Parker*, 14 Pick. (Mass.) 497 (1833). The question is discussed from various aspects in 12 HARV. L. REV. 134; 14 HARV. L. REV. 303; 28 HARV.

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that mere agreement without effective change of possession is insufficient.<sup>5</sup> But some things less than actual physical delivery to the pledgee will suffice. Constructive delivery of very bulky articles may be allowed.<sup>6</sup> Or the requirement of delivery may be satisfied by the fact that at the time of the pledge agreement the goods are already in the possession of the pledgee or his agent,<sup>7</sup> or of a third person who then agrees to hold as his agent.<sup>8</sup>

The principal case involves a further relaxation of this requirement. The plaintiff had delivered jewels to A at an earlier date for valuation by him. But at the time of the creation of the debt and pledge agreement, the jewels were in the possession of the defendant, B, who held not in behalf of but in opposition to A, the alleged pledgee, to the extent of advances made A, on the security of these jewels, of a larger sum than A's loan to the plaintiff, the alleged pledgor. As between A and the defendant, — so long as the plaintiff did not intervene,<sup>9</sup> — A was entitled to receive the goods back upon payment of the defendant's loan. But there is no authority that such an attenuated reversionary right to possession is a sufficient substitute for delivery and the court does not hold that it is. The ground of the decision is that the original delivery was intended to be the only one necessary to create the pledge.<sup>10</sup> It is respectfully submitted that the reason is inadequate. It is admitted

L. REV. 211. It may be suggested that most of the cases in which the pledgor has held as the pledgee's agent without impairment of the latter's rights have been where possession has been returned to the pledgor for a special purpose, there having been an initial delivery to the pledgee. See, for example, *Reeves v. Capper*, 5 Bing. N. C. 136 (1838). See *Harding v. Eldridge*, 186 Mass. 39, 42-43, 71 N. E. 115, 116 (1904); *JONES, op. cit.*, § 44. Or where the existence of an equitable lien or the right to possession was sufficient to justify the result between the parties as to the suit. *Martin v. Reid*, 11 C. B. (N. S.) 730 (1862); *Keiser v. Topping*, 72 Ill. 226 (1874).

<sup>5</sup> *Fletcher American Nat'l Bank v. McDermid*, *supra*; *People's Nat'l Bank v. Mulholland*, 224 Mass. 448, 113 N. E. 365 (1916); *Hastings v. Lincoln Trust Co.*, 197 Pac. 627 (Wash., 1921).

<sup>6</sup> Thus a boom of logs was validly pledged by agreement with the pledgor and pledgee going in person and pointing out the logs involved. *Jewett v. Warren*, 12 Mass. 300 (1815).

<sup>7</sup> *Van Blarcom v. The Broadway Bank*, 9 Bosw. (N. Y.) 532 (1862).

<sup>8</sup> *Ladd v. Myers*, 87 Pac. 1110 (Cal. App., 1906); *Dearborn v. Union Nat'l Bank*, 61 Me. 369 (1873). The ability to pledge goods by the transfer of a negotiable document of title rests upon this basis, — the bailee having agreed in advance to hold as agent for such persons as should come within the terms of the receipt, and there is a pledge or not according as the alleged pledgee is brought within those terms — and therefore put into such dominion as to be the equivalent of possession — or not. *Whitney v. Tibbits*, 17 Wis. 359 (1863) (pledge valid); *Hastings v. Lincoln Trust Co.*, *supra* (pledge invalid).

<sup>9</sup> Something less than a formal demand upon him by the owner may also require the bailee to protect the rights of the owner against the bailor. See *WILLISTON, SALES*, § 421.

<sup>10</sup> The lower court held that no pledge was created. *Blundell-Leigh v. Attenborough*, [1921] 1 K. B. 382. The Court of Appeal approved the law of that decision and reversed it solely on the ground that the original delivery to A was intended by him and the plaintiff to be a "good delivery for the purpose of creating a pledge, whenever that pledge was created." *Blundell-Leigh v. Attenborough*, [1921] 3 K. B. 235, 240. This construction of the contract of bailment had been rejected by the lower court. It seems clear, therefore, that it is the character of this delivery and not the fact that the defendant held to some extent in A's behalf which is decisive of this point of the case.

that the agreement to pledge and the delivery need not be contemporaneous,<sup>11</sup> but possession and agreement must at some moment coincide. When the delivery succeeds the agreement it does coincide with it, for it finds the agreement still in force. This is equally true when delivery precedes and the pledgee is in possession at the date of the agreement. Here, however, the agreement arose only after the alleged pledgee's possession — the only possible basis for predicated an extension of the original delivery into future time — had ceased. Again, the wrongful pledge to the defendant was a conversion for which the plaintiff could have recovered the full value of the jewels. But from the result of this case, it follows that this wrong, after it arises, is, without the knowledge or assent of the plaintiff, cut down to a mere wrongful dealing with the pledgor's interest therein.<sup>12</sup> To consider a pledge as created where there is so material a departure from the technical requirements, and where at the outset and by its creation the rights of the parties become so complicated and disputable, is to disregard the necessity for that simplicity and certainty which ought, for the sake of all concerned, to characterize transactions of pledge.<sup>13</sup>

But assuming that a pledge was created and that the pledge interest in the goods passed to the defendant,<sup>14</sup> what were the rights of the parties after the pledge and debt became thus separated and after the further separation by A's delivery of the plaintiff's note to C to secure advances by the latter? A transfer of the debt and security together would plainly have been unimpeachable.<sup>15</sup> And the pledgee can effectively, though tortiously,<sup>16</sup> assign the pledge interest by delivery

<sup>11</sup> A striking illustration of this is *Atherton v. Beaman*, 264 Fed. 878 (1st Circ., 1920). A pledge was attempted by the delivery of a warehouse receipt in due form, the warehouseman agreeing to hold fifty cars of the pledgor's lumber under this receipt for the pledgee. A larger amount than this was constantly on hand, and no specific fifty cars were appropriated to the receipt until two years later. Such later appropriation was held to validate the pledge, no rights of third parties having intervened. Only the intervention of specific liens of third parties could have altered the result. *Parshall v. Eggert*, 54 N. Y. 18 (1873).

<sup>12</sup> This proposition would seem to be correct if the English doctrine is accepted that such a dealing with the pledge as does not result in a forfeiture of the pledge interest is a tort less than a conversion, actionable in case. There might be more question under the view that there is a conversion, but that the amount of the debt may be used as a set-off. See note 16, *infra*. Which theory is correct would be crucially tested in an action against the pledgee for conversion after he has sold the pledge to one and then the debt in the form of a negotiable instrument to another *bona fide* purchaser. The defendant there would not be able to use the debt to set off. The answer may be that such conduct ought to work a forfeiture of the pledge interest. See note 16, *infra*.

<sup>13</sup> It may be said for the decision that the same result is reached as would be the case if the wrongful repledge had occurred after the pledge had been validly created and that the time order is immaterial. It is believed that the difficulties mentioned in the text and preceding note indicate that the problem is not so easily settled. In the latter case there is no cutting down of a full-fledged tort. Further, this is not a result to be encouraged.

<sup>14</sup> The court holds that the pledge interest enures to the benefit of the defendant by estoppel. This interesting question will be discussed in a subsequent number of the REVIEW.

<sup>15</sup> *Waddle v. Owen*, 43 Neb. 489, 61 N. W. 731 (1895).

<sup>16</sup> *Johnson v. Stear*, 15 C. B. (N. S.) 330 (1863); *Halliday v. Holgate*, L. R. 3 Ex. 299 (1868). Reading these two cases together it appears to be the English law that

without assigning the debt at law.<sup>17</sup> By the strange holding as to the creation of the pledge, the principal case stood in this situation from the very outset. The pledgee had the note, to which, however, the defendant, having advanced a larger sum upon the security of the jewels, was equitably entitled.<sup>18</sup> The defendant had the jewels and, his loan to the pledgee remaining unpaid, he was entitled to retain them "until the extinguishment of the original obligation."<sup>19</sup> The pledgor could not, after notice of the defendant's interest, destroy that interest by payment to the pledgee, A.<sup>20</sup> Hence a tender to the defendant of the amount due from the plaintiff was a prerequisite to a successful claim that the defendant's retention after demand was a conversion,<sup>21</sup> or to a successful suit to regain possession from him.<sup>22</sup> On this point, there-

the pledgee would be held liable in case for the value of the pledgor's interest, but not in trover for the value of bailed chattel. *Accord*, *Post v. Union Nat'l Bank*, 159 Ill. 421, 42 N. E. 976 (1896). See 10 HARV. L. REV. 65. Some American authority reaches a similar result by allowing a suit in trover in which the amount of the debt may be set off by the defendant. *Feige v. Burt*, 118 Mich. 243, 77 N. W. 928 (1898); *Neiler v. Kelley*, 69 Pa. St. 403 (1871). Conversely the conversion is allowed to be set up by the defendant in a suit upon the debt. *Waring v. Gaskill*, 95 Ga. 731, 22 S. E. 659 (1895); *Richardson v. Ashby*, 132 Mo. 238, 33 S. W. 806 (1896). Where forms of action are abolished, the same measure of damages is retained and the question of form of suit is eliminated. *Revert v. Hesse*, 193 Pac. 943 (Cal., 1920); *Aulwes v. Farmer's Bank*, 182 N. W. 528 (S. Dak., 1921). These cases involve no question of tender as the wrongful repledge or sale is itself the cause of action. See *Neiler v. Kelley*, *supra*; *Aulwes v. Farmer's Bank*, *supra*. They are therefore distinctly not in conflict with such cases as *Donald v. Suckling*, L. R. 1 Q. B. 585 (1866). There is no logical inconsistency in holding the repledge a wrong remediable in some form of action and at the same time holding that the pledge interest is not forfeited. But see 9 HARV. L. REV. 289; *id.*, 540; 27 HARV. L. REV. 393.

<sup>17</sup> It is suggested that some dealings with the pledged chattel may be so inconsistent with the terms of the pledge as to work a forfeiture of it. *Blackburn, J.*, in *Donald v. Suckling*, L. R. 1 Q. B. 585, 614-615 (1866). It might be said that where the debt is in the form of a negotiable instrument, the separation of it from the pledge is such an inconsistent dealing. But see *Talty v. Freedman's Savings & Trust Co.*, 93 U. S. 321 (1876). In this case the fact that at one time the note and pledge were separated is not even adverted to in the opinion.

<sup>18</sup> *Whitney v. Peay*, 24 Ark. 22 (1862); *Kernohan v. Maness*, 53 Ohio St. 118, 41 N. E. 258 (1895). *Cf. Gottlieb v. City of New York*, 128 App. Div. 148, 112 N. Y. Supp. 545 (1908). See 22 HARV. L. REV. 308. This result may be considered as reached by way of specific reparation for the tort upon the defendant by A in representing to him that he owned the jewels and thereby inducing the loan, or as reached on the ground that, having purported to transfer more than he had, A could not be heard in equity to say that he did not transfer that which alone could make the assigned pledge interest in the jewels more than a bare legal right, namely, the debt. Both lines of thought probably rest upon the same fundamental conceptions.

<sup>19</sup> *Williams v. Ashe*, 111 Cal. 180, 186, 43 Pac. 595, 597 (1896). See also cases in notes 21, 22, *infra*.

<sup>20</sup> There are *dicta* that at law the pledgor, to entitle himself to possession of the pledge as against any assignee thereof, need only pay the legal holder the debt. See *Ratcliff v. Davis*, Yelv. 178; JONES, PLEDGES AND COLLATERAL SECURITIES, 2 ed., § 418. If this includes the case where the pledgor has notice of the assignee's interest before such payment, it seems out of line with the spirit of the modern authorities and ought to be disregarded in a court administering both law and equity, or even in a court of law as a short cut to an equitable result. *Cf. Thurston v. Blanchard*, 22 Pick. (Mass.) 18 (1839).

<sup>21</sup> *Lewis v. Mott*, 36 N. Y. 395 (1867).

<sup>22</sup> *Donald v. Suckling*, L. R. 1 Q. B. 585 (1866); *Talty v. Freedman's Savings & Trust Co.*, 93 U. S. 321 (1876); *Williams v. Ashe*, 111 Cal. 180, 43 Pac. 595 (1896); *Bradley v. Parks*, 83 Ill. 169 (1876).



fore, the principal case seems sound unless the delivery of the note to C makes some substantial difference. If C became a holder in due course, then, to the extent of his interest, the equitable right of the defendant to the note would be cut off, and the defendant's right to the security would in equity pass equally as an incident of the debt.<sup>22</sup> But if C was not such a holder, then the prior rights of the defendant would subsist unimpaired.

It does not appear which alternative meets the facts of the principal case. But either would justify its result, as the part payment of the note to C exceeded the amount for which he held the note as security, leaving the defendant with a right to the balance due thereon. This right he was entitled to protect by retaining the jewels until tender of at least that sum.

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INTERSTATE COMPACTS AS A MEANS OF SETTling DISPUTES BETWEEN STATES. — Three methods have been used in the United States to avoid or determine controversies, potential or existing, between states: (1) Direct legislation by Congress. (2) A suit by one state, either in its political capacity or as *parens patriæ*,<sup>1</sup> against the other state, in the United States Supreme Court. (3) A compact between states approved, when necessary, by Congress.

The first of the methods is narrow in scope, because Congress may interfere between states only when its constitutional powers permit it to do so.<sup>2</sup> Congress has full power over the territories, however, and by fixing their boundaries<sup>3</sup> and jurisdictional limits before they became states,<sup>4</sup> has doubtless anticipated much interstate dissension.

The second method is more inclusive. Whatever doubt there may be as to what constitutes an interstate cause of action, it is undisputed that the Constitution<sup>5</sup> gave states a remedy for recognized legal wrongs.<sup>6</sup>

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<sup>22</sup> *Kernohan v. Manss*, *supra*, note 18.

<sup>1</sup> *Missouri v. Illinois and Sanitary District*, 180 U. S. 208 (1901); *Kansas v. Colorado*, 185 U. S. 125 (1902); *New York v. New Jersey and Sewerage Commissioners*, U. S. Sup. Ct., Oct. Term, 1920, No. 2, Original. Cf. *Georgia v. Tennessee Copper Co.*, 206 U. S. 230 (1907).

<sup>2</sup> Legislation as to navigable interstate waters is the instance most in point. See *Escanaba Co. v. Chicago*, 107 U. S. 678, 682 (1882); *United States v. Rio Grande Irrigation Co.*, 174 U. S. 690, 708 (1899).

<sup>3</sup> See, as instances, 33 STAT. AT L. 714 (consent to Arkansas to extend her western boundary at the expense of a territory); 26 STAT. AT L. 971, 36 STAT. AT L. 1454 (confirming and reaffirming the boundary line between the state of Texas and the territory of New Mexico). See George C. Lay, "Interstate Controversies," 54 AM. L. REV. 705, 710.

<sup>4</sup> Boundaries and jurisdictional limits are laid down in the enabling acts. It is common in such acts to give states concurrent jurisdiction over boundary waters. *State v. Moyers*, 155 Iowa 678, 136 N. W. 896 (1912); *State v. George*, 60 Minn. 503, 63 N. W. 100 (1895); *Roberts v. Fullerton*, 117 Wis. 222, 93 N. W. 1111 (1903).

<sup>5</sup> Art. III, § 2, cl. 1.

<sup>6</sup> In colonial days, disputes between the colonies were settled by the Privy Council. See *Penn v. Lord Baltimore*, 1 Ves. 443 (1750). See 2 STORY, COMMENTARIES ON THE CONSTITUTION, § 5 ed., §§ 1679, 1681. Under the Articles of Confederation, Art. IX, there was a provision for the appointment of commissions, with an appeal to Congress,

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There was hesitation at first, during the framing of the Constitution, as to whether Congress, or the Supreme Court, or both, should be the tribunal to determine such questions.<sup>7</sup> When the Supreme Court was finally fixed upon, the provision was warmly supported,<sup>8</sup> and the court's original jurisdiction over interstate suits of a civil nature was by statute<sup>9</sup> made exclusive. This function of the court has justly become one of the most admired features of the American federal system.<sup>10</sup> By this means over seventy suits between states have been decided.<sup>11</sup> But this method of determining interstate disputes, necessary though it is,<sup>12</sup> is not entirely adequate. It is difficult to secure execution of a judgment against a state.<sup>13</sup> This difficulty, however, is inherent in any method of determining interstate differences, and can be overcome by borrowing

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but of eight proceedings commenced under this procedure, only three cases were actually heard, and only one was finally settled. Eleven interstate disputes survived the Confederation. See *Fowler v. Lindsey*, 3 Dall. (U. S.) 411 (1799); *Rhode Island v. Massachusetts*, 12 Pet. (U. S.) 657 (1838). See PUTNEY, CONSTITUTIONAL LAW, § 62; William C. Coleman, "The State as a Defendant," 31 HARV. L. REV. 210, 211; Carman F. Randolph, "Notes on Suits Between States," 2 COL. L. REV. 283.

<sup>7</sup> For the history of this provision in the Constitutional Convention, see *Missouri v. Illinois*, *supra*, at 219-224; William C. Coleman, *supra*, 31 HARV. L. REV. 210, 211-216.

<sup>8</sup> See Hamilton in THE FEDERALIST No. 80. Some such method must be available, since neither war nor diplomatic means is open to the states.

<sup>9</sup> See 1789 1 STAT. AT L. 80.

<sup>10</sup> In Switzerland the Federal Tribunal has jurisdiction over suits between cantons. See DICEY, CONSTITUTION, 7 ed., 522. The High Court of Australia has jurisdiction over suits between states, and perhaps a wider range of disputes is made justiciable. See 1900 COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT, 63 & 64 VICT., c. 12, §§ 75 (iv.), 78; A. I. CLARK, STUDIES IN AUSTRALIAN CONSTITUTIONAL LAW, 1 ed., 110; W. H. MOORE, COMMONWEALTH OF AUSTRALIA, 1 ed., 267-269.

<sup>11</sup> Most of these are boundary disputes. Others concern extradition, state obligations, riparian rights in interstate rivers and jurisdiction over interstate oyster beds, and public health. The cases are collected in JAMES B. SCOTT, JUDICIAL SETTLEMENT OF CONTROVERSIES BETWEEN STATES OF THE AMERICAN UNION, and are fully annotated in a separate ANALYSIS. See an instructive review of this work by George C. Lay, "Interstate Controversies," 54 AM. L. REV. 705. The cases are listed in the Contents to Mr. Scott's ANALYSIS. To this list should be added *Arkansas v. Mississippi*, 250 U. S. 39 (1919); *U. S. Sup. Ct.*, Oct. Term, 1920, No. 6, Original; *Minnesota v. Wisconsin*, 252 U. S. 273 (1920); *Oklahoma v. Texas*, *U. S. Sup. Ct.*, Oct. Term, 1920, No. 23, Original; *New York v. New Jersey and Passaic Valley Sewerage Commissioners*, *U. S. Sup. Ct.*, Oct. Term, 1920, No. 2, Original.

<sup>12</sup> It is necessary where states cannot come to an agreement, where congressional assent to an agreement is refused, or where a state disputes the terms of an agreement it has made or refuses to perform it. See *Virginia v. West Virginia*, 206 U. S. 290 (1907).

<sup>13</sup> Georgia refused to obey the judgment in *Chisholm v. Georgia*, 2 Dall. (U. S.) 419 (1793), and made it a capital offense for anyone to undertake to execute it. The potential complications may be appreciated from a consideration of the final phase of *Virginia v. West Virginia*, 246 U. S. 565 (1918).

Apparently a plaintiff state may be authorized to take possession of disputed territory; a defendant state may be ordered to cease doing acts within the state, *Missouri v. Illinois*, *supra*; *Kansas v. Colorado*, 185 U. S. 125 (1902); and performance of acts by subordinate officials may be compelled by *mandamus*, or contempt proceedings. Money judgments have also been rendered, but until recently the difficulties involved were not considered. See *United States v. North Carolina*, 136 U. S. 211 (1890). One difficulty is that all the state's property may be devoted to governmental purposes, and the only way of satisfying the judgment will be by appropriation of the state legislature. See George C. Lay, *supra*, 54 AM. L. REV. 705, 714; Carman F. Randolph, *supra*, 2 COL. L. REV. 283, 309.

assistance from the executive<sup>14</sup> or from Congress.<sup>15</sup> Again, though some doubt has been felt as to what law will govern,<sup>16</sup> precedents are gradually being established. But the chief and seemingly insurmountable difficulty is that not all matters in dispute between states are considered as capable of judicial determination.<sup>17</sup> Thus a state cannot be compelled to perform an obligation which, if in question between two nations, could be enforced only through the political departments.<sup>18</sup> So also where the injury to a state is one of which the law usually takes no cognizance, the Supreme Court will give no relief.<sup>19</sup>

In view of these defects, agreements between states upon points likely to cause friction are desirable. But there are constitutional difficulties to be overcome. The Constitution forbids absolutely all "treaties, alliances or confederations," and any "agreement or compact with another State," without the consent of Congress.<sup>20</sup> These provisions seemed so naturally desirable<sup>21</sup> to the framers that they called forth little comment, either in the Convention debates or in the Federalist essays.<sup>22</sup> Parallel provisions in the Swiss Constitution<sup>23</sup> distinguish between political agreements, which are prohibited absolutely, and non-political agreements, which, with federal consent, are permitted.<sup>24</sup>

<sup>14</sup> But compare Jackson's attitude after *Worcester v. Georgia*, 6 Pet. (U. S.) 515 (1832). See William C. Coleman, *supra*, 31 HARV. L. REV. 210, 228.

<sup>15</sup> In *Virginia v. West Virginia*, *supra*, the Supreme Court held it had power to issue a *mandamus* to compel West Virginia to pay its debt; but refused to exercise that power until Congress was first allowed a chance to coerce West Virginia by legislation. West Virginia arranged for payment without further urging. See JAMES B. SCOTT, *op. cit.*, ANALYSIS, 519.

<sup>16</sup> See *Rhode Island v. Massachusetts*, *supra*, note 6; *South Carolina v. Georgia*, 93 U. S. 4 (1876); *Missouri v. Illinois*, 200 U. S. 496 (1906). See also 19 HARV. L. REV. 606; 21 HARV. L. REV. 132.

<sup>17</sup> There must of course be a real dispute between the states. Rights of a citizen or a group of citizens masquerading as states' rights will not be adjudicated. *New Hampshire v. Louisiana*, 108 U. S. 76 (1883); *South Dakota v. North Carolina*, 192 U. S. 286 (1904). But see Carman F. Randolph, *supra*, 2 COL. L. REV. 283, 292.

<sup>18</sup> In *Kentucky v. Dennison*, 24 How. (U. S.) 66 (1860), the court refused to order a state governor to perform his constitutional duty to return a fugitive. See *Holmes v. Jennison*, 14 Pet. (U. S.) 540, 614 (1840); *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 288, 289 (1888); *South Carolina v. Georgia*, 93 U. S. 4 (1876); PATTERSON, UNITED STATES AND THE STATES UNDER THE CONSTITUTION, 2 ed., § 96. Compare the broad conception of Hamilton as to the probable scope of the Supreme Court's jurisdiction. THE FEDERALIST, No. 80. And compare the powers given to the High Court of Australia, note 10, *supra*.

<sup>19</sup> See *Louisiana v. Texas*, 176 U. S. 1 (1900); *Kansas v. Colorado*, 206 U. S. 46 (1907).

<sup>20</sup> Art. I, § 10, cl. 1 and 3.

<sup>21</sup> See Marshall, C. J., in *Barron v. Baltimore*, 7 Pet. (U. S.) 243, 248 (1833); 1 BRYCE, AMERICAN COMMONWEALTH, 2 ed., 375. The "confederation" clause was of course one decisive reason against the legality of the Southern Confederacy. See PATTERSON, *op. cit.*, § 85.

<sup>22</sup> See Madison in THE FEDERALIST, No. 44.

<sup>23</sup> Art. 7.

<sup>24</sup> The Swiss cantons had been truly sovereign states, and had even been in the habit of negotiating independently with foreign countries. But after the *Sonderbund* of 1847, the cantons were willing to resign their rights, to prevent the recurrence of such a menacing confederation. See W. A. B. Coolidge, "Switzerland; History," ENCYCLOPEDIA BRITANNICA, 11 ed.; DICEY, *op. cit.*, 527. In America, although the states were jealous of each other and of the federal power, and although no such

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The United States Constitution makes no such explicit distinction.<sup>25</sup> But it does recognize different degrees of prohibitions. Thus treaties, alliances, or confederations are absolutely prohibited.<sup>26</sup> On the other hand, though in no case is Congressional assent expressly dispensed with,<sup>27</sup> state decisions and unchallenged federal *dicta* do sanction compacts unapproved by Congress if the political condition of no state is affected thereby.<sup>28</sup> Intermediate are those compacts where the assent of Congress is required. This assent may be permissive or ratifying, express or implied.<sup>29</sup> The adoption by Congress of proceedings taken under the compact is the typical instance of implied ratification.<sup>30</sup> Both permission and ratification are combined in a recent federal statute,<sup>31</sup> which approves an agreement between Minnesota and South Dakota as to criminal jurisdiction over boundary waters, and consents in advance to a similar compact between the states of North and South Dakota, Minnesota, Wisconsin, Iowa, and Nebraska. Such a statute is to be commended. Compacts between states, approved by Congress, offer a solution to interstate disputes hitherto considered unapproach-

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impelling historical example was before them, yet they had never been truly sovereign as colonies, and it is not surprising that they made little objection to this limitation on their powers. Indeed, it would have been surprising if they had permitted states by compacts to enlarge their powers at the expense of the rest of the states. See 1 STORY, *op. cit.*, § 244; COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 8.

<sup>25</sup> The Articles of Confederation had distinguished dealings with foreign nations (absolutely prohibited) and with other states (permissible with the assent of Congress). Art. VI. See 2 STORY, *op. cit.*, § 1402.

<sup>26</sup> The framers were familiar with the New England Confederacy of 1643, the Temporary Congress of 1690, and the Plan of Union of 1754, and especially, of course, with the successful united action of the colonies against Great Britain in fighting the Revolution. See COOLEY, *op. cit.*, 7 ed., 7; EGERTON, FEDERATIONS AND UNIONS WITHIN THE BRITISH EMPIRE, 8, 14.

<sup>27</sup> Since the Constitution forbids "treaties, alliances or confederations" between states at all times, and then goes on to refer to "agreement or compact," Story concluded that the latter words must have been used in a very broad sense to include any sort of arrangement between states, even as to local administrative matters, and that no agreement would ever be good without Congressional consent. See 2 STORY, *op. cit.*, § 1403; Andrew A. Bruce, "Compacts and Agreements of States," 2 MINN. L. REV. 500, 514.

<sup>28</sup> Mackay v. R. R. Co., 82 Conn. 73, 72 Atl. 583 (1909); Hendricks v. Commonwealth, 75 Va. 934 (1882). See Virginia v. Tennessee, 148 U. S. 503, 518 (1893); Wharton v. Wise, 153 U. S. 155, 167-170 (1893). See Andrew A. Bruce, *supra*, 2 MINN. L. REV. 500. Chief Justice Bruce approves the distinction but suggests that non-political compacts are voidable by Congress. See also 1 WILLOUGHBY, CONSTITUTIONAL LAW, § 112; PUTNEY, *op. cit.*, § 101.

<sup>29</sup> Poole v. Fleeger, 11 Pet. (U. S.) 185 (1837); Central R. R. Co. v. Jersey City, 209 U. S. 473 (1908).

<sup>30</sup> See State v. Cunningham, 102 Miss. 237, 59 So. 76 (1912); Russell v. American Ass'n, 139 Tenn. 124, 201 S. W. 151 (1918). Approval may be inferred from admission as a state under the terms of a compact. Green v. Biddle, 8 Wheat. (U. S.) 1 (1823); Virginia v. West Virginia, 11 Wall. (U. S.) 39 (1870). See 2 STORY, *op. cit.*, § 1405.

<sup>31</sup> Resolution of Mar. 4, 1921, No. 68. See 1921 FED. STAT. ANN., Nos. 26-27, p. 67. Seventeen statutes have been passed confirming existing compacts between states; seven approving in advance prospective compacts. The statute most closely resembling that under discussion is 36 STAT. AT L. 882, by which approval was given to a prospective agreement by Wisconsin, Illinois, Indiana, and Michigan as to their criminal jurisdiction on Lake Michigan. See the statutes listed by Andrew A. Bruce *supra*, 2 MINN. L. REV. 500.

able,<sup>32</sup> and afford a remedy less troublesome to the court<sup>33</sup> and more satisfactory to the parties<sup>34</sup> than recourse to the Supreme Court.

**TAXATION OF THE EXERCISE OF TESTAMENTARY POWERS OF APPOINTMENT.** — An increasing amount of litigation is demonstrating the importance of determining when a state may tax the execution of testamentary powers of appointment. According to accepted theories of what constitutes due process, such a tax will be unconstitutional unless the state by its law contributes as a *quid pro quo* some benefit or privilege toward accomplishing the succession.<sup>1</sup> It seems clear that the state wherein the property, either real or personal, is located may always impose such a tax, for its law actually permits the appointee to take. In the case of personalty, wherever it may be, the state of the donor<sup>2</sup> likewise has an unailing ground for taxation in that its law will determine the validity

<sup>32</sup> Questions as to expropriation of lands in another state, impossible by ordinary eminent domain proceedings, might be settled by this means. See Charles N. Gregory, "Expropriation by International Arbitration," 21 HARV. L. REV. 23; Carman F. Randolph, *supra*, 2 COL. L. REV. 364, 378. Cf. *Virginia v. Tennessee*, 148 U. S. 503, 518 (1893). So as to the question of how much water a state may divert from an interstate river, raised by *Kansas v. Colorado*, 185 U. S. 125 (1902); 206 U. S. 46 (1907). See a similar situation discussed in George B. French and Jeremiah Smith, "Power of a State to Divert an Interstate River," 8 HARV. L. REV. 138.

<sup>33</sup> The Supreme Court urges that interstate compacts be employed as far as possible. See *Washington v. Oregon*, 214 U. S. 205, 217, 218 (1909); *Minnesota v. Wisconsin*, 252 U. S. 273, 283 (1920).

<sup>34</sup> Litigation between states is often protracted, and by a compact the expense and delay of a lawsuit may be avoided, but the difficulty of enforcement still remains. There is no reason to suppose at the present time that a state would be any more ready to heed the terms of its own compact than the decree of the United States Supreme Court.

<sup>1</sup> The general principles governing a state's right to tax, as distinguished from its power to do so, under the 14th Amendment, were well defined by the Supreme Court in *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 202 (1905). Cf. *Matter of Cummings*, 63 N. Y. Misc. 621, 118 N. Y. Supp. 684 (1909); *State v. Brim*, 4 Jones Eq. (N. C.) 300 (1858). See C. E. Carpenter, "Jurisdiction over Debts," 31 HARV. L. REV. 905, 919 *et seq.*

<sup>2</sup> It is well settled that the state of domicile may tax the succession to a resident's foreign personalty. *Matter of Swift*, 137 N. Y. 77, 32 N. E. 1096 (1893); *Frothingham v. Shaw*, 175 Mass. 59, 55 N. E. 623 (1899). Whether there is actual jurisdiction for such a tax is open to question. See C. E. Carpenter, *supra*, at 921. The fact that the rules of succession furnished by the state of the testator do in reality fix the rights of the beneficiaries may be sufficient. *Dammert v. Osborn*, 141 N. Y. 564, 35 N. E. 1088 (1894). See J. H. Beale, "Jurisdiction to Tax," 32 HARV. L. REV. 587, 629. If so, then the same reasoning should justify an inheritance tax by the state of the donor, to be collected at the execution of the power by will. But where the state in which chattels subject to appointment are found provides by statute that tangible property of a foreign decedent shall pass according to domestic law, another state could not tax on the basis of residence of the donor. See 1874 ILL. REV. STAT., c. 39, § 1. When the donor is a resident, but the donee and the appointed property both foreign, the state of the donor, though competent to tax the transfer, would not do so under a statute like that of New York, *infra*, n. 9, which includes only such appointments as would be taxable if the property belonged absolutely to the donee. Cf. *Matter of Fearing*, 200 N. Y. 340, 93 N. E. 956 (1911). If, however, any of the property is within the state, the transfer falls to that extent under the statute. *Matter of Kissel*, 65 Misc. 443, 121 N. Y. Supp. 1088 (1909).

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of the exercise of the power.<sup>3</sup> This follows from the common-law theory that the instrument by which the appointor executes the power takes effect not as a distribution of his own property but as a completion of the original settlement<sup>4</sup> under which the appointee is held to take. A third and more difficult situation arises when the state of the donee desires to tax the exercise of the power. If the donor was also a resident, or the property within the state, it can plainly do so, upon the theories already mentioned.<sup>5</sup> If not, may the appointees contend that the transfer is wholly independent of the law of the donee, and that therefore an attempt by his state to tax it would deprive them of property without due process?<sup>6</sup> A recent New York case has so held.<sup>7</sup> Here, the will of the resident donee was not probated at his domicile but only in the state where the property was; this fact, however, should have been immaterial.<sup>8</sup>

There are two lines of reasoning upon which the court might have upheld the New York statute<sup>9</sup> exacting the tax. In the first place, the state of the donee cannot be considered arbitrary or unreasonable in regarding him as possessing important attributes of ownership, as using them to raise up an estate in the beneficiaries,<sup>10</sup> and as thereby

<sup>3</sup> *Harlow v. Duryea*, 42 R. I. 234, 107 Atl. 98 (1919); *Prince de Bearn v. Winans*, 111 Md. 434, 74 Atl. 626 (1909). See also cases at the end of note 4, *infra*.

<sup>4</sup> *Duke of Marlborough v. Lord Godolphin*, 2 Vesey 61, 77 (1750); *Doolittle v. Lewis*, 7 Johns. Ch. (N. Y.) 45, 48. See LITT., § 169; CO. LIT., 113, a. The classical statement of this rule in the U. S. is by Chancellor Kent in 4 KENT, COMMENTARIES, 338. It has been firmly established by leading cases in various states. *Sewall v. Wilmer*, 132 Mass. 131 (1882); *Lane v. Lane*, 4 Pennewill (Del.) 368, 55 Atl. 184 (1903); *Bingham's Appeal*, 64 Pa. St. 345 (1870). See 2 SUGDEN, POWERS, 3 ed., 19.

<sup>5</sup> To avoid double taxation, it must at the donor's death have levied only on the immediate estate given to the donee, leaving the possible limitations by appointment to be assessed when they happen. States which tax future interests dependent upon contingencies, at the decedent's death, would tax remainders in default of appointment at the same time as the life estate passing to the donee. New York, however, has construed its statute (1909 N. Y. LAWS, c. 62, § 230; CONSOL. LAWS, c. 60, Art. 10) as not including such remainders if the power is general. *Matter of Howe*, 86 App. Div. 286, 83 N. Y. Supp. 825, affirmed on opinion below, 176 N. Y. 570, 68 N. E. 1118 (1903). But see *Matter of Burgess*, 204 N. Y. 265, 97 N. E. 591 (1912). See also 19 HARV. L. REV. 121.

<sup>6</sup> The authorities are conflicting. See, as opposed to such a tax, *Walker v. Treasurer & Receiver General*, 221 Mass. 600, 109 N. E. 647 (1915). *Contra*, *State ex rel. Smith v. Probate Court*, 124 Minn. 508, 145 N. W. 390 (1914); *Matter of Frazier*, 188 N. Y. Supp. 189 (Sur., 1921). This case, and *Matter of Seaman*, 187 N. Y. Supp. 254 (Sur., 1921) must now be considered overruled in New York by *Matter of Canda*, *infra*, n. 7, although the latter attempts to distinguish them.

<sup>7</sup> *Matter of Canda*, 189 N. Y. Supp. 917 (App. Div.) (1921). For the facts of this case, see RECENT CASES, *infra*, p. 348.

<sup>8</sup> See, *infra*, note 19.

<sup>9</sup> See 1909 N. Y. LAWS, c. 62, § 220 (6); CONSOL. LAWS, c. 60, Art. 10. For the New York Law as to powers, see 1909 N. Y. LAWS, c. 52, §§ 130-182; CONSOL. LAWS, c. 50, Art. 5.

<sup>10</sup> Cases such as *Matter of Harbeck*, 161 N. Y. 211, 55 N. E. 850 (1900), and *Emmons v. Shaw*, 171 Mass. 410, 50 N. E. 1033 (1898), show the rigor with which the common-law theory as stated by Chancellor Kent (see *supra*, note 4) has been applied. Contrast the language of these cases with *Matter of Delano*, 176 N. Y. 486, 493, 68 N. E. 871, 873 (1903) (affirmed *sub nom.* *Chanler v. Kelsey*, 205 U. S. 466 (1906)). See *ibid.*, 474, and with *State ex rel. Smith v. Probate Court*, 124 Minn. 508, 511, 145 N. W. 390, 392 (1914). The surprising case of *In re Pryce*, [1911] 2 Ch. 286, in principle, goes further than contended for in the text. An English testatrix, domiciled

subjecting that process to taxation at his domicile just as if he had willed the property as absolute owner. Some of the very cases which established the common-law theory that the conveyance was simply from donor to appointee recognized this theory as a fiction, applied by the law only to reach certain desired results.<sup>11</sup> The increasing number of statutes,<sup>12</sup> purporting to include every testamentary transfer which would have been taxable had the property belonged absolutely to the donee, shows a disposition to override the fiction. This is a tendency which can readily be justified on principle and by analogy. A life-tenant, with a general power to appoint by will, certainly possesses two of the valuable incidents embraced under the compendious term ownership, *vis.*: security in present enjoyment, and the capacity to create by will an absolute estate in any person of his choice—a power upon which he doubtless could realize by contract. Moreover, since the end of the seventeenth century, equity has insisted that upon execution of the power the appointed property becomes assets in the hands of the appointor's executor, available to his creditors.<sup>13</sup> Furthermore, in testing the limitations which he then creates, the Rule against Perpetuities is by some courts applied not from the inception of the power but from the time of its exercise.<sup>14</sup> Notwithstanding these considerations,<sup>15</sup> courts influenced by recent cases of controlling authority which deny that the property passes as part of the personality of the donee,<sup>16</sup> would prob-

in Holland, exercised by will a testamentary power of appointment over funds in England, the power being derived from an English will. Her surviving parent was held entitled to a *legitime*, by Dutch law, in one eighth of the property, it having become by exercise of the power a part of the estate of the testatrix.

<sup>11</sup> In *Bartlett v. Ramsden*, 1 Keb. 570 (1665), the rule that the appointees were in by the original deed was characterized as only *fictionis juris*, "for they were not in *without* the will (*i. e.* of the donee) and therefore that was the principal part of the title." See *Duke of Marlborough v. Lord Godolphin*, *supra*, note 4, at p. 75. See also *Hole v. Escott*, 4 Myl. & Cr. 187, 193 (1838); *Rous v. Jackson*, 29 Ch. Div. 521, 526 (1885); *Jackson v. Davenport*, 20 Johns. (N. Y.) 537, 551 (1822).

<sup>12</sup> See 1917 CAL. STAT., c. 589, § 2 (6); 1911 MINN. LAWS, c. 372, § 1 (5); 1913 GEN. STAT. OF MINN., § 2271; 1909 MASS. STAT., c. 527, § 8; 40 STAT. AT L., c. 18, § 402, p. 1097. For the N. Y. statute, see note 9, *supra*.

<sup>13</sup> *Thompson v. Towne*, 2 Vern. 319 (1694); *Johnson v. Cushing*, 15 N. H. 298 (1844); *Clapp v. Ingraham*, 126 Mass. 200 (1879). *Contra*, *Balls v. Dampman*, 69 Md. 390, 16 Atl. 16 (1888). See 2 SUGDEN, POWERS, 6 ed., c. 8, § 3 (7). This general ground was considered insufficient to make the appointed property assets of the donee within the meaning of the inheritance tax of his state, in *Commonwealth v. Duffield*, 72 Pa. St. 277 (1849).

<sup>14</sup> This is the settled rule in England, as to general powers to appoint both by deed or will, and by will only. *Rous v. Jackson*, 29 Ch. Div. 521 (1885); *In re Flower*, 55 L. J. Ch. (N. S.) 200 (1885). But in the United States, the great weight of authority places the *terminus a quo* at the creation of the power, if to appoint by will. *Boyd's Estate*, 199 Pa. 487, 49 Atl. 297 (1901); *Minot v. Paine*, 230 Mass. 514, 120 N. E. 167 (1918). The authority of Mr. Gray (see GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 526 *et seq.*) has doubtless influenced the American cases. His position has been ably attacked in a classical controversy. See Kales, "General Powers and the Rule against Perpetuities," 26 HARV. L. REV. 64; Thorndike, "General Powers and Perpetuities," 27 HARV. L. REV. 705. See also Foulke, "Powers and Perpetuities," 16 COL. L. REV. 627, 647.

<sup>15</sup> There are other instances in the books where the conveyance is regarded as from the donee. Thus, an appointee may sue the donee on a covenant for quiet enjoyment in the appointing instrument. *Hurd v. Fletcher*, Dougl. 43 (1778). See 2 SUGDEN, POWERS, 3 ed., 19.

<sup>16</sup> *O'Grady v. Wilmot*, [1916] 2 A. C. 231; *United States v. Field*, 41 Sup. Ct. 256

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ably hesitate to adopt this argument to sustain the constitutionality of the tax.

A second ground of support was overlooked by the court in failing to draw a distinction between the proper exercise of the power by the *terms* of the appointing instrument — admittedly to be settled by the law of the donor — and the *validity* of that instrument as a will. Before a court having jurisdiction over the property construes the instrument executed by the donee, it must decide whether the writing meets the first essential required by the donor for the exercise of the power, *i. e.*, whether it is in fact the donee's will. Certainly, in the case of personality,<sup>17</sup> this preliminary question should be determined by reference to the law of the donee's domicile.<sup>18</sup> Unless the donor expressly stipulates otherwise, it cannot reasonably be supposed that he desires formalities different from those required to pass the donee's own personality. Nor does policy demand a departure from the usual test of validity, the law of the domicile. Nothing could be more inconvenient

(1921). Both, however, are cases of statutory construction. The latter case, arising under 39 STAT. AT L. 756, 777, as amended by 39 STAT. AT L. 1000, 1002, reversed a ruling of the U. S. Treasury Department (1919 REGULATIONS, TREAS. DEPT. 37, Art. 30) to the effect that property passing under the execution of a general testamentary power constituted part of the gross estate of the appointor.

<sup>17</sup> This is the general law with respect to personality. *Cross v. U. S. Trust Co.*, 131 N. Y. 330, 30 N. E. 125 (1892); *Jones v. Habersham*, 107 U. S. 174 (1882). See STORY, CONFLICT OF LAWS, 6 ed., § 380.

<sup>18</sup> It is difficult to determine the precise condition of the law on this point. In England, *Tatnall v. Hankey*, 2 Moore P. C. 342 (1838), simply decided that no court would pass upon the question of the execution of a testamentary power until the Probate Court had admitted the instrument as a will. The case has been widely cited for its *dicta* without noting the significance of its holding. Answering the question left open in *Tatnall v. Hankey*, *D'Huart v. Harkness*, 34 Beav. 324 (1865), which was decided before Lord Kingsdown's Act (24 & 25 Vict., c. 114) took effect, held that a will valid at the foreign domicile of the donee, though not conforming to the law of the donor, was sufficient. It was followed in *In re Price*, [1900] 1 Ch. 442. This sound doctrine cannot be considered as overruled by cases such as *In re Kirwan's Trusts*, 25 Ch. Div. 373 (1883), since these rest upon Lord Kingsdown's Act. Nor by *In re D'Este's Settlement Trusts*, [1903] 1 Ch. 898, nor *In re Scholefield*, [1905] 2 Ch. 408, for the language of the wills there did not amount to an exercise of the power. In *Murphy v. Deichler*, [1909] A. C. 446, the House of Lords decided briefly and without citing authorities that a will invalid at the domicile of the donee, but executed according to English formalities, was a good exercise of an English power of appointment. This would seem to follow a statement of *In re Price*, *supra*, at 452, that the usual test of validity, by the *lex domicilii testatoris* is subject to exception where the will shows on its face that it was made with reference to the law of some other country than that of the testator.

In the United States the most direct decision on testamentary validity as distinguished from specific exercise of the power is a most unfortunate one. *Blount v. Walker*, 28 S. C. 545, 6 S. E. 558 (1888), held that a will, good at the domicile of the donee, was not "duly executed" within the meaning of the donor, unless valid by the law of his state. Part of the property, however, was realty in the state of the donor, and there was a strong dissent. Chief Justice Gray in *Sewall v. Wilmer*, 132 Mass. 131, 135, says, *obiter*, that a will executed according to the requirements of either state should be valid. Cf. *Ward v. Stanard*, 82 App. Div. 386, 81 N. Y. Supp. 906 (1903). See also *Hollister v. Hollister*, 85 Oreg. 316, 320, 166 Pac. 940, 941 (1917); *Matter of N. Y. Life Ins. & Trust Co.*, 139 N. Y. Supp. 695, 711 (Sur., 1913).

It has been argued that even on the common-law theory as to the effect of appointment, both the validity of the will and its specific execution of the power should be determined by the law of the donee. See 19 HARV. L. REV. 122. This cannot be sustained on authority.



than to require a testator to ascertain and comply with the varying statutory requirements of every state where personalty subject to his disposal may happen to be.

If in the principal case the state of the donor recognized the appointing instrument as a will because valid as such at the testator's domicile,<sup>19</sup> then the law of the latter did contribute something toward effecting the transfer, and without departing at all from the common-law theory, a tax at the domicile could have been justified.

THE RIGHT *IN REM* IN ADMIRALTY. — Attention has been called recently in *The Pesaro*<sup>1</sup> to the conflict between the American and English views as to the nature of the right *in rem* in admiralty. In our courts, Mr. Justice Story in *The Malek Adhel*,<sup>2</sup> echoing the words of Chief Justice Marshall in an earlier case,<sup>3</sup> unequivocally adopts the doctrine that the action is against the ship itself, not the owner, — the strict *in rem* theory. The language of these cases has been closely adhered to.<sup>4</sup> The English courts have wavered,<sup>5</sup> but now hold that the right against the ship is merely in the nature of a foreign attachment, a proceeding *quasi in rem*.<sup>6</sup>

The theories of both courts find explanation in history. The American doctrine rests on an animistic theory, prevalent in the early stages of legal systems, which endowed an offending instrument with human qualities and fixed the instrument itself with responsibility for the injury.<sup>7</sup> It is not surprising that this doctrine persisted in admiralty, as, popularly, personification applies *par excellence* to a ship.<sup>8</sup> The origin of the English doctrine is more obscure. It probably developed

<sup>19</sup> It may be fairly inferred from the opinion that if the will of the donee had first been probated in New York, the tax would have been upheld. But this can only be upon the ground that Massachusetts recognizes the instrument as a will because probated at the domicile. Where such probate is lacking, would not Massachusetts, to be consistent, test the *factum* of will by the *lex domicilii*, and thus in either case afford New York a basis for taxation?

<sup>1</sup> Dist. Ct. S. D. N. Y., Oct. 1, 1921. Here it was held that a libel *in rem* could be maintained against a ship in the commercial service of the Italian Government. For the facts of this case see RECENT CASES, *infra*, p. 337.

<sup>2</sup> 2 How. (U. S.) 210, 234 (1844).

<sup>3</sup> *The Little Charles*, 1 Brock. 347, 354 (1818).

<sup>4</sup> *The China*, 7 Wall. (U. S.) 53 (1868); *The John G. Stevens*, 170 U. S. 113 (1897); *The Barnstable*, 181 U. S. 464 (1901).

<sup>5</sup> See the conflicting decisions of Dr. Lushington in *The Ticonderoga*, Sw. 215 (1857), and *The Druid*, 1 W. Rob. 391 (1842).

<sup>6</sup> *The Dictator*, [1892] P. 304; *The Dupleix*, [1912] P. 8; *The Parlement Belge*, 5 P. D. 197 (1879); *The Castlegate*, [1893] A. C. 38; *The Porto Alexandre*, [1920] P. 30. See MAYERS, ADMIRALTY LAW AND PRACTICE IN CANADA, pp. 6-23.

<sup>7</sup> See HOLMES, THE COMMON LAW, Chap. I, for a complete exposition of this theory.

<sup>8</sup> Many of the old books express this idea. See 1 BLACK BOOK OF THE ADMIRALTY, 242; *Clay v. Snelgrave*, 1 Ld. Raym. 576 (1700); PARDESSUS, DROIT COMM., n. 961; 3 BLACK, BOOK OF THE ADMIRALTY, 103, 243, 345; *Mors v. Slew*, 3 Keb. 112, 114 (1673).

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through the creeping in of common-law ideas during the long eclipse of the admiralty by the common-law judges.<sup>9</sup>

Analytically a right *in rem* is not a right in a thing, but the sum of all the rights *in personam* in respect to that thing.<sup>10</sup> It is the correlative of the duties of others not to touch that thing.<sup>11</sup> When the whole or nearly the whole world<sup>12</sup> is under such a duty, the sum of all the duties creates a right *in rem*. The courts of the jurisdiction which have power over the *res* may create such a composite of duties, adjusting the relations of everyone to the *res* according to their law. The English courts in effect adopt this theory, and determine the rights of all the world in the ship with the owner as well as the injured party in mind. The American courts, however, influenced by the conception that the ship is the wrongdoer, have naturally gone much further in cutting off the owner's rights in favor of an injured party. They have allowed the latter redress from the ship irrespective of demise,<sup>13</sup> compulsory pilotage,<sup>14</sup> or piracy of the crew.<sup>15</sup> In so holding they have frequently repeated the statement that the vessel itself is responsible.

But they have not followed the principle to its logical limits. It involves holding that the ship is the limit as well as the source of liability, but an action *in personam* against the owner may be brought.<sup>16</sup> Again in actions against vessels owned by foreign sovereigns, the courts have consistently considered the question of sovereign immunity,<sup>17</sup> though if the ship itself were the defendant that immunity would clearly not extend to it. Thus, in cases where the application of the doctrine would produce a particularly undesirable result, it is abandoned.

This judicial opportunism is unfortunate. A recognition and application of the true theory of a right *in rem* is desirable, since it would in

<sup>9</sup> See MAYERS, ADMIRALTY LAW AND PRACTICE IN CANADA, p. 21, pointing out that in *The Dictator*, *supra*, at p. 311, the *in personam* theory was advanced on the authority of CLERKE, PRAXIS CURIAE ADMIRALITATIS, written in 1679, the darkest part of the admiralty eclipse. As, however, the struggle was primarily over jurisdiction, the substantive law may not have been affected.

<sup>10</sup> See Holmes, J., in *Tyler v. The Court of Registration*, 175 Mass. 71, 76, 55 N. E. 812, 814 (1900).

<sup>11</sup> See W. N. Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning," 26 YALE L. J. 710.

The possessor of a right *in rem* has usually other powers, privileges, and immunities with respect to the *res* in question; e.g., the owner of a *res* has (usually) the privilege of using it, the power of alienating it, and an immunity from any other person's exercising a power with respect to it. See W. N. Hohfeld, *supra*, at p. 746.

<sup>12</sup> The example given by Hohfeld, that though A is said to have a right *in rem* in Blackacre, yet B and C may have easements over it, shows that a right may be *in rem* and yet not bind the whole world.

<sup>13</sup> *The Barnstable*, n. 4, *supra*.

<sup>14</sup> *The China*, n. 4, *supra*.

<sup>15</sup> *The Malek Adhel*, n. 2, *supra*.

<sup>16</sup> *Stevens v. Sandwich*, 23 Fed. Cas. no. 13, 409 (D. Md., 1801). See Admiralty Rules, 254 U. S. 679 (1921). Congress has by statute, no doubt influenced by historical as well as economic considerations, limited the liability of an owner not personally at fault to the value of the ship. 9 STAT. AT L. 635 (1851). This was apparently the rule of the early maritime law. See the learned opinion of Judge Ware in *The Rebecca*, 20 Fed. Cas. no. 11, 619 (D. Me., 1831), and also *Norwich Co. v. Wright*, 13 Wall. (U. S.) 104 (1871).

<sup>17</sup> See *The Schooner Exchange*, 7 Cranch (U. S.) 116 (1811). See also the discussion in *The Pesaro*, note 1, *supra*.

all cases lead to a consideration of the interests of all persons involved. Before the transaction, whether it be furnishing supplies to, or a tort committed by the ship, the owner has, as one of that compound of rights *in personam* constituting a right *in rem*, a right that the present plaintiff shall not touch the ship. After the transaction, the situation may be reversed and the plaintiff given the right *in rem*, including a right that the owner himself shall not touch the ship until the plaintiff's claim be satisfied from it. Whether the transaction should produce this shifting of rights is ultimately a question of political and economic policy.<sup>18</sup> The interests of all parties must be considered and regulated in view of the peculiar circumstances of maritime affairs. The courts of the United States, it is submitted, should follow the English courts and develop on such bases reasoned principles of decision, rather than gloss over the real difficulties involved by the application of a chimerical rule based on an historical misconception.

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VALIDITY OF A LABOR UNION BY-LAW INVOLVING EXPULSION FOR PETITIONING THE LEGISLATURE. —The long struggle of labor unions for a place in our legal scheme of things has been generally successful. No longer is their very existence attacked as a criminal conspiracy or a combination in restraint of trade. They are acknowledged as a desirable, or at least a necessary, feature of modern industry. The chief factor in the winning of such recognition, especially through legislative enactment, has been the force of collective action. A recent Pennsylvania decision,<sup>1</sup> which seriously impairs the unions' power to maintain their external unanimity in spite of internal differences, is therefore especially significant. A by-law of a local union of the Brotherhood of Railroad Trainmen provided that any member using his influence against the union's legislative representative should be expelled.<sup>2</sup> A member signed a petition to the state legislature asking a reconsideration of the Full Crew Law.<sup>3</sup> This action was admitted to come within the by-law and the member was expelled therefor. The court ordered him to be re-

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<sup>18</sup> Support for the American cases may be found in such considerations of economic policy. In contract cases perhaps few would deal with a ship if no lien could be obtained on her and the only right allowed were one against a foreign owner. The tort cases may be supported on the idea of a risk of the business. But these considerations are not conclusive and the arguments for and against it deserve more consideration than has been given them in our courts. An interesting analogy is to be noted in some states where statutes have been passed giving a lien on an automobile causing an injury, even when driven by one other than the owner or his agent. See 1905 LAWS OF TENN., c. 173, § 5; 1912 ACTS OF S. CAR., p. 737.

<sup>1</sup> *Spayd v. Ringing Rock Lodge, etc.*, 113 Atl. 70 (Pa. 1921). For a statement of the facts of this case, see RECENT CASES, *infra*, p. 348.

<sup>2</sup> "Any member of the brotherhood using his influence to defeat any action taken by the national legislative representative or any action regularly taken by the legislative representatives in meeting assembled, or of legislative boards under their proper authorities, shall, upon conviction thereof be expelled."

<sup>3</sup> 1911 PA. P. L., 1053; PA. STAT., §§ 18655-18663. See *Pennsylvania, etc. Co. v. Ewing*, 241 Pa. St. 581, 88 Atl. 775 (1913).

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instated,<sup>4</sup> on the ground that the by-law was void as a breach of the constitutional guarantee of the right to petition the legislature.<sup>5</sup>

The general power of labor unions to adopt by-laws for internal discipline is unquestioned.<sup>6</sup> Penalties for violations of union rules as to strikes,<sup>7</sup> wages,<sup>8</sup> open shops,<sup>9</sup> and unfair employers,<sup>10</sup> all of which rules are for the purpose of making the union's action unanimous and thereby effective, are imposed continually. The distinguishing point of the Pennsylvania case was that the act there penalized was the exercise of a constitutional privilege.

An agreement not to exercise a constitutional privilege does not deprive the promisor of that privilege,<sup>11</sup> but the law may or may not allow a penalty<sup>12</sup> for breach of the contract.<sup>13</sup> Thus a contract of arbitration, though ineffective to deprive the parties of their legal remedies, may give a right to damages on its breach.<sup>14</sup> So an agreement by a foreign corporation not to remove a suit to a federal court is ineffective for that end, but its license to do business may be revoked if it does so.<sup>15</sup> If, however, it is engaged in interstate commerce it may not be

<sup>4</sup> Reinstatement is the proper remedy if the expulsion was not according to lawful rules of the association. *Weiss v. Musical, etc. Union*, 189 Pa. St. 446, 42 Atl. 118 (1890); *Fritz v. Knaub*, 57 Misc. 405, 103 N. Y. Supp. 1003 (1907), aff'd, 124 App. Div. 915, 108 N. Y. Supp. 1133 (1908).

<sup>5</sup> The court found some Pennsylvania authority to the effect that any unreasonable by-law of a voluntary association may be disregarded by the courts. *Lynn v. Freemansburg, etc. Ass'n*, 117 Pa. St. 1, 11 Atl. 537 (1887); *Hibernia, etc. Co. v. Comm.*, 93 Pa. St. 264 (1880). Such a doctrine finds little support in the authorities. See *Weatherly v. Medical Society*, 76 Ala. 567 (1884); *Levy v. Magnolia Lodge*, 110 Cal. 297, 42 Pac. 887 (1895). And in view of the complete lack of predicability under such a rule, sound principle is opposed to it. The court said it might rest the case on this ground alone.

<sup>6</sup> *Wabash, etc. Co. v. Hannahan*, 121 Fed. 563 (E. D. Mo., 1903); *Jetton-Dekle Lumber Co. v. Mather*, 53 Fla. 969, 43 So. 590 (1907). See notes 7-10 *infra*.

<sup>7</sup> *Mayer v. Journeyman, etc. Ass'n*, 47 N. J. Eq. 519, 20 Atl. 492 (1890); *Jetton-Dekle Lumber Co. v. Mather*, *supra*.

<sup>8</sup> *Master, etc. Ass'n v. Walsh*, 2 Daly (N. Y.) 1 (1867); *Longshore, etc. Co. v. Howell*, 26 Ore. 527, 38 Pac. 547 (1894).

<sup>9</sup> *Gray v. Building Trades Council*, 91 Minn. 171, 97 N. W. 663 (1903); *Mayer v. Journeyman, etc. Ass'n*, *supra*.

<sup>10</sup> *Burns v. Bricklayers, etc. Union*, 27 Abb. N. C. 20, 14 N. Y. Supp. 361 (1891); *Longshore, etc. Co. v. Howell*, *supra*.

<sup>11</sup> *Nashua River Paper Co. v. Hammermill Paper Co.*, 223 Mass. 8, 111 N. E. 678 (1916).

<sup>12</sup> The usual penalty is of course damages. In the principal case expulsion may fairly be said to be an agreed substitute for damages, something in the nature of liquidated damages, if the by-law be construed as a promise not to petition the legislature. See note 15, *infra*.

<sup>13</sup> Similarly waiver of a constitutional right may or may not be allowed. An example is the right to trial by jury, which may be waived in civil cases, *Henderson's Distilled Spirits*, 14 Wall. (U. S.) 44 (1871); *Palmer v. Lavers*, 218 Mass. 286, 105 N. E. 1000 (1914), but probably not in criminal cases, *Hill v. People*, 16 Mich. 351 (1868); *Dickinson v. United States*, 159 Fed. 801 (1st Circ., 1908).

<sup>14</sup> *Call v. Hagar*, 69 Me. 521 (1879); *Pond v. Harris*, 113 Mass. 114 (1873).

<sup>15</sup> *Doyle v. Continental Ins. Co.*, 94 U. S. 535 (1876); *Security, etc. Co. v. Prewitt*, 202 U. S. 246 (1906).

These cases suggest the possibility that, in the principal case, even though a contract to the same effect would be unenforceable, this by-law might be effective as a condition of membership. Since the union can exclude men altogether, may it not admit them on any condition whatever? See *Greer v. Stoller*, 77 Fed. 1 (W. D. Mo., 1896). This argument might hold in case of a purely social association. See *Levy v.*

so penalized, even as to its intra-state business.<sup>16</sup> So the fact that the by-law in the principal case penalized the exercise of a constitutional privilege is not enough by itself to decide the case.<sup>17</sup> The real question in every such case is whether the social interest in the free exercise of the constitutional privilege involved is sufficiently strong to invalidate the agreement which is hampering the exercise of that privilege.

In the principal case there is a clear social interest in the maintenance of efficiently functioning labor unions,<sup>18</sup> an interest increasingly recognized by legislatures<sup>19</sup> and courts.<sup>20</sup> Moreover, there is a strong interest in having unions resort to the legislature for the accomplishment of their purposes rather than to economic warfare. Any decision which impairs the effectiveness of this method of action must therefore be carefully scrutinized. On the other hand lies the great public interest in keeping the legislature informed of and responsive to the popular will. The contact to be established is between the legislature and the actual present will of the individual, not his will as determined for him by a majority vote of a labor union, even though he has so agreed. It is essential to the maintenance of this contact that the exercise of the "right to petition" shall not entail serious penalties to the individual.<sup>21</sup>

There is a further important consideration. This by-law affects the members of the union not only as individuals but also as citizens, and thereby affects the state. Agreements between private persons touching public matters rest on very insecure footing.<sup>22</sup> A contract as to appointment to or exercise of a public office is void as against public policy.<sup>23</sup>

Magnolia Lodge, 110 Cal. 297, 310, 42 Pac. 887, 891 (1895). But the members of a labor union like that in the principal case have a property interest therein which the constitution protects. There is a wide distinction between the governing power of a state, exercised in making foreign corporations agree to "unconstitutional conditions," and that of a labor union. The latter flows wholly from the agreement between the members, so if this by-law is effective in any way it must be because the members agreed that it shall be so. *Austin v. Searing*, 16 N. Y. 112 (1857); *Harrington v. Sendall*, [1903] 1 Ch. 921. The difference between holding the by-law a contract and treating it as a condition is only a matter of legal technique. The case depends on whether the by-law is to be given effect according to its tenor, and that depends on the same considerations under either theory.

<sup>16</sup> *Western Union v. Kansas*, 216 U. S. 1 (1910); *Pullman Co. v. Kansas*, 216 U. S. 56 (1910); *Herndon v. Chicago, etc. Co.*, 218 U. S. 135 (1910); *Harrison v. St. Louis, etc. Co.*, 232 U. S. 318 (1914); *Donald v. Philadelphia, etc. Co.*, 241 U. S. 329 (1916).

<sup>17</sup> The court seemed to think so, however. It relied most strongly on general *dicta* from *United States v. Cruikshank*, 92 U. S. 542 (1875), to the effect that an individual cannot deprive another of a constitutional right.

<sup>18</sup> See 34 HARV. L. REV. 880, 884.

<sup>19</sup> See CLAYTON ACT, § 6, 38 STAT. AT L. 731, and TRADE DISPUTES ACT (1906), 6 EDW. 7, c. 47.

<sup>20</sup> *Comm. v. Hunt*, 4 Met. (Mass.) 111 (1842); *Tracy v. Banker*, 170 Mass. 266, 49 N. E. 308 (1898); and cases cited notes 6-10, *supra*.

<sup>21</sup> "The right *unrestrained and unpenalized* by state action on compliance with the forms required by the law of the United States to ask the removal of a cause pending in a State to a United States court is *obviously of the very essence of the right* to remove conferred by the law of the United States." *per White, C. J.*, speaking for a unanimous court in *Harrison v. St. Louis, etc. Co.*, 232 U. S. 318, 329 (1914).

<sup>22</sup> See 3 WILLISTON, CONTRACTS, §§ 1726-1735.

<sup>23</sup> *Sallade v. Schuylkill County*, 19 Pa. Super. Ct. 191 (1902); *Wishek v. Hammond*, 10 N. D. 72, 84 N. W. 587 (1900); *Harris v. Chamberlain*, 126 Mich. 280, 85 N. W. 728 (1901).

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A labor union may not financially support a public official,<sup>24</sup> or control him while in office,<sup>25</sup> because the office is a public trust requiring the untrammelled judgment of the incumbent. Such a judgment is desired from every voter, since all, for the purpose of voting, are public officials. Consequently an agreement to vote in a certain way is clearly unenforceable.<sup>26</sup> A by-law of a labor union providing that any member not voting as directed should be expelled would be equally invalid.<sup>27</sup> Yet this is but one step logically beyond the principal case and rests on the same kind of considerations. On the whole, the result in the principal case seems satisfactory. But the question is a very nice one, and a slight variation in the facts might well lead to the opposite result.

LIABILITY OF A STATE ENGAGED IN COMMERCIAL ENTERPRISES. — In view of the present tendencies toward governmental ownership and administration of commercial industries, apparent in some of our western states,<sup>1</sup> the question is becoming increasingly important, whether the state, in controversies arising from such enterprises, may be sued without its consent. In a recent case<sup>2</sup> in which a depositor of the Bank of North Dakota sought to garnish credits of the bank, the Supreme Court of North Dakota answered this question in the affirmative. It is submitted that the decision is unsound.

It has not been at all uncommon for states to be interested in commercial enterprises through stock ownership in corporations. Chief Justice Marshall's *dictum* in *Bank of the United States v. Planters' Bank*,<sup>3</sup> to the effect that a government which becomes a partner in a trading company takes for that purpose the character of a private citizen, was in reality directed toward the corporate situation only.<sup>4</sup> There applied, it is, of course, sound. A legal entity has been created which, by the terms of its creation, may sue and be sued.<sup>5</sup> Whether the state owns little or all of the stock is immaterial.<sup>6</sup> A different situation is presented, however, when the industry is owned by the state and operated in its name by an administrative body.<sup>7</sup> No corporate interme-

<sup>24</sup> *Osborne v. Amalgamated Society*, [1909] 1 Ch. 163; *Amalgamated Society v. Osborne*, [1910] A. C. 87.

<sup>25</sup> *Schneider v. Local Union*, 116 La. 270, 40 So. 700 (1905). See *Amalgamated Society v. Osborne*, [1910] A. C. 87, 99, 111.

<sup>26</sup> See 3 WILLISTON, *CONTRACTS*, § 1732.

<sup>27</sup> See *Osborne v. Amalgamated Society*, [1909] 1 Ch. 163, 193.

<sup>1</sup> See Andrew A. Bruce, "State Socialism and the School Land Grants," 33 HARV. L. REV. 401.

<sup>2</sup> *Sargent County v. State, Doing Business as Bank of North Dakota*, 182 N. W. 270 (N. D., 1921). For the facts of this case see RECENT CASES, *infra*, p. 346.

<sup>3</sup> *Wheat. (U. S.)* 904, 907 (1824).

<sup>4</sup> See 2 STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES*, 3 ed., 519.

<sup>5</sup> An illustration of this is presented by the Emergency Fleet Corporation. In the *Matter of Eastern Shore Shipbuilding Corporation, Bankrupt* (*Emergency Fleet Corporation v. Wood*), 54 Chi. L. N. 58 (2d. Circ., 1921).

<sup>6</sup> *Darrington v. Bank of Alabama*, 13 How. (U. S.) 12 (1851). The state of Alabama was the only stockholder of the bank.

<sup>7</sup> That is the method employed in North Dakota. See 1919 LAWS OF NORTH DAKOTA, c. 151.

diary exists which may be sued.<sup>8</sup> Does the mere fact that the state is engaging in a heretofore private venture make it amenable to suit?<sup>9</sup>

The early technical basis of the doctrine of sovereign immunity was that the "King cannot be sued by writ, for he cannot command himself."<sup>10</sup> The broader reason is that it would hamper the performance of the sovereign's public duties to subject him to suits as a matter of right.<sup>11</sup> In light of the cases<sup>12</sup> supporting the constitutionality of the North Dakota statutes<sup>13</sup> providing for the bond issues with which to finance these enterprises, it cannot be seriously contended that the state in undertaking them is not performing public duties. The power to engage in these ventures was granted to the state by constitutional amendment.<sup>14</sup> The purpose was to promote the welfare of all; state money was used to finance them; the state in its own name owns and operates them; their profits go to the state. Giving due regard to the powers granted and received, the nature, importance, and purposes of the enterprises, and the way in which they have been regarded by courts<sup>15</sup> and legislatures, the conclusion seems inevitable that the state, in the exercise of these enlarged functions, acts in none other than its sovereign capacity. The rule of sovereign immunity would, therefore, apparently apply in this situation. But the broader argument on which the rule is based loses much of its force when the public duty concerned is that of conducting a commercial enterprise, not necessarily incident to government or regarded as such. Further, expediency demands that in the conduct of such business parties to transactions have reciprocal remedies. In view of these considerations it is arguable that the court should abrogate the rule in so far as the reasons underlying it are no longer persuasive.

<sup>8</sup> The North Dakota court reasoned in effect that the state, though conducting the bank, was not doing so in its capacity as a sovereign state, and that therefore its credits were subject to garnishment, even in the absence of legislative consent to such proceedings. *Sargent County v. State, Doing Business as Bank of North Dakota*, *supra*.

<sup>9</sup> Authorities do not support such a proposition. A libel will not lie against a ferry boat owned by the Crown. *Young v. Steamship Scotia*, 89 L. T. R. 374 (1903). Nor will a suit lie against a railway whose assets have been conveyed to the government. *Ballaine v. Alaska Northern Ry. Co.*, 259 Fed. 183 (9th Circ., 1919). When South Carolina operated the liquor business, a suit against a liquor dealer was dismissed as being in substance a suit against the state. *Murray v. Wilson Distilling Co.*, 213 U. S. 151 (1909). Cf. *South Carolina v. United States*, 199 U. S. 437 (1905). See also 17 HARV. L. REV. 270.

<sup>10</sup> COMYNS'S DIGEST, Praerogative D. 78. See also 2 BLACKSTONE, COMMENTARIES, 3 ed., Book 3, p. 252; GEORGE STUART ROBINSON, CIVIL PROCEEDINGS BY AND AGAINST THE CROWN, p. 2.

<sup>11</sup> *Briggs v. Light-Boats*, 11 Allen (Mass.), 157, 162 (1865).

<sup>12</sup> *Green v. Frazier*, 176 N. W. 11 (N. D., 1920), *aff'd*, 253 U. S. 233 (1920).

<sup>13</sup> 1919 LAWS OF NORTH DAKOTA, c. 148. Other acts of the same year regarding state industries were: c. 147, banks; c. 149, dairies; c. 150, home building associations; c. 152, mills and elevators.

<sup>14</sup> 1919 LAWS OF NORTH DAKOTA, AMENDMENTS TO THE CONSTITUTION, 1911 Art. xxxii.

<sup>15</sup> The North Dakota court, speaking of the Bank of North Dakota, declared, it functions "as an agency of the sovereign power of the State, in like manner as the treasurer of the State of North Dakota." *Green v. Frazier*, 176 N. W. 11, 18 (N. D., 1920).

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Such action on the part of the court would, however, be open to grave objections. The doctrine of the immunity of a sovereign in his own courts is thoroughly and unqualifiedly established in our system of law.<sup>16</sup> Though in particular cases its reason may be attacked as valueless, its existence must be recognized, and for a court to overthrow or modify it would be judicial legislation. Further, in every case the question would arise, how to determine which undertakings should and which should not subject the state to suits. Rules of law would not answer that question. An examination of the particular enterprise, considered in its relation to other state undertakings, with a careful weighing of the conflicting interests and of the various considerations of expediency involved, would be necessary. Such a problem is in its nature one with which legislatures rather than courts should deal. Actually, legislatures do deal with it. When they provide for administration of state activities, they explicitly declare in what manner claims against the state may be settled, and what legal proceedings, if any, may be brought against it.<sup>17</sup> Such provisions are results arrived at with deliberation, and unless the courts can find therein consent expressed or implied, no suits against the state should be permitted.<sup>18</sup>

## RECENT CASES

**ADMIRALTY — JURISDICTION — IMMUNITY OF GOVERNMENT VESSELS FROM ARREST.** — A libel *in rem* was brought against a ship owned by the Italian Government and operated by a ministry of that government in regular commercial business. Proctors for the ship asserted the sovereign immunity in its favor. *Held*, that the libel may be sustained. *The Pesaro*, Dist. Ct., S. D. N. Y., Oct. 1, 1921.

For a discussion of the principles involved, see *NOTES, supra*, p. 330.

**CONFLICT OF LAWS — PARTNERSHIP — WAR — ALIEN PROPERTY CUSTODIAN — DISSOLUTION OF FOREIGN PARTNERSHIP BY DECLARATION OF WAR.** — In 1912, X, a citizen and resident of the United States, and Y, a subject and resident of Germany, formed a partnership, doing business both in Germany and the United States. War was declared by the United States against the Imperial German Government in 1917. Pursuant to the provisions of the Trading with the Enemy Act, the domestic assets of the partnership came into the custody of the Alien Property Custodian. X sues the Alien Property Custodian, under a statute, seeking to have the defendant pay over to the plaintiff a partner's share of the property. (TRADING WITH THE ENEMY ACT, § 9; 40 STAT. AT L. 419; U. S. COMP. STAT., ANN. SUPP., 1919, § 3115½e.) The defendant contends that the partnership was organized under German law, and that therefore, by German law, it was not dissolved on the out-

<sup>16</sup> *Beers v. State of Arkansas*, 20 How. (U. S.) 527, 529 (1857); *Smith v. Reeves*, 178 U. S. 436, 448 (1900). See 15 HARV. L. REV. 59.

<sup>17</sup> This was true with respect to the statute in the principal case. See 1919 LAWS OF NORTH DAKOTA, c. 147, § 22. Garnishment proceedings were not included within the specific classes of suits permitted.

<sup>18</sup> For a discussion of the general question of sovereign immunity, see the dissenting opinion of Mr. Justice Iredell in *Chisholm v. Georgia*, 2 Dallas (U. S.), 419, 429 (1793).



break of the war. *Held*, that, assuming the facts to be as the defendant contends, the plaintiff is entitled to judgment. *Rossie v. Garvan*, 274 Fed. 447 (D. Conn.).

The *lex loci contractus* governs the discharge of a contract. *Tenant v. Tenant*, 110 Pa. St. 478, 1 Atl. 532. See DICEY, *CONFLICT OF LAWS*, 2 ed., 569 *et seq.* It seems, by analogy, that the law governing the creation of a partnership should determine what acts cause its dissolution. And *cf.* *King v. Sarria*, 69 N. Y. 24. But foreign law, even where normally applicable, will not be applied when repugnant to clear domestic policy. *The Kensington*, 183 U. S. 263. See 15 HARV. L. REV. 579. And see 2 WHARTON, *CONFLICT OF LAWS*, 3 ed., §§ 428, 490-494. At common law, a declaration of war dissolves a previously existing partnership composed of a resident and an enemy. *Stevenson & Sons, Ltd. v. Aktiengesellschaft für Cartonmagen-Industrie*, [1918] A. C. 239. See *Griswold v. Waddington*, 16 Johns. (N. Y.) 438, 488. And see 28 YALE L. J. 680, 681; 6 VA. L. REV. 365. That doctrine has been fortified by an expression of legislative intent. See *TRADING WITH THE ENEMY ACT*, § 3a (unlawful to trade with enemy); § 3c (unlawful to communicate with enemy); 40 STAT. AT L. 412; U. S. COMP. STAT., ANN. SUPP., 1919, § 3115½b (a), (c). *Cf.* *McStea v. Matthews*, 50 N. Y. 166; *Matthews v. McStea*, 91 U. S. 7. And so strong is this policy that an agreement that the partnership shall continue is void. *Planters' Bank v. St. John*, Fed. Cas., No. 11,208 (Circ. Ct., S. D. Ala.). The court therefore properly held that a contrary German rule would not be followed. See *Mayer v. Garvan*, 270 Fed. 229, 237 (D. Mass.). It may be suggested that under a possible interpretation of the Trading with the Enemy Act, it is immaterial whether or not there is a dissolution by the common-law rule. It is arguable that the Alien Property Custodian takes title to the seized property, that the ownership of the partnership ends by force of the Act, and that the domestic partner has such an "interest, right, or title" in the property as will enable him to maintain this action.

CONSTITUTIONAL LAW — POWERS OF THE EXECUTIVE — MARTIAL LAW — ABSENCE OF MILITARY FORCE. — The governor of West Virginia, by proclamation, declared the existence of a state of war in Mingo County, inaugurated martial law, and required obedience to certain regulations. At the order of the acting adjutant general, but before a military force was at hand, the petitioners were arrested and imprisoned by a sheriff for violations of these regulations. Writs of *habeas corpus* were granted and returns were made. *Held*, that the prisoners be discharged. *Ex parte Lavinder*, 108 S. E. 428 (W. Va.).

There are two types of martial law, punitive and preventive. Under the former, military courts are established to try civil offenders; and this can be lawfully done only within the actual zone of military operations. *Ex parte Milligan*, 4 Wall. (U. S.) 2. See 34 HARV. L. REV. 659. The object of preventive martial law is to quell disturbance and maintain order; and while civil offenders cannot be tried under it in military courts, they can be arrested and detained when necessary. *In re McDonald*, 49 Mont. 454, 143 Pac. 947. The necessity for preventive martial law may be conclusively determined by the governor. *Moyer v. Peabody*, 212 U. S. 78; *Hatfield v. Graham*, 73 W. Va. 759, 81 S. E. 533; *In re McDonald*, *supra*. When troops are at hand, a proclamation of martial law *ipso facto* establishes it. See 2 WINTHROP, *MILITARY LAW AND PRECEDENTS*, 2 ed., 1278. It is submitted that even though troops are unavailable, preventive martial law may be thus established. The necessity for martial law exists only when civil authority is inadequate to avoid a reign of lawlessness. Unless this power is granted, — the necessity being admitted, — lawlessness ensues. To meet such an emergency, the governor

may, as an exercise of his military power, use civil officers, who as citizens are potential militiamen, and whose acts are justified not by their civil authority, but by the military authority of the governor.

**CONTRACTS — CONTRACTS UNDER SEAL — SUIT BY ORALLY DISCLOSED PRINCIPAL WHEN AGENT SIGNS AND SEALS AS PARTY.** — The plaintiff's agent, in his own name, signed and sealed a contract for a lease. Alleging these facts and also that the defendant knew the contract was made in his behalf, the plaintiff seeks specific performance. *Held*, that the defendant's demurrer be overruled. *Lagumis v. Gerard*, 190 N. Y. Supp. 207 (Sup. Ct.).

Where a contract is not under seal, an undisclosed principal on whose behalf it was made can sue on it. *Edwards v. Gildemeister*, 61 Kan. 141, 59 Pac. 259; *Foster v. Graham*, 166 Mass. 202, 44 N. E. 129. But where the instrument is sealed, the older authorities refused to allow suit by anyone not appearing on its face as a party. *Borcherling v. Kats*, 37 N. J. Eq. 150; *Walsh v. Murphy*, 167 Ill. 228, 47 N. E. 354. The modern law tends to get away from the technicalities which formerly surrounded the use of the seal. *Donner v. Whitecotton*, 201 Mo. App. 443, 212 S. W. 378. *Cf. Gill v. Atlanta Ry. Co.*, 24 Ga. App. 780, 102 S. E. 457. And see *Sanger v. Warren*, 91 Tex. 472, 44 S. W. 477. In accordance with the same spirit, it is now generally held that a sealed instrument may be varied by an executory parol agreement. *Harris v. Shorall*, 230 N. Y. 343, 130 N. E. 572. Possibly the result of this case could be reached without disregarding the seal. It is not a case of undisclosed principal, strictly speaking, because the plaintiff was orally disclosed. Since both parties knew that the contract was made in his behalf, the instrument does not express the real intent of the parties, and there is apparently a case for reformation. See 1 WILLISTON, CONTRACTS, §§ 296, 302. And it is to be noted that the suit here is already in equity. The court, however, does not adopt this reasoning, but bases its decision on a frank disregard of profitless technicalities.

**CORPORATIONS — DIRECTORS AND OTHER OFFICERS — BANKRUPTCY — RIGHT OF PRESIDENT TO FILE ANSWER TO PETITION IN BANKRUPTCY.** — Two creditors of a corporation, who were also directors thereof, filed an involuntary petition in bankruptcy against the corporation. The Bankruptcy Act provides: "The bankrupt or any creditor may appear and plead to the petition." (§ 18b; 1918 U. S. COMP. STAT., § 9602.) It appears that the four directors of the corporation, who own the stock in equal shares, are deadlocked as to whether the corporation should file an answer to the petition. Consequently no answer was filed for the corporation. The president, who is also one of the directors and stockholders of the corporation, filed an answer, as president, alleging that the petition was filed as the result of a conspiracy to ruin the corporation. The petitioning creditors move to strike out the answer. *Held*, that the motion be denied. *Regal Cleaners & Dyers, Inc. v. Merlis*, 274 Fed. 915 (2d Circ.).

Ordinarily, in an action against a corporation only the corporation can defend. *General Electric Co. v. West Asheville Imp. Co.*, 73 Fed. 386 (Circ. Ct., W. D. N. C.). See 6 FLETCHER, CYCLOPEDIA OF CORPORATIONS, § 4055. In a suit in equity, however, if the directors fraudulently refuse to defend, stockholders may intervene. *Bronson v. LaCrosse R. Co.*, 2 Wall. (U. S.) 283. See 6 FLETCHER, *op. cit.*, § 4055. Bankruptcy proceedings are administered in accordance with principles of equity. *Zeitinger v. Hargadine-McKuttrick Co.*, 244 Fed. 719 (8th Circ.). So in the principal case, the deadlock and failure to defend being caused by the fraudulent conduct of two of the directors, a stockholder might intervene. *Ogden v. Gilt Edge Consolidated Mines Co.*, 225 Fed. 723 (8th Circ.); *Zeitinger v. Hargadine-McKuttrick Co.*, *supra*. See 1 REMING-

TON, BANKRUPTCY, 2 ed., § 326. And see 35 HARV. L. REV. 195. Since the president was a stockholder, the decision is orthodox. But in New York the president, although he must be a director, is not necessarily a stockholder. See 1909 N. Y. CONSOL. LAWS, c. 61, §§ 25, 30. And the theory of the court, it seems, is that the president may defend *qua* president. A stockholder is allowed to intervene in this situation to protect his interests. *Bronson v. LaCrosse R. Co.*, *supra*. See 35 HARV. L. REV. 195. But the president as such has no similar interests. Neither can he ordinarily act for the corporation except in so far as authorized by the directors and by-laws. *Wail v. Nashua Armory Ass'n*, 66 N. H. 581, 23 Atl. 77. The court seems to be advancing a new doctrine, — one which leaves open interesting questions. May the president file an answer for the corporation where there is simply a fraudulent failure to defend; or must there be a fraudulently caused deadlock; or would a deadlock among the directors without any fraud be sufficient?

EQUITY — JURISDICTION TO AID AVOIDANCE OF CONTRACT FOR INFANCY. — The plaintiff, an infant twenty years of age, made a contract to act for the defendant film corporation. On her representation that she was free to contract, a second firm engaged her at a higher salary. By threatening to sue if the plaintiff's services were accepted, the defendant induced the second firm to repudiate its contract. The plaintiff seeks an injunction against such interference with her efforts to secure other employment. *Held*, that the injunction be denied. *Carmen v. Fox Film Corporation*, 269 Fed. 928 (2d Circ.).

An infant may avoid contracts of employment. *Gaffney v. Hayden*, 110 Mass. 137; *Luskin v. Mayall*, 25 N. H. 82. See 1 WILLISTON, CONTRACTS, § 228. Any act indicating such intention is sufficient. See 1 WILLISTON, CONTRACTS, § 234. It is clear, then, that the first contract was avoided. In similar cases, equity has often aided infants in securing the full benefit of avoidance. *Bell v. Burkhalter*, 176 Ala. 62, 57 So. 460; *Barr v. Packard Co.*, 172 Mich. 209, 137 N. W. 697. See *Reynolds v. McCurry*, 100 Ill. 356, 362. The jurisdiction of equity in such cases is a jurisdiction to remove clouds on title, which by the modern view extends to personality as well as realty. *O'Donnell v. Brown*, 35 R. I. 522, 87 Atl. 311; *Perry v. Young*, 133 Tenn. 522, 182 S. W. 577; *Voss v. Murray*, 50 Ohio St. 19. By analogy, equity should have jurisdiction to remove a substantial cloud upon the power to dispose of personal services. So long as the defendant can frighten away prospective employers by asserting the validity of the avoided contract, there is clearly a serious cloud upon the plaintiff's power of contracting, with no adequate relief at law. The court seems to recognize its jurisdiction, but refuses to exercise it. Looking beyond the strict rules of law freeing the plaintiff from legal obligation upon avoidance, it sees the moral obligation of a deliberate promise, and refuses equitable relief which would assist her in violating it. Rules of law, being of general application, can at best achieve justice in a majority of cases. But the discretionary remedies of equity are properly to be exercised according to the justice of the particular instance.

EXECUTORS — PROCEEDINGS BY OR AGAINST — SET-OFF AGAINST LEGATEE. — In a proceeding for the distribution of the testator's estate, the administratrix sought to set off against a legacy a debt alleged to be due from the legatee to the estate. The legatee objected on the ground that the statute of limitations barred the claim. The probate court sustained the objection. *Held*, that there was no error. *In re Schaeffer's Estate*, 200 Pac. 508 (Cal.).

An executor may set off an actionable debt against a legatee or distributee. *Re Savage*, [1918] 2 Ch. 146. And in England, the fact that the statute of limi-

tations has run on the debt makes no difference. *Courtenay v. Williams*, 3 Hare, 539; *Coates v. Coates*, 33 Beav. 249. But a debt unenforceable for any reason other than the statute of limitations will not be set off. *Re Wheeler*, [1904] 2 Ch. 66. The majority of American decisions are in accord with the English view. *Tinkham v. Smith*, 56 Vt. 187; *Jordan v. Jordan*, 201 Ill. App. 44. This view is based on the theory that there is in substance not a set-off, but a retention of part of a fund in the course of distribution; and that this retention is conscionable because the moral duty to pay the debt persists. See *Webb v. Fuller*, 85 Me. 443, 445, 27 Atl. 346; *Holmes v. McPheeters*, 149 Ind. 587, 590, 49 N. E. 452, 453. But it may be urged that a legatee's statutory claim is in its nature legal, although in form equitable. At law the statute is a bar, and equity should, as generally in enforcing a legal right, follow the analogy of the statute. *Dean v. Dean*, 9 N. J. Eq. 425. The principal case illustrates the trend of the American authorities away from the English view. *Allen v. Edwards*, 136 Mass. 138; *Kimball v. Scribner*, 174 App. Div. 845, 161 N. Y. Supp. 511.

**FEDERAL COURTS — AUTHORITY OF STATE LAW — EFFECT OF DECISION ON VESTED INTERESTS.** — In 1838 the United States made a grant to certain Indians, including part of the Arkansas River. In 1907 Oklahoma, including this region, was admitted to the Union. In 1913 the state granted oil and gas rights in the river bed to the defendants. In 1914 the state supreme court, in an action between other parties, found that the river was navigable and that title to adjacent parts of the bottom was in the state. (*State v. Nolegs*, 40 Okl. 479, 139 Pac. 943.) The United States sues on behalf of the Indians to enjoin the defendants from extracting oil and gas. The trial court gave judgment for the complainant on the ground that the river was not navigable in fact, and that title to its bed had never passed to the state. Held, that the decree be affirmed. *Brewer-Elliott Oil & Gas Co. v. United States*, 270 Fed. 100 (8th Circ.).

Federal courts, in determining state law, usually follow the decisions of the state courts. It is particularly important that they should do so where title to realty is affected. *Port of Seattle v. Oregon & Washington R. R. Co.*, 255 U. S. 56. But it is now settled law that they will not, in construing a state statute, follow state decisions subsequent to the vesting of rights under the statute. *Great Southern Hotel Co. v. Jones*, 193 U. S. 532; *Butte & S. Copper Co. v. Clark-Montana Realty Co.*, 248 Fed. 609 (9th Circ.), aff'd, 249 U. S. 12. See 18 HARV. L. REV. 134. While there are obvious advantages in allowing the federal judiciary to exercise an impartial and independent opinion, no reason favoring this exception outweighs the consideration that title should not depend on the litigants' choice of courts. To make a new exception, as the principal case does, is doubly unfortunate. The court has authority for its decision. *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349. But in that case there were other grounds, absent here. It may be that the principal case is supportable without reliance on the rule laid down. The federal court might be justified in considering the state decision on navigability an inconclusive finding of fact. Cf. *Economy Light & Power Co. v. United States*, U. S. Sup. Ct., Oct. Term, 1920, No. 104. And it is arguable, as the court suggests, that the Indians got title by the grant, whether the river was navigable or not.

**GARNISHMENT — GARNISHMENT BY PLAINTIFF OF DEBTS DUE FROM HIMSELF.** — The plaintiff, being unable to get personal service on the defendant, garnished debts which he himself owed to the defendant. The garnishment was executed as provided for by statute. (1910 OHIO GEN. CODE, §§ 11822,

11828). The defendant appeared specially and moved to dismiss the action on the ground that jurisdiction had not been properly acquired. *Held*, that the motion be denied. *Sandusky Cement Co. v. A. R. Hamilton & Co.*, 273 Fed. 596 (N. D. Ohio).

The terms of the statute under which this action was brought are broad enough to embrace, as subject to garnishment, debts due from the plaintiff. Under this statute the garnishee is not considered a party to the action. *Secor v. Witter*, 39 Ohio St. 218, 231. See *Conley v. Chilcote*, 25 Ohio St. 320. The result reached in the principal case is not, therefore, open to the objection that one party is both plaintiff and defendant. See *Beknap v. Gibbens*, 13 Met. (Mass.) 471. The result is, moreover, in harmony with the decisions under the Custom of London of foreign attachment, the predecessor of the American garnishment statutes. *Paramore v. Pain*, Cro. Eliz. 598. See 1 COM. DIG., 1785 ed., 423. See *Graigle v. Notnagle*, Fed. Cas. No. 5679. See SERGEANT, ATTACHMENT, 205. Where garnishment statutes are not broad enough in terms to include debts due from the plaintiff, a situation is found analogous to that which existed when the terms in which the Custom of London was averred were similarly restricted. *Nonell v. Hullett*, 4 B. & Ald. 646. The principal case is merely a logical application of the doctrine that in garnishment proceedings personal jurisdiction of the defendant is unnecessary. *Harris v. Balk*, 198 U. S. 215. The perils to which defendants are exposed by the result in this case afford an added objection to the doctrine to which it is a corollary. See Joseph H. Beale, "Jurisdiction *In Rem* to Compel Payment of Debt," 27 HARV. L. REV. 107. But see Charles E. Carpenter, "Jurisdiction over Debts," 31 HARV. L. REV. 905, 909.

**HOMESTEAD — WHAT PROPERTY IS SUBJECT TO MORTGAGE EXECUTED BY HUSBAND ALONE.** — By statute, a homestead cannot be mortgaged unless the mortgage is executed by both husband and wife. (1913 N. D. COMP. LAWS, § 5608.) The statute fixes the homestead exemption at \$5000. (1913 N. D. COMP. LAWS, § 5605.) A husband and wife executed a mortgage of \$2500 on homestead property worth \$7200. The husband executed a second mortgage of \$1500 on the same property. The second mortgagee seeks to foreclose. *Held*, that the second mortgage is valid. *First National Bank v. Hallquist*, 184 N. W. 269 (N. D.).

Where two parcels of land, one homestead and the other not, are validly mortgaged to the same mortgagee, and later a lien attaches to the non-homestead land, it has been held that the first mortgagee must satisfy himself, so far as possible, from the non-homestead land, though this cuts off the second lienholder. *Frick Co. v. Ketels*, 42 Kan. 527, 22 Pac. 580; *Butler v. Stainback*, 87 N. C. 216; *Cf. Brown v. Cozard*, 68 Ill. 178. Similarly, if there is but one piece of property, the value of which exceeds the homestead exemption, and this is sold under a mortgage valid against the homestead, junior liens not valid against the homestead cannot reach the excess proceeds until the homestead value is deducted therefrom. *White v. Horton*, 154 Cal. 103, 97 Pac. 70; *In re Barrett's Estate*, 140 Fed. 569 (D. Ore.). This, in effect, is making the homestead exemption a lien on the property, subordinate to a mortgage valid against the homestead, but superior to any other mortgages or liens. Such a result, though not undisputed, seems in harmony with the policy of the Homestead Acts. See 3 FREEMAN, EXECUTIONS, 3 ed., § 440. It should make no difference which mortgagee first seeks to foreclose. Applying this doctrine to the present case: the first mortgage is for \$2500; the value of the property is \$7200; the \$4700 left is entirely covered by the homestead exemption. As the second mortgage is good only to the extent of any excess, and there is no excess, it should be held invalid.

**HUSBAND AND WIFE — RECOVERY BY WIFE FOR LOSS OF CONSORTIUM DUE TO NEGLIGENT INJURY OF HUSBAND.** — The plaintiff alleged that her husband, while working for the defendant, was injured as the proximate result of the defendant's negligence, that by reason thereof she had suffered a nervous shock, resulting in physical ailments, had been forced to pay sundry expenses, had been deprived of support and the care, protection, companionship, aid and society of her husband, and that her husband had brought action against the defendant and judgment had been for the defendant. A statute provided that damages for torts sustained by the wife were her own and could be recovered by her suing alone. (1913 N. C. CON. STAT., § 2513.) The defendant demurred. *Held*, that the demurrer be overruled. *Hipp v. Dupont de Nemours & Co.*, 108 S. E. 318 (N. C.).

The court directs its attention largely to the question of loss of *consortium*, and its argument is that as the husband can now no longer recover for the injury to the wife, if she cannot recover there has been a real injury for which there is no redress. The wife has suffered an injury separable from the husband's. See *Flandermeyer v. Cooper*, 85 Ohio St. 327, 98 N. E. 102. For this she should be compensated. See 26 HARV. L. REV. 74. Yet in spite of the removal, by Married Women's Acts, of the common-law reasons for denying recovery, the unanimous American authority prior to this case denied her recovery on various grounds. *Smith v. Nichols Bldg. Co.*, 93 Ohio St. 101, 112 N. E. 204; *Kosciulek v. Portland Ry., etc. Co.*, 81 Ore. 517, 160 Pac. 132; *Bernhardt v. Perry*, 276 Mo. 612, 208 S. W. 462; *Feneff v. New York, etc. R. Co.*, 203 Mass. 278, 89 N. E. 436. Most of these grounds apply equally to actions by the husband when the wife has been injured negligently, yet there recovery is allowed even though the wife has prosecuted an action to judgment. *Neumeister v. City of Dubuque*, 47 Iowa, 465; *Guevin v. Manchester St. Ry.*, 78 N. H. 289, 99 Atl. 298. See *Selleck v. City of Janesville*, 104 Wis. 570, 80 N. W. 944. *Contra*, *Bolger v. Boston Elevated Ry. Co.*, 205 Mass. 420, 91 N. E. 389. The other reasons advanced are that the wife's action, unlike the husband's, is not based on loss of services; and that if she recovers the defendant will be subjected to double damages. But loss of services is not the gist of the husband's action. See *Baker v. Bolton*, 1 Campb. 493; *Guevin v. Manchester St. Ry.*, *supra*. See 10 COL. L. REV. 678. And double damages are impossible under a statute which makes the cause of action for a tort to the wife, her property. See 1868 N. C. CONST., Art. X, § 6; 1913 N. C. CON. STAT., § 2513. There is no substantial reason why the wife should not recover.

**INSURANCE — EMPLOYERS' LIABILITY INSURANCE — SUBROGATION OF INSURER TO EMPLOYER'S STATUTORY RIGHT AGAINST TORTFEASOR INJURING WORKMAN.** — An employee of the H Company was injured in the course of his employment through the defendant's negligence. Compensation was awarded him, and paid by the H Company's employers' liability insurance company. The Workmen's Compensation Act provides that an "employer, having paid the compensation, or having become liable therefor, shall have the right to recover in his own name." (1918, 3 CARROLL KY. STAT., 5 ed., § 4890.) The insurance company sued for its own benefit in the name of the H Company. *Held*, that the suit be dismissed. *Henderson Telephone & Telegraph Co. v. Owensboro Home Telephone & Telegraph Co.*, 233 S. W. 743 (Ky.).

The court reasons that there is no right of subrogation because the insurer's business is to pay on its policies, and hence it has suffered no loss. It is to be regretted that basic principles of insurance law should be disregarded in developing this comparatively new branch of the subject. The court's reasoning

applies equally to fire and marine insurance, where it is well settled that there is a right of subrogation. *Hall & Long v. Railroad Companies*, 13 Wall. (U. S.) 367; *Wunderlich v. C. & N. W. Ry. Co.*, 93 Wis. 132, 66 N. W. 1144; *The Frank G. Fowler*, 8 Fed. 360 (S. D. N. Y.). That the insured's original cause of action was statutory is immaterial. *Hart v. Western R. R.*, 13 Met. (Mass.) 99; *Caledonia Ins. Co. v. No. Pac. Ry. Co.*, 32 Mont. 46, 79 Pac. 544. It is true that no subrogation is allowed to life insurance companies. *Conn. Mutual Life Ins. Co. v. R. R. Co.*, 25 Conn. 265; *Ins. Co. v. Brame*, 95 U. S. 754. But employers' liability insurance is strictly a contract of indemnity, and therefore resembles, in this particular, fire and marine rather than life insurance. See RICHARDS, *INSURANCE*, 3 ed., § 478; SHELDON, *SUBROGATION*, 2 ed., § 239. The right of subrogation was recognized without difficulty in the analogous case of land-occupiers' liability insurance. *Wanamaker et al. v. Otis Elevator Co.*, 228 N. Y. 192, 126 N. E. 718. In fire insurance, subrogation is granted against defendants who are not negligent, provided the insured had an action. *Hall & Long v. Railroad Companies*, *supra*; *Hart v. Western R. R.*, *supra*. A fortiori it should be granted against the negligent defendant in the principal case. The obvious result of the court's decision is that the employer pays for insurance which inures to the benefit of the tortfeasor, in the event that the employee elects to claim compensation. The Circuit Court of Appeals has reached an opposite result. *Travelers' Ins. Co. v. Great Lakes Co.*, 184 Fed. 426 (6th Circ.).

**MANDAMUS — ADEQUACY OF OTHER REMEDIES — INADEQUATE REMEDY BY APPEAL.** — The respondent, as judge in the court below, refused to make a reasonable allowance to the relator for expenses in prosecuting her suit for separate maintenance, on the ground that he had no jurisdiction to make such award. This was error cognizable by appeal. The relator petitions for a writ of mandamus to compel the respondent to make such allowance. *Held*, that the writ issue. *State ex rel. Travis v. Maxwell*, 108 S. E. 418 (W. Va.).

Where a court refuses to act because it mistakenly decides it has no jurisdiction so to act, mandamus is a proper remedy. *State v. Smith*, 69 Ohio St. 196, 68 N. E. 1044; *Wheeling Bridge & T. Ry. Co. v. Paull*, 39 W. Va. 142, 19 S. E. 551. But it is well settled that mandamus to an inferior court will not issue where there is an adequate remedy by appeal. *Commonwealth v. Thomas*, 163 Pa. St. 446, 30 Atl. 206; *State v. Superior Court*, 20 Wash. 502, 55 Pac. 933; *Succession of Macarty*, 2 La. An. 979. A usual code provision is that the writ must issue "where there is not a plain, speedy, and adequate remedy in the ordinary course of law." See 1915 CAL. CODE CIV. PROC., § 1086; 1907 MONT. REV. CODE, § 7215; 1913, 2 S. D. COMP. LAWS, CODE CIV. PROC., § 765. Courts have occasionally been willing to find that delay or inconvenience makes appeal an inadequate remedy. *State v. Johnson*, 105 Wis. 90, 80 N. W. 1104; *Ketchum Coal Co. v. District Court*, 48 Utah, 342, 159 Pac. 737; *State v. District Court*, 126 Minn. 501, 148 N. W. 463. See 79 CENT. L. J. 295. But cf. *State v. Hadley*, 20 Wash. 520, 56 Pac. 29; *Ex Parte Whitney*, 13 Pet. (U. S.) 404. Particularly has this been true in Alabama and Michigan. *Ex Parte King*, 27 Ala. 387; *Dillon v. Judge*, 131 Mich. 574, 91 N. W. 1029; *T. & B. Co. R. Co. v. Iosco Circuit Judge*, 44 Mich. 479, 7 N. W. 65. See HIGH, *EXTRAORDINARY LEGAL REMEDIES*, 3 ed., §§ 186, 187. The West Virginia Court has also indicated a tendency to liberality. *People's National Bank v. Burdett*, 69 W. Va. 369, 71 S. E. 399. In the principal case it finds the remedy by appeal inadequate, because the relator needs funds now to prosecute her suit. *Ex Parte King*, *supra*. A just result is thus reached by stretching the principles of mandamus; but it would be better, instead of overworking and extending extraordinary remedies, to reach justice through a reformed appellate procedure.

**PLEADING — EQUITABLE REPLY TO A LEGAL DEFENSE IN THE FEDERAL COURTS.** — The plaintiff sued at law on a contract in a federal court. The defendant pleaded a settlement. The plaintiff's replication set up fraud. The defendant demurred to the replication on the ground that as a matter of procedure the plaintiff's only remedy was a bill in equity to set aside the settlement. The Judicial Code, as amended March 3, 1915, provides that "in all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. . . . In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication . . ." (§ 274b; 1918 U. S. COMP. STAT., 1251b.) *Held*, that the demurrer be overruled. *Plews v. Burrage*, 274 Fed. 881 (1st Circ.).

In civil actions the district courts, under the Conformity Act, follow the general practice of the courts of the state where they are held. See 1918 U. S. COMP. STAT., § 1537. In many states equitable defenses and replications in actions at law have been expressly permitted by statute. See 1913 WIS. STAT., § 2657; 1913 MINN. GEN. STAT., § 7756; 1918 CONN. GEN. STAT., §§ 5554, 5636. This was the practice in the state where the action in the principal case was brought. See 1920 MASS. GEN. LAWS, c. 231, § 35. But before the Act of March 3, 1915 the state practice was not followed so as to permit an equitable defense to be pleaded in an action at law. *Scott v. Armstrong*, 146 U. S. 499; *McManus v. Chollar*, 128 Fed. 902 (5th Circ.). This was in accord with the rule in the Supreme Court that the distinction as to procedure between law and equity must be observed. *Scott v. Armstrong*, *supra*. See *Bennett v. Butterworth*, 11 How. (U. S.) 669, 675. In a very technical ruling the Circuit Court of Appeals of another circuit has, contrary to the present decision, limited the application of the Act of 1915 to equitable pleas. *Keatley v. U. S. Trust Co.*, 249 Fed. 296 (2d Circ.). It is submitted that that is too narrow a construction of the act, and that the decision in the principal case is more in harmony with its purpose and intention, namely, to avoid multiplicity of suits. See *Manchester St. Ry. Co. v. Barrett*, 265 Fed. 557 (1st Circ.). See Hand, J., dissenting, in *Keatley v. U. S. Trust Co.*, 249 Fed. 296, 299 (2d Circ.). And see 3 FOSTER, FEDERAL PRACTICE, 6 ed., § 454g. The decision of the court seems all the more reasonable in view of the fact that the plaintiff could here have amended in this very action, and proceeded. See 1918 U. S. COMP. STAT., § 1251a.

**PLEDGES — DELIVERY TO CREATE A FUTURE PLEDGE — ASSIGNMENT OF DEBT TO ONE PERSON AND OF PLEDGE TO ANOTHER.** — The plaintiff delivered jewels to A, who was to keep them as security if a loan should later be made by him and accepted by the plaintiff. A pledged the jewels to the defendant, B, to secure a loan to himself of £1000. The defendant had no notice that they did not belong to A. A then loaned the plaintiff money and took her note to himself or order for £600, with her written statement of the deposit of the jewels as security. The plaintiff knew nothing of the transactions with the defendant. A borrowed £300 from one C and deposited the plaintiff's note as security. The plaintiff then, with notice of the defendant's claim, paid C £400 on account of the note. Making no tender whatsoever to the defendant, she sued for the return of the jewels. *Held*, that judgment be entered for the defendant. *Blundell-Leigh v. Attenborough*, [1921] 3 K. B. 235 (C. A.).

For a discussion of the principles of the law of pledges involved in this case see NOTES, *supra*, p. 318. The questions of estoppel considered in the case will be treated in a subsequent number of this REVIEW.

**SPECIFIC PERFORMANCE — GENERAL NATURE AND SCOPE OF EQUITABLE RELIEF — UNCERTAINTY IN CONTRACT TO CONVEY SPECIFIED AMOUNT OF LAND TO BE SELECTED BY VENDOR FROM LARGER TRACT.** — The defendant



company contracted to convey to the plaintiff's testator 640 acres out of the land it should hold at a certain time, of the same average probable value per acre as the remaining lands it should then hold, to be selected by the agent of the defendant company. At the time for performance the defendant company owned 6,320 acres. The plaintiff, who has fully performed, appeals from a decree dismissing his suit for specific performance. *Held*, that the decree be reversed. *Williams v. Cow Gulch Oil Co.*, 270 Fed. 9 (8th Circ.).

Because of practical considerations, it is generally recognized that a greater degree of certainty is necessary for specific enforcement of a contract than for enforcement at law. See POMEROY, SPECIFIC PERFORMANCE, § 159; FRV, SPECIFIC PERFORMANCE, 6 ed., § 380. On the ground of uncertainty, the weight of authority denies specific performance of a contract to convey a certain amount of land to be selected by the vendor out of a larger tract. *Rampho v. Beuhler*, 203 Ill. 384, 67 N. E. 796; *Auer v. Mathews*, 129 Wis. 143, 108 N. W. 45. See also *Pearce v. Watts*, L. R. 20 Eq. 492. There is, however, respectable authority to the contrary. *Fleishman v. Woods*, 135 Cal. 256, 67 Pac. 276. *Cf. Jenkins v. Green (No. 1)*, 27 Beav. 437. The minority view, with which the principal case accords, seems more reasonable. The requirement of certainty, coming largely from history, has been overemphasized. See Roscoe Pound, "Progress of the Law — Equity," 33 HARV. L. REV. 420, 434; 3 WILLISTON, CONTRACTS, § 1424. If the fact of performance can be determined by objective standards, there should be no objection to ordering the defendant to perform, choosing from the alternatives which the contract gives him. *Jones v. Parker*, 163 Mass. 564, 40 N. E. 1044. In the principal case, moreover, the plaintiff had already performed. This circumstance makes a court of equity more ready to give relief. *Sanderson v. Cockermouth & Worthington Ry. Co.*, 11 Beav. 497, aff'd, 2 H. & T. 327; *South Eastern Ry. Co. v. Associated Portland Cement Manufacturers*, [1910] 1 Ch. 12. See also, *Guntton v. Carroll*, 101 U. S. 426; *Lowe v. Brown*, 22 Ohio St. 463. The court properly does not even mention certain entirely unfounded *dicta* that the requisite of certainty is greater when some one other than the original party to the contract is suing. See *Odell v. Morin*, 5 Ore. 96, 98; *Montgomery v. Norris*, 1 How. (Miss.) 499, 506.

STATES — LIABILITIES ARISING FROM GOVERNMENTAL INDUSTRIES. — A North Dakota statute provides that the state shall establish a bank, to be financed by sale of state bonds, to be operated by a state Administrative Commission. (1919 LAWS OF N. D., c. 147.) Provision is made for bringing civil actions against the "State, Doing Business as the Bank of North Dakota." (*Ibid.*, § 22.) The plaintiff, a depositor, seeks to garnish credits of the bank. The remedy of garnishment is not by the statute made applicable to the state. From an order refusing to vacate garnishment proceedings, the defendant appeals. *Held*, that the order be affirmed. *Sargent County v. State, Doing Business as the Bank of North Dakota*, 182 N. W. 270 (N. D.).

For a discussion of the principles involved, see NOTES, *supra*, p. 335.

TAXATION — INHERITANCE TAXES — TRANSFERS IN CONTEMPLATION OF DEATH. — The plaintiff seeks to recover taxes paid under protest under the provision of the federal inheritance tax statute taxing conveyances in contemplation of death. (39 STAT. AT L. 777; U. S. COMP. ST., § 6336½c.) The trial court refused to charge the jury that "in contemplation of death" refers only to the "apprehension which arises from some existing condition of body or some impending peril" but instructed that the transfer is "in contemplation of death if the expectation or anticipation of death in either the immediate or reasonably distant future is the moving cause of the transfer." *Held*, that there was no error. *Shwab v. Doyle*, 269 Fed. 321 (6th Circ.).

Under the New York transfer tax law the earlier decisions held that, in the absence of an intent to evade taxes, only gifts *causa mortis* were to be considered as being in contemplation of death. *Matter of Spaulding*, 49 App. Div. 541, 63 N. Y. Supp. 694, aff'd, 163 N. Y. 607, 57 N. E. 1124; *Matter of Cornell*, 66 App. Div. 162, 73 N. Y. Supp. 32 (reversed on other grounds, 170 N. Y. 423, 63 N. E. 445). But it is now well settled that, although its literal meaning is ambiguous, the provision also applies to transfers *inter vivos*. *Matter of Palmer*, 117 App. Div. 360, 102 N. Y. Supp. 236; *Merrifield's Estate v. People*, 212 Ill. 400, 72 N. E. 446. See ROSS, INHERITANCE TAXATION, § 120. Nor is an intent to evade taxes necessary. *Rosenthal v. People*, 211 Ill. 306, 71 N. E. 1121. This interpretation seems correct, since the purpose of the provision is to tax all transfers that are intended to be of a nature and effect similar to testamentary bequests. *Conway's Estate v. State*, 120 N. E. 717 (Ind. App.); *State v. Pabst*, 139 Wis. 561, 131 N. W. 351. See ROSS, INHERITANCE TAXATION, § 111. The court in this case properly holds that the cause of the donor's expectation of death is immaterial, and that this expectation need not be of immediate death; it being sufficient that anticipation of death in the reasonably close future is the moving cause of the transfer, since the donor would in such a case intend a result substantially similar to that of a testamentary disposition. See also *Conway's Estate v. State*, *supra*. Old age and illness of the donor are, of course, strong evidence that the transfer is of this nature. *Matter of Dee*, 148 N. Y. Supp. 423 (Surr. Ct.), aff'd, 210 N. Y. 625, 104 N. E. 1128. But since in any case the impelling motive may not be the expectation of death, the bodily condition of the donor is not conclusive. *People v. Burkhalter*, 247 Ill. 600, 93 N. E. 379; *State v. Thompson*, 154 Wis. 320, 142 N. W. 647.

**TAXATION — COLLECTION AND ENFORCEMENT — NATURE OF DOUBLE TAX UNDER NATIONAL PROHIBITION ACT.** — The National Prohibition Act provides that upon evidence of an illegal manufacture or sale of intoxicating liquor "a tax shall be . . . collected . . . in double the amount now provided by law, with an additional penalty of \$500 on retail dealers and \$1000 on manufacturers." (41 STAT. AT L. 305, 318.) The plaintiff seeks to restrain the defendant from collecting the "double tax" by warrant of distress. *Held*, that the bill be dismissed. *Kelly v. Lewellyn*, 274 Fed. 108 (W. D. Pa.).

Federal courts agree on enjoining the collection of penalties by warrant of distress. *Kausch v. Moore*, 268 Fed. 668 (E. D. Mo.); *Kelly v. Lewellyn*, 274 Fed. 112 (W. D. Pa.). On the other hand, a federal statute forbids enjoining the collection of taxes, by warrant of distress or otherwise. See 1875 U. S. REV. STAT., § 3224. It is therefore necessary to determine whether the tax of double the ordinary amount, imposed by the National Prohibition Act, is a tax or a penalty. Since a tax does not, as a license does, confer authority to do the act affected, it is clear that the sovereign has power to tax acts which at the same time it declares illegal. See 2 COOLEY, TAXATION, 3 ed., 1134. Such taxes are, however, so unusual that a very clear intent that the charge be a tax should be required before so construing it. See *Thome v. Lynch*, 269 Fed. 995, 1003 (D. Minn.). Merely naming a charge a tax, though it has some bearing, is not conclusive. *Helwig v. U. S.*, 188 U. S. 605. Cf. *Hodge v. Muscatine County*, 106 U. S. 276. But see *Lipke v. Lederer*, 274 Fed. 493 (E. D. Pa.). In view of the fact that a tax is a revenue measure, while a penalty is a punishment, the fact that a greater charge is imposed when an act is illegally done than when the same act is legally done is a strong indication that the imposition, at least to the extent that it exceeds the ordinary tax, is a penalty. On the whole, the decisions reaching a result *contra* to the principal case seem preferable. *Ledbetter v. Bailey*, 274 Fed. 375 (W. D. N. C.); *Thome v. Lynch*, *supra*.

**TAXATION — PARTICULAR FORMS OF TAXATION — INHERITANCE TAX ON EXERCISE BY WILL OF RESIDENT OF POWER OF APPOINTMENT IN WILL OF NON-RESIDENT.** — A Massachusetts testator left personalty to be held there by trustees, and gave to a New York beneficiary the life interest, with a general power of appointment by will. This was exercised by the donee in favor of appointees in Massachusetts. Her will, executed at her residence in New York, was probated in Massachusetts only. New York seeks to tax the transfer under its inheritance tax law. (1909 N. Y. LAWS, c. 62, § 220 (6); CONSOL. LAWS, c. 60, Art. 10.) *Held*, that the statute, so far as applying to this case, is unconstitutional. *Matter of Conda*, 189 N. Y. Supp. 917 (App. Div.).

For a discussion of the principles involved, see NOTES, *supra*, p. 326.

**TORTS — NEGLIGENT DISSEMINATION OF KNOWN FALSEHOODS — NERVOUS SHOCK RESULTING IN PHYSICAL HARM.** — The defendant falsely told A among others that the plaintiff's son, who had been temporarily absent from home, had hanged himself. A told B, B told C, and C told D, who told the plaintiff. The defendant could have foreseen that the plaintiff would hear the report. The plaintiff, believing the report, suffered a severe nervous shock which produced physical ailments. She now sues the defendant for a malicious wrong which caused physical harm. *Held*, that the plaintiff recover. *Bielitzki v. Obadisk*, [1921] 3 W. W. Rep. 229 (K. B., Sask.).

The plaintiff here has suffered the sort of harm for which the better view is that the law should give compensation, even in cases of negligence. *Dulieu v. White*, [1901] 2 K. B. 669; *Lindley v. Knowlton*, 179 Cal. 298, 176 Pac. 440. *Contra*, *Spade v. Lynn, etc. R. Co.*, 168 Mass. 285, 47 N. E. 88. If such a statement had been made to her directly by the defendant, there would have been a strong inference of an aggressive intent, and recovery could clearly have been had. *Wilkinson v. Downton*, [1897] 2 Q. B. 57. See 34 HARV. L. REV. 337. But granting that the defendant's mind had not addressed itself to the consequences likely to follow his act, the case is sound. It disregards categories, and applies to unusual facts general principles of tort liability. It recognizes a duty not to make knowingly false statements, from which it could be foreseen that injury might result. The duty is grounded on the plaintiff's interest in her personal security, and the obvious social interest in protecting that security, which outbalance the defendant's interest in the free exercise of his faculties for the purpose of disseminating lies.

**TRADE UNIONS — INTERNAL ADMINISTRATION — BY-LAW INVOLVING EXPULSION FOR PETITIONING THE LEGISLATURE.** — A by-law of the defendant labor union provided that any member using his influence against the legislative representative of the union should be expelled. The plaintiff member, in admitted violation of the by-law, signed a petition to the legislature asking the reconsideration of a certain statute. He was expelled and now seeks reinstatement on the ground that the by-law is void since the state constitution guarantees the right to petition the legislature. *Held*, that the plaintiff be reinstated. *Spayd v. Ringing Rock Lodge*, 113 Atl. 70 (Pa.).

For a discussion of the principles involved, see NOTES, *supra*, p. 332.

**WILLS — REVOCATION — DEPENDENT RELATIVE REVOCATION — REVOCATION BY CLAUSE IN LOST WILL.** — The testatrix duly executed two successive wills with substantially the same provisions, leaving her estate to the proponent. The second will, containing an express revocatory clause, was lost after her death, and only one witness was available. A statute provided that no will should be proved as a lost will unless upon the testimony of at least two credible witnesses. (CAL. CIV. CODE, § 1339.) There was further pro-

vision that a will might be revoked by a written will or other writing of the testator, declaring such revocation, and executed with the same formalities as a will. (§ 1292.) The proponent offered the first will for probate. The contestant, to establish intestacy, offered to prove its revocation by the revocation clause of the lost will, upon the testimony of the one available witness. *Held*, that the second will was inoperative as a revocation. *In re Thompson's Estate*, 198 Pac. 795 (Cal.).

Under the Code the second will could not be probated. The majority, holding that the revocatory clause could not be given effect apart from the will containing it, decided that there was no revocation. The weight of authority and reason is with the minority view, that the second will, being executed with the requisite formalities, is valid as a revocation. *Matter of Wear*, 131 App. Div. 875, 116 N. Y. Supp. 304; *Vining v. Hall*, 40 Miss. 83. It is clear that a written revocation need not be the valid last will of the testator. See CAL. CRV. CODE, § 1292. And, further, a revocation acts *eo instanti*. *Brown v. Brown*, 8 E. & B. 876; *Lones v. Lones*, 108 Cal. 688, 41 Pac. 771. But if the first will is thus revoked and the second cannot be probated, the obvious intent of the testatrix to leave her property to the proponent will be defeated. Can her intent be properly effectuated? It is apparent that she revoked the first will relying on the certainty of probate of the second. The doctrine of dependent relative revocation is applied to relieve against a revocation made under a present mistake. See Joseph Warren, "Dependent Relative Revocation," 33 HARV. L. REV. 337, 348 *et seq.* In the principal case supervening circumstance, the loss of the second will, rendered probate impossible. In the law of contracts, the substantive rules of mistake and impossibility are inherently the same. See 3 WILLISTON, CONTRACTS, § 1953. The impossibility in the principal case should not be allowed, any more than present mistake, to defeat the testatrix's intent. The revocation should be recognized as valid, but set aside.

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## BOOK REVIEWS

ESSAYS ON CONSTITUTIONAL LAW AND EQUITY. By Henry Schofield. Boston: Chipman Law Publishing Co. 1921. Vol. I, pp. xxiv, 456. Vol. II, pp. viii, 457-1006.

The subject matter of some of these essays is of local interest only, such as the articles on the "Street Railroad Problem of Chicago" and the "State Civil Service Act and the Power of Appointment." Others, however, contain valuable discussions of fundamental problems of constitutional law, conflict of laws and equity, such as the relation of federal and state courts under the due process clause, the problem of *Swift v. Tyson*,<sup>1</sup> the scope of the full faith and credit clause, the vexatious problem of jurisdiction for divorce, the specific enforcement of negative covenants, and the rule of mutuality.

In the dedication Professor Schofield is spoken of as a consummate master of constitutional law. There is much in the essays to justify this. A wide and accurate knowledge and understanding of the actual decisions is displayed. In fact at times the argument is so packed with authorities as to make heavy going for the reader. The author does not hesitate to depart from the beaten paths of his subject. He proposes and defends with vigor and originality

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<sup>1</sup> 16 Pet. (U. S.) 1.

several theses startlingly contrary to ideas generally accepted. The essays are remarkably free from a "jurisprudence of conceptions." The theory that judges only declare pre-existing law and do not make law is recognized as a fiction, but the author finds value in the fiction as a restraint on action too much at large. When he contends for a wider application to state decisions of the due process clause of the fourteenth amendment, he overemphasizes this value, but in the main the nature of the judicial process is clearly seen. The patient reader has to struggle at times to wrest the argument from a very involved style which is only occasionally relieved by shorter sentences and clearer forms of expression, but his diligent attention is rewarded by ideas which are stimulating and valuable even when he does not assent to them.

The author shows a passion for uniformity and centralization. Problems of the relation of federal and state courts on matters of state law he always solves in favor of the former. The due process clause, he says, applies to the decisions of a state supreme court as well as to the acts of its legislature, but to a wider extent. "Due process of law as a restraint upon state judges means the whole body of the existing law." Thus a state court may render a decision as to state law so erroneous that the litigation will not be due process of law although the jurisdiction may be complete and the procedure perfect. "But when a state disregards or misapplies established principles of State law and makes John Doe suffer for the Commonwealth's sake, the cases show, I think, that its action may be vetoed by the Supreme Court of the United States." This comes perilously close to making the principle of *stare decisis* an essential element of due process of law. The qualification is added, however, that the departure from established principles must be "so gross as to shock the reason and justice of mankind." A distinction is made between error and error so great as to be lawlessness. This veto power, it is argued, should be exercised to prevent the localization of justice "to unreasonable extremes." It is assumed that localization of justice is necessarily bad, and the expediency of so wide an appellate jurisdiction in an already overburdened Supreme Court is not discussed.

When a federal court obtains jurisdiction because of diversity of citizenship alone, and decides a question of so-called general law contrary to the established principles laid down by the state court, which since *Swift v. Tyson* it may do, the author contends the state court should follow the federal. This solution he finds in the constitutional grant of judicial power to the federal courts in controversies between citizens of different states, and in the provision of Article VI, "This constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land." The attempt to explain the contrary decision of the Supreme Court<sup>2</sup> is not convincing. The desire for uniformity has led to a forced construction of Article VI. The author meets the argument that little will be left of state independence under such a construction by the assertion of the power of the state legislature to change the rule of state law made by the federal court. The wide field remaining for interpretation, both genuine and spurious, of the state statutes is not mentioned, nor the effect of such a supremacy of the federal courts upon the prestige and caliber of the state courts.

The argument that the full faith and credit clause does away with "comity" as a ground for enforcing statutory and common law causes of action accruing in sister states, while hardly supported by the decisions, is perhaps logical as to statutory causes at least and has considerable intrinsic merit. Little has been accomplished by the refusal of state courts on the ground of "public policy" to enforce causes of action created in sister states, except a failure to secure adequately interests which it was the aim of the state law where the

<sup>2</sup> *Delmas v. Merchants' Insurance Co.*, 14 Wall. (U. S.) 661.

cause of action arose to protect. But it is hard to accept the argument that this same clause admits of an extension to give the Supreme Court power to declare when a state court rendering a decree of divorce was so lacking in jurisdiction that no other state may enforce the decree, or that in it can be found a power in Congress to pass a national divorce act. Surely the full faith and credit clause is a command to the states to give full faith and credit, not to deny it. Whether such a power to veto the enforcement of a divorce decree of another state lies in the due process clause of the fourteenth amendment is not discussed.

Perhaps the most satisfactory article is that on "Freedom of the Press." The true nature of the problem is pointed out; that is, the necessity of securing social and individual interests by allowing the fullest possible dissemination and discussion of truth and at the same time protecting existing social and political institutions. Truth in statement of fact and fairness of comment are the tests suggested as to the publication of matters of public concern, with motive not an issue. There is a vigorous criticism of "the judge-made law of contempt of court for publication censuring judges" by persons not parties to the litigation in question as "intolerable in a land of equality before the law."

The editors might well have contented themselves with the publication in a single volume of the more fundamental articles of general interest, but the work is published as a tribute to the memory of Professor Schofield by his colleagues, and as a memorial the two volumes fulfill their purpose admirably. They show the scope and nature of the author's work and make it more readily accessible to the profession. The high opinion which those who knew him best had of Professor Schofield and his work as a teacher and scholar appears in the two excellent forewords.

WILLIAM C. VAN VLECK.

THE QUESTION OF ABORIGINES IN THE LAW AND PRACTICE OF NATIONS. By Alpheus Henry Snow. New York: G. P. Putnam's Sons. 1921. pp. v, 376.

This question is: "First. What are the general principles of the law of nations which the colonizing States respectively have recognized and applied and now recognize and apply, as governing their respective relations with the uncivilized tribes which were inhabiting the regions colonized by them at the time they respectively assumed the sovereignty of the regions? Second. To what extent and on what principles have civilized States coöperated with each other in recognizing and applying these principles?" (p. 18).

Mr. Snow's book was written at the request of the State Department that the author "undertake the task of collecting, arranging, and, so far as he may deem necessary, editing the authorities and documents relating to the subject of 'Aborigines in the Law and Practice of Nations.'" This fact explains much in both form and substance. Apparently the author was pressed for time, for the request was made in April, 1918, and the Prefatory Note is dated December, 1918, though the heading of the book (p. 3) announces that it was "written at the request of the Department of State, 1919." In any event it seems to be a compilation intended to serve at the Peace Conference. There is, however, no indication of unfairness toward German colonial administration. The book lacks much of present interest because it omits consideration not only of the question of the mandate system under the League of Nations but of all questions raised by the War (such as recruiting or drafting of aboriginal troops by France) and indeed of everything that has happened in the last ten years, with the exception of a brief reference to our treatment of the Philippines.

The author's main thesis is that in controlling aboriginal races a state acts

as mandatory of the society of nations, that it is a trustee in the widest sense, a tutor or guardian of the native peoples. His proof, however, is not convincing to anyone acquainted with what has been done as well as what has been said. The author purports to tell us what is the law and practice of nations. But his attention is chiefly fixed on the diplomatic language of nations. He gives a diplomatic history of the treatment of inhabitants of lands occupied and ruled by the European races. (There is no mention of Japanese exploitation of Formosa or continental Asia.) He tells us of international agreements and municipal regulations. Of the performance of these agreements and the administration of these regulations little is said. And thus for over 300 pages we wander for the most part in a paradise of rather hypocritical diplomacy. The outward show of altruism is sometimes the harbinger of its inward growth, and we may hope that such is the case in this matter. Hypocrisy then is the manifestation of a sense of shame which has not yet become strong enough to change conduct. But it is conduct alone that constitutes the law, or at least the practice of nations.

After a discussion of the word "aborigines" and a short historical introduction, the policy of the principal states with colonial possessions is taken up under the titles, "Rights of Aborigines in Land," "Personal Rights of Aborigines," and "Agreements between Tribes and States." The latter half of the book deals chiefly with general treaties concerning central Africa and Morocco. The account of the relations of Great Britain and the United States with the American Indians is the most satisfactory part of the book, for, on the whole, judicial decisions and legislative documents, which are the author's mainstay throughout, give a fair idea of their actual legal status. But it is difficult to discover in these authorities intimations that the liberties denied or secured the Indians express a principle of international law. The gradual abolition of the slave trade is also told in an illuminating way. The author is of the opinion that, though international traffic in slaves is illegal today, inland slavery is "not contrary to the law of nations." If this is so, how can he rely on our treatment of free red men (or free black men) as establishing any principle of international law?

Mr. Snow's book contains many long quotations, which are none too carefully translated. His statements, moreover, are now and then inaccurate. These slips are probably to be attributed to haste, but they detract seriously from the value of the book. Thus a part of the Act of March 3, 1871, forbidding future treaties with Indian tribes, is printed (p. 207) as if a direct quotation, although it is the sense of the statute that is given and not the exact words. Again, the author says that "the question of Liberia is plainly not one of the relationship of civilized states to aboriginal tribes, since the inhabitants, though of aboriginal descent, are civilized" (p. 27). But the population of Liberia of American experience and their descendants comprise only about one per cent. of the total population, a proportion scarcely larger than that of the European population in adjacent parts of Africa. Laws of several colonies are translated not from the original language. Once indeed the author gives the law of a British colony translated from a French text (p. 167)! The translation of the resolutions of the Brussels African Congress (pp. 179-189) retains several unfortunate Gallicisms, such as "professional knowledge of the aborigines" "professional schools of aboriginal industries," and "judiciary authority." There are also numerous misprints, particularly in the French.

The book in short shows the usual shortcomings of hasty work, necessary perhaps in its compilation, but certainly not in its editing for publication. This is perhaps due to the fact that it was published posthumously. But it marks a beginning of systematic treatment of a topic of vital concern to exploited peoples and indeed to all peoples.

WILLIAM GORHAM RICE, JR.

THE HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE. Cambridge Studies in English Legal History, Vol. I. By Percy Henry Winfield. Cambridge, England: University Press. 1921. pp. xxvii, 217.

The new life that was breathed into the English universities a hundred years ago quickened every branch of learning but that of law. In its homeland the common law was still deemed unworthy of serious study; the universities judging that only the law of Rome could yield return for scientific research. A half century passed before the common law really got a foothold. Not until the historical study of the English law was undertaken did any phase of it seem capable of scientific treatment. In fact, the school of reformers which derived from Bentham saw in law only an aggregate of unrelated rules; the Langdellian vision of the "seamless web" was seen by Maitland and inspired that fine phrase, but it has made its way slowly with British lawyers.

Under Maitland in Cambridge, and Sir Frederick Pollock and Sir Paul Vinogradoff in Oxford, the historical method changed this attitude of the universities. English legal history took its place in the legal curriculum, and was followed by the law itself; so that now about a year of English law, out of a three-year course, is offered at these universities.

In Cambridge, especially, Maitland's enthusiasm for the constructive history of law has not been allowed to die; his benign features rouse the ambition of the undergraduate in the Squier Law Library and his speaking portrait cherishes the zeal of his successor in the hall of Downing. The torch has not failed. Professor Hazeltine's valued writings have kept it alight. His inspiration is felt in the recent foundation, by the younger teachers, of the *Cambridge Law Journal*. Finally we have this first volume of the Cambridge Studies in English Legal History. This productivity proves the force of the example, and it shows as well the health and vigor of the new life. The true spirit of legal learning is still animating Maitland's university.

In a modest preface Professor Hazeltine sets forth the program of the new series. "The point of view adopted in planning the series is that English law has a place in world history and not merely in insular history." "Two kinds of studies will be included in the series: monographs and editions of texts." In no place so well as in Cambridge could the old texts of the law be edited. The incomparable collection of early legal manuscripts, and the almost unrivalled collection of early printed English law books in the Cambridge University Library make it almost the duty of her scholars to edit the unprinted texts. As for the monographs, Dr. Winfield's book makes us eager for more.

After a general chapter on ancient dealings with abuse of legal process, the writ of conspiracy is taken up, and good reason given for concluding that it was based only on the Ordinance of Conspirators. The scope of the writ and the essentials to liability are next considered. In this chapter great force is added to the argument by the use of material still in manuscript.

The history of the writ and of the criminal procedure is then developed, through its "withering" by the Star Chamber, to its gradual extension to cover trade combinations; and the supersession of the writ by the action on the case follows. Thus bringing the law down to modern times, the author has prepared the ground for his promised work on the modern law.

Three chapters on Maintenance and Champerty, on Embracery and Misconduct of Jurors, and on Common Barratry, finish the discussion; and an index follows.

Of the work of Dr. Winfield one can speak only in the highest praise. He seeks his authorities in many fields. Mention has already been made of his careful use of the manuscripts. He also makes the parliament rolls yield rich returns. The author has proved himself one of the very best of those scholars who can make the legal past throw its light upon the present law.

J. H. BEALE.



MEN AND BOOKS FAMOUS IN THE LAW. By Frederick C. Hicks. With an Introduction by Harlan F. Stone. Rochester, N. Y.: The Lawyers' Co-operative Publishing Company. 1921. pp. 259.

This small volume traces in the broadest outline the lives of a few law writers, and more especially the story of their legal writings, the inception, production, and vicissitudes of works which for the most part have become classics in legal literature. It contains chapters on Cowell's Interpreter, Lord Coke and the Reports, Littleton and Coke upon Littleton, Blackstone and his Commentaries, James Kent and his Commentaries, Edward Livingston and his System of Penal Law, and Henry Wheaton, together with an appendix containing bibliographical suggestions. The book is also illustrated with portraits of the writers who are the subjects of the chapters. The chapters which deal with American authors seem on the whole better than those which deal with English authors. One might question the selection of authors and books, yet criticism is disarmed at the outset, for Mr. Hicks frankly admits that "out of the hundreds of authors and books that might have been considered, the selection of these few has been made almost at random — because they happened to be of special interest to the author" (p. 7).

Indeed to measure adequately the function of the book requires an appreciation of what the author has consciously undertaken. In Mr. Hicks's own words, "no pretense is made of giving an adequate picture of the contents of the books. That would require a technical presentation which would defeat the end sought. Nor is a complete picture of the authors of the books given. The studies are merely impressionistic sketches of men and books famous in the law, with glimpses here and there of the events and people of the time in which the books were written, published, and read" (p. 7). It seems to be assumed that the present methods of legal instruction are producing a body of lawyers who, while more scientific than their predecessors, are becoming progressively ignorant in the classics of their profession. "The figures of the great lawyers and commentators treated of in this volume, so vivid and outstanding to law students of an earlier day, are becoming shadowy and indistinct to the students and the lawyers of this generation" (p. 11). The purpose of the book is to inspire students to know more of the makers of the great law books, to the end that much of educational value may be gained from a study of the men and books that have influenced to a marked degree Anglo-American legal development. The author goes further and maintains that law books have a human appeal and should be a part of the general knowledge of every cultured person. The book, therefore, is directed to two essentially different classes of readers. The attempt is worthy of praise; its success is open to question. The chapters are too sketchy to give any real sense of satisfaction to a reader trained in the law. Even a student of law is worthy of more substantial mental diet. Sketchy as the chapters are they are not calculated to appeal to the general reader. The book is too much of the commentary and too little of the informative, and the commentary is upon matter of which the lay reader is usually ignorant. One might go further and take issue with Mr. Hicks on his fundamental proposition that law books have a universal human appeal. The law itself is catholic; its subject matter embraces all human activities, touches all the social relations, but it does not follow that books about the law have a general human interest. It is to be feared that Bracton, Glanvill, Littleton, Coke, and even Blackstone will continue to be of interest almost solely to the historian.

WILLIAM EDWARD MCCURDY.

**TRAINING FOR THE PUBLIC PROFESSION OF THE LAW — A REPLY TO MR. KALES.** — In the November issue of the REVIEW there appeared a book review by Mr. Albert M. Kales, of the Chicago bar, commenting upon "Training for the Public Profession of the Law," by Alfred Z. Reed, published by the Carnegie Foundation for the Advancement of Teaching. To this review Mr. Reed has written the following reply. While it has not been customary for the REVIEW to publish such replies, an exception has been made in this case, as it has seemed to the editors that the subject is one of extraordinary contemporary interest. — ED.

#### SCHOLARSHIP OR OPINION?

Mr. Albert M. Kales, reviewing my volume, "Training for the Public Profession of the Law," in the November number of the HARVARD LAW REVIEW,<sup>1</sup> complains at the outset that he finds it difficult to understand what I mean, in the last of my eight "Parts." This criticism could certainly not be directed against any portion of his own refreshingly vigorous comments. These do not, as it seems to me, convey to the uninformed reader an accurate impression of the scope and purpose of my volume, but they make entirely clear Mr. Kales' views in regard to certain matters. In spite of my lack of clearness, he proceeds confidently to assume that he knows what I am "driving at," and on this precarious basis he gives me a trouncing which — if his assumptions were correct — I should richly deserve. He then devotes three of his six pages to reiterating views, with which he has long been identified, in regard to the importance of teaching only local law, and scolds me, by name — though always with courtesy — for not agreeing with him. Finally, his concluding words are these: "Is this the beacon which is to fire the imagination of young men stirred by the recent conflict?" He implies quite plainly, first, that I have lighted no such beacon — which is obvious — and second, that I ought to have done so — which I think is open to question.

#### I

Mr. Kales is entirely correct in drawing attention to the verbal obscurity and substantial vagueness of my constructive proposals. Whether he is equally correct in imputing this to me as a defect, I am not so certain. The assurance with which he expresses himself in regard to highly contentious matters is admirable in the case of one who, like himself, has devoted his entire life to the practice and teaching of the law. I had thought that a similar tone would be somewhat out of place in the case of one who has devoted only eight years of study to law and legal education. Many disputable points are involved in this general topic. Nothing like common agreement exists among men whose opinions deserve respect. From the beginning it has seemed to me wise, therefore, to subordinate my own slowly crystallizing views to a statement, as nearly dispassionate as I could make it, of facts. I have thought that a concrete plan of reform, with all of its details perfected, would receive the treatment that is usually and rightly accorded to attempts of closet philosophers to regenerate the world. When, therefore, Mr.

<sup>1</sup> 35 HARV. L. REV. 96.

Kales dignifies my occasionally obtruded opinions by a six-page refutation, he seems to me to accord them greater importance than they deserve. If my statement of the facts is fairly comprehensive and clear, I doubt whether the value of a five hundred page study would have been enhanced by additional pages devoted to propaganda.

It may be that at some future date I might profitably explain more fully just what I mean when I declare that we not only always must have, but already actually do have, a "differentiated" bar. Discussion of this proposition would certainly contribute to my own enlightenment. In addition, a controversy, proceeding from this starting point, might entertain and possibly would even benefit others. Before I amplify my own tentative views, however, I should require some assurance that any real interest is taken in them. Such interest does not seem to be displayed by one who jumps to the conclusion that all I am "driving at" is "the division of lawyers into the strong and successful on the one hand and the weak and mediocre on the other"; this division to be determined largely by considerations of social position.<sup>2</sup> A critic who tortures my obscure and scattered "hints" into support of any such ridiculous proposition as this seems to me more eager to protect his own opinions against attack than to ascertain what merit, if any, there may be in my position.

## II

I cannot, however, pass over these opening pages of Mr. Kales' review without calling attention to one remarkable proposition that he advances. With some glimmering perception of what, under my verbal infelicities, I really am "driving at," he boldly asserts that "no differentiation can be based upon . . . the original educational effort of college and law school." His argument is that success at the bar "is a matter of competition," in the course of which the lawyer's original formal education, "while it may leave some marks, fades out very materially."<sup>3</sup>

Now of course in the past, when law schools were less efficient institutions than they are now becoming, and when the law was less complex than it is to-day, it has undoubtedly been true that experience, rather than education in a narrow sense, has been the determining factor in furthering success at the bar. The training received prior to admission to practice has contributed a relatively small amount to the fund of knowledge and of practical expertness which the accomplished lawyer displays. Practitioners whose native abilities have enabled them to counteract the defects of their early education are peculiarly liable to place a low estimate upon the importance, actual or potential, of formal preliminary training. Is this to be a permanent condition, however? Will the kind of preliminary training that lawyers receive never amount to much, one way or the other, either as a ground for forecasting that they will probably be successful or unsuccessful, or as a basis for dividing them in any other way? Will that part of a lawyer's proficiency which he secures at the expense of his early clients always bulk so large in the final result that it will make very little difference what sort of law school he has attended, or whether indeed he has attended any?

<sup>2</sup> 35 HARV. L. REV. 98.

<sup>3</sup> *Ibid.*

This may be true. The knowledge or skill required to practice many vocations can best be acquired almost entirely from experience, after a relatively unimportant grounding in general or technical preparation. It may be that the practice of the law is one of these vocations — that it is not now, and cannot be converted into, a genuine learned profession that requires an elaborate formal preparation before it may be properly pursued. If this is true, then indeed the publication of the recent Carnegie bulletin represents an entirely unnecessary waste of labor and time. It is part of a quite needless current pother about advancing the standards of law schools and of bar admission requirements.

### III

Mr. Kales does not, however, really believe that law schools are of negligible importance in the making of lawyers; for half of his entire review is taken up by a vigorous declaration that law schools should now abandon the pretense of teaching a non-existent "national law," and should devote themselves in future to teaching the concrete law of their own jurisdictions. Here again he may be correct. His argument is certainly convincing as to one not unimportant point: The Harvard Law School faculty recently included at least one professor who definitely repudiated the original concept of Dane and Story and Langdell. These worthies may well have been wrong. The attempt to realize their ideals has always been carried on under considerable practical difficulties. Perhaps because of these difficulties we should now abandon the attempt. Law schools which now contain students from many jurisdictions must either, in order to be good law schools, teach many different and independent systems of law concurrently; or, if this is a task which, for reasons outlined in my Chapter XXV, is beyond the resources of any school, then students from different jurisdictions should cease to come to a single law school. The Harvard Law School should confine itself to Massachusetts students, and the Michigan Law School to those of Michigan. It may be, in short, that the conceded difficulty of preventing our law from becoming permanently and increasingly disintegrated should now be rendered an utter impossibility. We should abolish a type of legal study which in the past has done something — and which Mr. Kales apparently concedes is still doing something — to arrest the naturally disruptive tendencies of our political organization.

I am not myself competent to phrase the argument against this position more adequately than I have phrased it in various passages of my volume. Not being a lawyer or a law teacher myself, my words in any case carry little weight. This much I will concede to Mr. Kales. If the present faculty of the Harvard Law School feel about this matter in the way that he does, then the sooner this school abandons the farce of pretending to teach national law, the better. On the other hand, if this faculty still includes scholars who hold that there is a fundamental integrity to our common American law which should by all means be preserved, lest the law of these United States become like that of Continental Europe prior to the adoption of the Code Napoléon — then it would seem incumbent upon them to reply to their late colleague. They can do so more effectively than I can.

I will accordingly restrict my own comment upon this portion of the review to two relatively unimportant observations.

Mr. Kales, who seems to have the same respect for me as an historian — I do not mean this sarcastically — that I have for him as a legal scholar and writer of forceful English, says<sup>4</sup> that I know how the English universities, with their teaching of Roman or civil law, became sidetracked in the development of English law and legal education. He condemns me, accordingly, for my incapacity to grasp the, to him, obvious truth that, if our own university law schools cling to their conception of national law they will be sidetracked in a similar manner by schools that teach the actual law of local practitioners. I waive the question whether, in a discussion covering local law, the development of the law of continental Europe does not provide a closer parallel, and whether the teaching of imperial Roman jurisprudence by the continental universities was not the precise cause that prevented the law of their states from becoming permanently disintegrated. Does he not overlook a vital defect in his own analogy? The graduates of the English universities did not enter into legal practice until after they had gone through the Inns of Court and learned the actual, living, de-academized "common" law. Even so — I have been told by those who know more about such matters than I do — a tincture of the civil law was infused into the English common law, by judges who had studied its principles in the universities. Whether this civil law element did much good to the practitioners' common law or not, I do not know. I rather suspect that those who may be interested in proving the point could show that it did. In any case, it crept in. Now perhaps the graduates of our national law schools ought similarly to go subsequently to a local law school, in order to get some of the theoretical nonsense out of their systems. Or perhaps they ought not. I myself rather incline to the latter view, believing that the gap between our own national and local law is far less wide than that between the civil law and the bureaucratically developed rules of the English courts; and that even now American national law can be and is taught in a fairly concrete and practical manner. However this may be, it seems to me clear that if the graduates of such schools do enter a local law school, they will be in as favorable a position for influencing the development of the law as was the university trained lawyer of England; and that if, on the other hand, they proceed, as now, directly into practice, they will be in a much more favorable position.

If a sufficient number of young men enter the legal profession, after being saturated with the spirit of the national law, they are likely to make their mark felt, if indeed they have not already begun to do so. To the extent that they are elevated to judicial positions — as some of them already have been — or produce good textbooks — as more of them might, — there is a possibility that what is now regarded as theoretical nonsense by many may be respected as genuine law by all. This weight of mere numbers must be taken into account in any attempt to forecast the probable development. Harvard could accomplish little in this direction when Harvard was standing alone. The large and increasing number of schools that are imbued with Harvard ideals may reasonably

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<sup>4</sup> 35 HARV. L. REV. 101.

hope to accomplish much more, particularly in case their efforts are reinforced by schools of different immediate aims, which employ, however, national-law textbooks for a portion of their curriculum. All this will, of course, take time. But *if* the opposition of older practitioners to this development is wrong, and *if* the constantly growing number of younger men are as forceful in the defense and promulgation of their point of view as Mr. Kales is in his, the chances seem to favor their eventual triumph.

In a word, it is submitted that the question that should properly be discussed is whether a national common law, or, if this cannot be attained, then at least a law that is much more nationalized than that which we now possess, would or would not be of inestimable advantage to the people of our not quite sufficiently united country. If it would be, then there is no reason why those to whom this ideal appeals should be discouraged by the fact that its full realization can be secured only at the cost of much time and labor.

As has just been intimated, it is not likely that the national law schools, of themselves, can bring this state of affairs to pass. For a long while, and perhaps permanently, local law schools will continue to exist. These will exert a powerful influence to block this development, unless by good teaching from good textbooks, some of which at least must be provided by the national schools, their forces can be turned in the same general direction. This brings me, however, to the second observation that I propose to make upon Mr. Kales' argument in favor of a unitary type of local law school. He asserts that I conceive "that the study of the local law must always remain narrow, practical, and inferior, and be carried on by part-time or low-standard schools."<sup>5</sup>

This is a most extraordinary assertion. Of course, we both of us recognize that there is a sense in which the study of local law may be said to be more "practical" than that of national law. The only basis that I can find for the remainder of the statement, however, is my expression of belief that part-time law schools will naturally emphasize local law.<sup>6</sup> The sentence as a whole is fundamentally at variance with views that I entertain with regard to the perfectibility of local, part-time instruction in the law — views which, whether right or wrong, whether important or unimportant, have at least been expressed with sufficient clearness to be understood by other critics of my volume. I trust that I shall not be considered discourteous or small-minded if I harbor the suspicion that Professor Kales has given to my Chapter XXV and to my concluding chapters only that measure of attention which he believes they justly deserve. He seems not to have read these parts of the volume with that degree of care which is commonly supposed to be one of the unfortunate responsibilities of a painstaking reviewer.

#### IV

Finally, a word as to that beacon light the absence of which from my volume Mr. Kales so emphatically deplures. No, I have not lit a beacon. My readers will find here at most a feeble tallow dip, hidden

<sup>5</sup> 35 HARV. L. REV. 101.

<sup>6</sup> TRAINING FOR THE PUBLIC PROFESSION OF THE LAW, 412.

under a bushel of historical data and statistical tables. Are these latter — as Mr. Kales seems to intimate — erudite, but of little practical value? If so, I am sorry; for I had hoped that a careful statement of the facts, coupled with an indication of some of the many problems they suggest and of the general way in which, as it seems to me, these problems will have to be approached, might be of some slight assistance to the coming generation of legal scholars. This was a more modest aim than that which Mr. Kales imputes to me, but for whatever value such work may possess, this was what I was actually trying to do. This would have been clearer to the readers of his review had he seen fit to quote my full title: "Training for the Public Profession of the Law: Historical Development and Principal Contemporary Problems of Legal Education in the United States, with some Account of Conditions in England and Canada."<sup>7</sup> A clumsy title, this. Mr. Kales' gift of terse expression is not mine. But it brings out better than does his own more readable criticism what I aspired to do. This was — to continue his metaphor — merely to gather fuel for any beacons that others may feel themselves competent to light. I am gratified that Mr. Kales has already applied the torch of his eloquence to my dry material. I hope that the blaze of scholarly discussion which — in admirable temper — he has kindled, may spread, and that we shall all be benefited by the resulting illumination.

ALFRED Z. REED.

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<sup>7</sup> The failure to quote the full title is chargeable to the editor rather than to the reviewer. — Ed.

## BOOKS RECEIVED

CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE: YEAR BOOK, 1921.  
pp. xvi, 244. Washington: The Endowment.

A NEW CONSTITUTION FOR A NEW AMERICA. By William MacDonald.  
pp. 260. New York: B. W. Huebsch, Inc. (To be reviewed.)

THE SPIRIT OF THE COMMON LAW. By Roscoe Pound. pp. xv, 224. Boston:  
Marshall Jones Company. (To be reviewed.)

THE BRITISH YEAR BOOK OF INTERNATIONAL LAW, 1921-1922. pp. viii, 272.  
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## INCOME FROM CORPORATE DIVIDENDS

THOSE who worship the corporate entity as a real presence may confidently invite us all to marvel at the wonders wrought in its name. Those of a different faith who regard a corporation as nothing but a legal device whereby human beings may pool their activities and acquire peculiar legal privileges and duties must in their realism realize how very peculiar these peculiar privileges and duties may be. By and large the privileges attract more attention than the duties, but on the Ides of March the duties come into the limelight. Invisible and intangible the corporation may be, but it is readily seen and touched by those who gather in the revenues of government. The earnings of the enterprise render unto Cæsar through a tax on the corporation and again through a tax on the stockholder to whom the earnings are transmitted. Our national Cæsar is somewhat less grasping than he might be and so exempts corporate dividends from the eight per cent normal tax on individual income. He demands, however, an excess profits tax on the income of the corporation and a progressive surtax on such part of that income as passes on to stockholders fortunate enough to be subject to surtax. In assessing these two taxes no attention is paid to the actual situation of the actual investors who bear the burden.<sup>1</sup> In approving of this

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<sup>1</sup> The excess profits tax imposes a progressive tax on corporate income in excess of the deduction of certain percentages of the invested capital of the corporation. In *La Belle Iron Works v. United States*, 256 U. S. —, 41 Sup. Ct. 528 (1921), invested capital is held to be the capital actually invested in the property of the corporation to the exclusion of appreciation subsequent to the acquisition of that

neglect the Supreme Court reveals the miraculous properties of incorporation.

With taxes on the corporation this paper is not concerned. Double taxation of corporation and of stockholder is important only because of resulting inequalities between different methods of doing business. These inequalities may perhaps be justified by the advantages accruing to those who become members one with another in a corporation. Clearly enough the income of the corporation should in some way be taxed as it is received. Otherwise the corporate treasury might be made a delectable place of refuge for stockholders who can afford to leave that treasury intact. Clearly enough, too, a progressive tax on individual recipients of income ought not to spare individual gains that are the fruit of business conducted in corporate form. Unless the individual is subjected to this progressive tax as his gains accrue to the corporation, he should meet it when his gains come to him by way of corporate dividends. The latter alternative is the one adopted by Congress and perhaps the only one that the Supreme Court would permit it to adopt.<sup>2</sup> But the gains thus treated as income to the stockholder need not be gains to him. It is enough if they are gains to the corporation, and are then transferred from the corporation to the stockholder. Thus we have an anomalous conception of income from property which dispenses with any requisite of gain.

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property. No account is taken of the amounts paid by existing stockholders for their interest in the corporation. Thus corporate income, which is at a high rate of return on the investment of the corporation, may bring but a moderate rate of return on the investment of stockholders who paid a high price for their stock. The tax therefore imposes unequal burdens on the amounts invested by those who acquired their stock prior to its imposition. Subsequent purchasers would of course take into consideration the reduction of the corporate net income occasioned by the tax.

<sup>2</sup> In *Collector v. Hubbard*, 12 Wall. (U. S.) 1 (1870), the Supreme Court sustained a federal tax on stockholders for their proportionate shares of the income received by the corporation, this income not being taxed to the corporation itself. In "The Stock Dividend Decision and the Corporate Nonentity," 5 *BULLETIN OF THE NATIONAL TAX ASSOCIATION*, 201, I have tried to make out that this decision can still stand notwithstanding the aspersions cast upon it in Mr. Justice Pitney's opinion in *Eisner v. Macomber*, 252 U. S. 189, 217-219 (1920). Mr. Arthur Ballantine, whose judgment is more valuable and more expensive than mine, thinks that these aspersions indicate that "the method sustained by the court in the Hubbard case would not be sustained to-day, at least in the case of large and active business corporations employing large capital." See his "Corporate Personality in Income Taxation," 34 *HARV. L. REV.* 573, 586.

The anomaly seems the more anomalous when we recall that the Supreme Court declares that in deciding whether what Congress chooses to call income is income within the meaning of the Sixteenth Amendment, "it becomes essential to distinguish between what is and what is not 'income,' as the term is there used; and to apply the distinction, as cases arise, according to truth and substance, without regard to form."<sup>3</sup> This authoritative recognition of the superiority of truth and substance on the one hand to form on the other is sufficient warrant for an effort to apply the tests of truth and substance to the interpretations of the Sixteenth Amendment which the Supreme Court has given us. Two principal issues are presented: How can truth and substance permit the discovery of income from property where there is no gain therefrom? To what extent are the judicial distinctions between dividends held income and dividends held not income the product of truth and substance and to what extent the product of form?

## I

That the process of issuing and receiving a dividend need not be in itself gainful in order to make the dividend income to its recipient is too plain to admit of criticism. Otherwise no dividend would be income, since the stockholder's interest in the corporation is necessarily reduced in value by the amount which the corporation turns over to him; his left hand loses what his right hand gains. Similarly the receipt of salary or of the price for the sale of property is not in itself normally a gainful process. One's credit at the bank may be as good when his salary is collectible as when it is collected. An owner of what we may call a \$10,000 house is as rich with the house as with the \$10,000 which he gets for selling it. The question in such a case is not whether the transaction is itself gainful but whether it yields a gain as of the appropriate antecedent date.<sup>4</sup> If the house was bought for \$5,000, its

<sup>3</sup> Mr. Justice Pitney, in *Eisner v. Macomber*, 252 U. S. 189, 206 (1920).

<sup>4</sup> Confusion on this point is contributed by inferences drawn from Mr. Justice Holmes's statement in *Towne v. Eisner*, 245 U. S. 418, 426 (1918), that after a stock dividend "the corporation is no poorer and the stockholder is no richer than they were before." Since shortly after this, dividends in cash and in the stock of another corporation were held in *Lynch v. Hornby*, 247 U. S. 339 (1918), and *Peabody v. Eisner*, 247 U. S. 347 (1918), to be income to the stockholder though they made him no richer than he was before, it was clear enough from then on that dividends which

sale for \$10,000 turns a \$5,000 gain from an interest in a house to cash in hand. The gain that was not income so long as it still inhered in the capital becomes income when extracted from it.<sup>5</sup> To get income from the sale of property both gain and its extraction are required.<sup>6</sup> To get income from corporate dividends, ex-

make the corporation poorer are income to the stockholder though they make him no richer, and that the *dictum* of Mr. Justice Holmes was directed to the point that unless the corporation parts with some of its assets which the stockholder receives there is not a sufficient change in the nature of the stockholder's interest to satisfy the test of realization which is made one of the requisites of income, *i. e.*, that without "outcome" from the corporation there cannot be "income" to the stockholder. *Cf.* Mr. Justice Pitney's statement in *Peabody v. Eisner*, at page 349, that the ground of *Towne v. Eisner* was that "it related to a stock dividend which in fact took nothing from the property of the corporation and added nothing to the interest of the shareholder, but merely changed the evidence which represented that interest," and his statement in *Eisner v. Macomber*, 252 U. S. 189, 211 (1920), that "the essential and controlling fact is that the stockholder has received nothing out of the company's assets for his separate use and benefit."

<sup>5</sup> Profit from the sale of capital was held income in *Merchants' Loan & Trust Co. v. Smietanka*, 255 U. S. 509 (1921); *Eldorado Coal & Mining Co. v. Mager*, 255 U. S. 522 (1921); *Goodrich v. Edwards*, 255 U. S. 527 (1921); and *Walsh v. Brewster*, 255 U. S. 536 (1921).

<sup>6</sup> That the requisite extraction is wrought by the sale is held in the cases cited in note 5, *supra*. In the first of these cases Mr. Justice Clarke quotes a previously approved definition of income as "a gain derived from capital, from labor, or from both combined," and adds:

"... we continue entirely satisfied with that definition, and, since the fund here taxed was the amount realized from the sale of the stock in 1917, less the capital investment as determined by the trustee as of March 1, 1913, it is palpable that it was a 'gain or profit' 'produced by' or 'derived from' that investment, and that it 'proceeded' and was 'severed' or rendered severable, from it, by the sale for cash, and thereby became that 'realized gain' which has been repeatedly declared to be taxable income within the meaning of the constitutional amendment and the acts of Congress. *Doyle v. Mitchell Brothers Co.*, and *Eisner v. Macomber*, *supra*." (255 U. S. 509, 519-520.)

As to the general rule that gain is a requisite of income from the sale of property there is no doubt, even though the point may not have been explicitly adjudicated under the Sixteenth Amendment. The fact that the approved definition of income starts with "gain" would not be controlling, since dividends from corporate stock are brought within the definition without inquiry into the gain involved. But in construing the Federal Corporation Excise Tax of August 5, 1909, Mr. Justice Pitney, in *Doyle v. Mitchell Brothers Co.*, 247 U. S. 179, 185 (1918), said of the definition quoted above:

"Understanding the term in this natural and obvious sense, it cannot be said that a conversion of capital assets invariably produces income. If sold at less than cost, it produces rather loss or outgo. Nevertheless, in many if not in most cases there results a gain that properly may be accounted as a part of the 'gross income' received 'from all sources'; and by applying to this the authorized deductions we

traction alone satisfies the Supreme Court. What is extracted by the dividend is held to be income even though after the dividend the recipient is no richer than when he acquired the stock on which the dividend is paid.

The case in which this first appears is *Lynch v. Hornby*,<sup>7</sup> decided in 1918. This involved a cash dividend paid in 1914 from the proceeds of the sale of property which the corporation had owned prior to 1913 when the Sixteenth Amendment took effect. While in the particular case the stockholder had owned his stock from 1906 and the dividend doubtless represented a gain to him as from that time, the decision goes on grounds broad enough to sustain the tax on one who had bought his stock shortly before the dividend was declared at a price based on the existence of the melon ready for cutting.<sup>8</sup> Thus it would justify treating as income a dividend of \$100 paid to a stockholder who had a month before paid

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arrive at 'net income.' In order to determine whether there has been gain or loss, and the amount of the gain, if any, we must withdraw from the gross proceeds an amount sufficient to restore the capital value that existed at the commencement of the period under consideration."

In *Merchants' Loan & Trust Co. v. Smietanka*, note 5, *supra*, Mr. Justice Clarke declared that the use made of the definition of income in the decision of cases under the Corporation Excise Tax Act was decisive of the case then before the court. The particular opinion in which this observation was made had to do only with the issue whether actual profit from the sale of property is income, but in two other cases decided at the same time there was the issue whether under the Income Tax Act of 1913 Congress meant to treat as income whatever realization on the sale of property was in excess of its value on March 1, 1913, even though its value on that date was less than the cost of the property when acquired. In holding that the income taxable under the Act is confined to the excess of sale price over cost price, the court must have been influenced more by its judgment that the taxable income should be restricted to the actual gain than by the language of the statute. This interpretation is set forth in note 9, *infra*. An explicit decision that Congress cannot discover income from the sale of property except to the extent of the gain as from the appropriate past date, has thus far been rendered unnecessary by the ability to hold that Congress has not sought to do so. An exception to this appears in *Stanton v. Baltic Mining Co.*, 240 U. S. 103 (1916), in which Congress was allowed to limit the allowance for depletion of the mine in reckoning the income from the sale of ore. For consideration of this see "Constitutional Aspects of Federal Income Taxation" in *THE FEDERAL INCOME TAX* (Columbia University Press, 1921), pp. 66-68.

<sup>7</sup> 247 U. S. 339 (1918).

<sup>8</sup> This is true also of *Peabody v. Eisner*, 247 U. S. 347 (1918), decided on the same day. The dividend involved here was paid by one corporation in the stock of another corporation. Nothing is said as to the time when the recipient acquired his parent stock except that it was prior to March 1, 1913. The dividend was received in 1914.

\$200 for his share of stock which the payment of the dividend reduced to its par value of \$100. With the issue whether this was within the intention of Congress<sup>9</sup> or the issue whether dividends which are the fruit of corporate assets possessed prior to the Sixteenth Amendment may be taxed as income when paid after that Amendment<sup>10</sup> we are not primarily concerned. Both questions

<sup>9</sup> On this point Mr. Justice Pitney said, in *Lynch v. Hornby*:

"Hence we construe the provision of the act that 'the net income of a taxable person shall include gains, profits, and income derived from . . . interest, rent, dividends,' . . . as including (for the purposes of the additional tax) all dividends. . . . In short, the word 'dividends' was employed in the act as descriptive of one kind of gain to the individual stockholder; dividends being treated as the tangible and recurrent returns upon his stock, analogous to the interest and rent received upon other forms of invested capital." (247 U. S. 339, 344-345.)

Compare with this the interpretation of the Income Tax Act of 1916 in *Goodrich v. Edwards*, note 5 *supra*, to limit the taxable income from the sale of property to the actual gain. The statute provided explicitly that for the purpose of ascertaining the gain derived from the sale of property acquired before March 1, 1913, the fair market price or value of the property as of that date "shall be the basis for determining the amount of such gain derived." The apparently unrestricted purport of these words was disregarded by the court by recurring to the general reference in the act to "gains, profits and income" and to the definition of income approved by the court and by declaring that "it is thus very plain that the statute imposes the income tax on the proceeds of personal property to the extent only that gains are derived therefrom by the vendor" and that the explicit provision making March 1, 1913, the upset date, so-called, "is applicable only where a gain over the original capital investment has been realized after March 1, 1913, from a sale or other disposition of property." Thus the only effect given to the specific clause making March 1, 1913, the "upset date" is to exclude gain accrued prior to that date. Such gain had been excluded by the Supreme Court in *Lynch v. Turrish*, note 10, *infra*, without any explicit direction in the Act of 1913. The explicit reference to March 1, 1913, in the Act of 1916 was therefore superfluous unless it was introduced to exclude loss accrued but unrealized prior to that date. It is difficult to believe that by denying it this effect the Supreme Court accurately surmised the intention of Congress.

<sup>10</sup> On this point Mr. Justice Pitney observed, in *Lynch v. Hornby*:

"That the retroactivity of the act from the date of its passage (October 3, 1913) to a date not prior to the adoption of the Amendment was permissible is settled by *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1, 20. And we deem it equally clear that Congress was at liberty under the Amendment to tax as income, without apportionment, everything that became income, in the ordinary sense of the word, after the adoption of the Amendment, including dividends received in the ordinary course by a stockholder from a corporation, even though they were extraordinary in amount and might appear upon analysis to be a mere realization in possession of an inchoate and contingent interest that the stockholder had in a surplus of corporate assets previously existing. . . . The stockholder is, in the ordinary case, a different entity from the corporation, and Congress was at liberty to treat the dividends as coming to him *ab extra*, and as constituting a part of his income when they came to hand." (247 U. S. 339, 343-344.)

were answered in the affirmative. Congress has relented with regard to dividends produced by corporate assets accumulated prior to 1913,<sup>11</sup> but it has left unchanged the provision which the Supreme Court interpreted as declaring dividends to be income to their full value even though what they bring to the stockholder is not to him a gain as from the time when he bought his stock.<sup>12</sup>

When we look to Mr. Justice Pitney's opinion for the truth and substance which justifies a conception of income without gain, we find statements that can hardly bear the strain of analysis. Dividends, he tells us, are commonly expended by the stockholder as income without regard to whether they come (1) from recent earnings or (2) from a surplus accumulated (a) from past earnings or (b) from an enhancement in the value of the corporate property.<sup>13</sup> To this he adds that dividends prove the capacity of the corporation to pay them, give hope of more dividends in the future, and quite probably increase the market value of the shares.<sup>14</sup> Neither

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On this question of gain accrued prior to the Amendment but realized thereafter, we find a contrast between corporate dividends and proceeds from the sale of property. *Lynch v. Turrish*, 247 U. S. 221 (1918), held that no part of the proceeds of the surrender of stock for a proportionate share of the corporate assets was taxable income within the meaning of the Income Tax Act of 1913, when the amount received on the dissolution of the corporation was not in excess of the value of the stock on the effective date of the Sixteenth Amendment.

<sup>11</sup> The provisions in the Acts of September 8, 1916, and October 3, 1917, are quoted in Mr. Justice Pitney's opinion in *Lynch v. Hornby*, and held not to be declaratory of the meaning of the Act of 1913, but a change of that meaning as a concession to the equity of stockholders. This concession is continued in section 201 of the Income Tax Act of 1921.

<sup>12</sup> Section 213 of the Income Tax Act of 1921 declares that gross income "includes gains, profits and income derived from . . . interest, rent, dividends, securities, . . . or gains or profits and income derived from any source whatever," with no provision to exclude dividends or any part thereof not bringing gain.

<sup>13</sup> The sentence in which these observations occur is in the paragraph quoted in note 10, *supra*, and apparently, therefore, is directed to the point that it is immaterial that a dividend brings no gain accruing subsequent to the effective date of the Sixteenth Amendment.

<sup>14</sup> The full statement on this point reads as follows:

"We do not overlook the fact that every dividend distribution diminishes by just so much the assets of the corporation, and in a theoretical sense reduces the intrinsic value of the stock. But, at the same time, it demonstrates the capacity of the corporation to pay dividends, holds out a promise of further dividends in the future, and quite probably increases the market value of the shares. In our opinion Congress laid hold of dividends paid in the ordinary course as *de facto* income of the stockholder, without regard to the ultimate effect upon the corporation resulting from their payment." (247 U. S. 339, 346.) This seems to be intended as a justi-



of these justifications touches the issue whether what the stockholder receives is for him a gain.<sup>15</sup> If it is not a gain, the stockholder who expends it as income is depleting his capital. His spending may not be influenced by the nature of the corporate activities which yielded the dividend, but unless he is a prodigal it certainly is influenced by the question whether those activities occurred before or after the date on which he bought his stock. He does not commonly expend as income such dividends as are nothing but a conversion of what he parted with his capital to get. Equally unsatisfactory is the assumption that the dividend increases the value of the stock. It certainly cannot help when it is false, and it is pretty plainly false when the dividend is the fruit of such a sale of corporate assets as that in the case at bar.

Somewhat more specific consideration of the miracle of income without gain appears in *United States v. Phellis*,<sup>16</sup> decided on November 21, 1921. Here a New Jersey corporation transferred all its assets to a Delaware corporation newly created for the purpose. The New Jersey corporation remained in existence and received stock of the Delaware corporation, of which it retained part in its treasury and distributed the rest among its stockholders. These stockholders were held to receive taxable income to the full value of the shares thus acquired, without inquiry into their actual gain from the time of their purchase of the parent stock. The objection that the rearrangement of their stockholdings was not in itself productive of gain was again made and readily dismissed as the "normal and necessary effect of all dividend distributions."<sup>17</sup> With this there can be no quarrel. Mr. Justice Pitney is less happy when he considers the possibility that the stockholders are taxed

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fication only for the point that the fact that the issue and receipt of a dividend is not in itself a gain-producing transaction does not prevent the dividend from being income within the intention of Congress.

<sup>15</sup> See notes 13 and 14, *supra*, for the recognition that Mr. Justice Pitney was not directing his argument to the justification of treating dividends as income beyond the extent to which they bring a gain. In neglecting this issue he was warranted by the fact that the complaining stockholder had owned his stock since 1906 and for all that appears the corporate gain which made the dividend possible had all accrued while he was a stockholder. What he says, however, would, if always true, minimize the importance of inquiring whether a dividend brings a gain to the recipient, and its bearing on the question of gain is therefore material to the present inquiry.

<sup>16</sup> 257 U. S. —, 42 Sup. Ct. 63 (1921).

<sup>17</sup> 42 Sup. Ct. 63, 66 (1921).

on what is not a gain to them from any standpoint. It is easier to approve of his ideal in recognizing "the importance of regarding matters of substance and disregarding forms in applying the provisions of the Sixteenth Amendment and income tax laws enacted thereunder,"<sup>18</sup> than to commend his arguments that this ideal is realized in the opinion rendered.

Though the taxpayer is left without relief, he is given the consolation of sympathy, or perhaps only of "apparent" sympathy. He may be glad to be told that "the possibility of occasional instances of apparent hardship in the incidence of the tax may be conceded."<sup>19</sup> This apparent hardship intrudes when an investor buys shortly before the dividend at a price enhanced by an estimate of the corporate surplus which makes the dividend possible. Then if the surplus is distributed by a dividend, "with corresponding reduction in the intrinsic market value of the shares," and the stockholder is "called upon to pay a tax upon the dividend received, it might look in his case like a tax upon his capital."<sup>20</sup> Then follows the reassurance: "But it is only apparently so."<sup>21</sup> This is predicated on the analysis that in the purchase of shares in a corporation with a surplus pregnant with possible dividends, "presumably the prospect of a dividend influenced the price paid, and was discounted by the prospect of an income tax to be paid thereon."<sup>22</sup> This, it is to be observed, assumes the certainty of a taxable dividend issuing from the corporate surplus. The presumption would have no validity in those cases in which the retention of the surplus was anticipated. Even when an approaching dividend is certain and known of all men, the income tax thereon will vary according to total taxable incomes of the several recipients in the particular year in which the dividend chances to be declared. Conceivably it might happen now and then that a purchaser of stock about to bear an extraordinary dividend will pay to the seller and to the government combined just what the seller would have succeeded in getting if the income tax on the dividend were confined to the actual gain realized by the recipient. That such hypothetical coincidence would be frequent is not to be credited. Mr. Justice Pitney's presumption invokes a prevision and a precision more

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<sup>18</sup> 42 Sup. Ct. 63, 65 (1921).

<sup>21</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>20</sup> *Ibid.*

characteristic of abstract speculation than of actual business transactions.

If the Supreme Court were really persuaded that corporate dividends should be regarded as income only to the extent that they bring the recipient an enhancement of his original investment in the shares from which they issue, it is unthinkable that it would have shut the door to proof that such enhancement is less than the value of the dividend. No one who attaches importance to the particular facts of a particular transaction would foreclose inquiry into the facts and substitute the suggestion that corporate shares are probably increased in value by the subtraction from the corporation of accumulated assets which have contributed largely to that value, and the presumption that the purchase price of shares in a corporation with a surplus reflects a tax on a possible future distribution of that surplus with such precision that an ensuing distribution brings the purchaser no part of that purchase price but only a gain and profit in addition thereto. The moderate and qualified manner in which these suggestions were put forth indicates a want of any firm faith in their merits. They might plead to be passed over in silence were it not for the attendant professions of regard for truth and substance.

There is of course truth and substance in the analysis that a prospective tax on a prospective dividend will depress the price that otherwise would be paid for the stock from which the dividend is anticipated. This, however, is quite different from a presumption that "the prospect of a dividend" which may or may not materialize will be "discounted" by the prospect of varying and unpredictable rates of taxation on the dividends that may in the future be received by different taxpayers. Such discounting would be possible only if the statutory rates of taxation are to remain uniform from year to year world without end and if sales of stock are confined to purchasers who know what rate they will pay on the dividends received. We know in fact that the statutory rates are subject to the whimsicalities of politics and that the taxable income of an individual varies from year to year. All this uncertainty makes certain the want of that enduring inelasticity which is essential to the validity of Mr. Justice Pitney's presumption that the prospect of a dividend is "discounted" by the prospect of an income tax to be paid thereon. Necessarily his bread

of consolation is a stone to those whose dividends come from stock acquired prior to that assured prospect of a tax which he takes for granted as one of the justifications for defeating the hope that the tax might be escaped.

This economic speculation has already lured me beyond my depth, but an additional element tempts me still further. When the prior holder of stock sells at a price greater than what he paid to acquire it, he is subjected to an income tax on the resulting profit. If the prospect of a tax on a threatened dividend influences possible purchasers to offer less for the stock than they otherwise would, the prospect of a tax on the profit from the sale of the stock must influence present owners to hold their stock at a higher price than they would otherwise demand. If one tax pulls the price down, the other pushes it up.<sup>23</sup> If the deterrent effect of taxation

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<sup>23</sup> To illustrate. Suppose no income tax to be reckoned with and one who buys stock for \$100 sells it for \$500, making a profit of \$400. The purchaser then receives a dividend of \$400 and his stock falls in value to \$100. The dividend brings him no profit. Now suppose that the prospective seller and buyer are each subject to surtaxes of 50% but that the sale was made and the dividend paid without taking the taxes into account. The seller yields to the government \$200 of his profit and the buyer yields \$200 of his capital. After this experience they begin to bargain for the sale and purchase of other stock which has also risen from 100 to 500 since the present holder acquired it. Suppose that assured dividends make the stock worth \$500 to the holder provided the corporate surplus is prevented from disgorging a dividend. In anticipation of a dividend, however, a purchaser will pay only \$300 to acquire the stock since the dividend will cost him \$200 in taxes. The owner, however, will not sell for \$300. True, a dividend of \$400 will cost him \$200 in taxes and reduce his capital to \$300. But if he sells for \$300, he realizes a profit of \$200 and pays a tax of \$100. Thus there would remain of his investment only \$200, which is \$100 less than what he would have if he retained his stock and pays a tax on his dividend. Thus on our assumptions of perfect knowledge and perfect calculation on the part of possible sellers and buyers certain to pay a fifty per cent tax on their realized income, there would be an *impasse*. In fact, of course, present holders and possible purchasers would pay varying rates of income tax. The poor could afford to take less for their stock and to pay more to acquire it than could the rich. Now and then an equilibrium would be discovered so that the prospect of the taxes on profit from sale and from dividends might come near enough being "discounted" to overlook slight discrepancies. While the poor we have always with us and in great abundance, it may be doubted whether they have enough stock to sell or enough means to buy stock so that this imaginary equilibrium would amount to much in practice. The assumption that present stockholders are always free to choose between retaining their stock or selling it frequently does not fit the facts. When their stock is pledged some one else decides whether it shall be sold and the price may be appreciably less than what an untrammelled owner would demand. To the extent that in fact stock will be sold for whatever it will bring, the prospect of a tax on a dividend may come

were allowed to get in its perfect work, it might well deter both sales and extraordinary dividends. The influence of a single tax on the realization of an actual gain is inevitable unless genuine income is to be exempted. For a second tax on a subsequent transfer of the same gain there is less to be said. If those in the market and those in the seats of corporate power know that stock in a corporation with an accumulated surplus will be held at a higher price than its earning power alone would command and that those who pay this price must face the possibility of a tax on the transfer of this surplus by an extraordinary dividend, the golden eggs from the corporate goose will become smaller and fewer. By abstracting the deterrent effect of taxation from other factors in the situation, we see that in the abstract few sales would be made. That sales and extraordinary dividends continue to occur must be due to these other factors which frustrate the speculative niceties of the presumed incidence of taxation. These niceties doubtless put salt on the tail of the trend of what will happen in the long run, but they fall far short of an accurate account of the past transactions involved in the cases that come before the courts.

We must therefore reject Mr. Justice Pitney's consolation that the prospect of a tax on a dividend being a tax on capital is only "apparent." There must be instances in which a dividend brings to its recipient something more than a gain to the capital invested in the stock. When this happens, rates based on conceptions of what it is expedient to extract from gains are applied to transfers of capital. The severity of this is apparent. In the case of a stock normally selling at par and paying six per cent dividends, a tax of two per cent on the capital takes as much from the taxpayer as a tax of thirty-three and one-third per cent on the income. In applying to transfers of capital income tax rates fixed on the general understanding that they take toll only from gains from capital, we get a burden on capital many times as great as that which

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close to being discounted. This, however, does not annihilate the hardship of treating dividends as income beyond the extent of the gain which they bring to the recipient. It merely shifts the burden. The seller not only pays a tax on the profit actually realized but is deprived of additional profit that he would have commanded but for the purchaser's prospect of a tax on a return to him of part of his capital. *Quere*, whether these double taxes, one of which is not confined to gains and profits, may not cost taxpayers more than they yield the government in cases where an owner of stock is forced to sell it for what he can get.

the government professes or in general attempts to impose. The truth and substance of such a result will appear more readily if we assume that an owner of property worth \$200,000 transfers the title to a trustee and a year later receives back from him the title to one-half of it. This re-transfer would not be thought of by any one as an income-producing transaction. It would not give rise to an income tax. If, however, this \$200,000 worth of property is exchanged for corporate stock with a par value of 100, and a year later the corporation transfers one-half of its assets to its stockholders, a foolish virgin who chose to participate in this second enterprise rather than in the first may under existing federal law pay \$65,000 to the government while her wiser sister would pay nothing.

Here is food for thought for those who cherish the fancy that a corporation is a person entirely distinct from those fleshly creatures who are its stockholders. Mr. Justice Pitney seems to credit the notion when he says in *Lynch v. Hornby*<sup>24</sup> that "the stockholder is, in the ordinary case, a different entity from the corporation, and Congress was at liberty to treat the dividends as coming to him *ab extra*, and as constituting a part of his income when they came to hand."<sup>25</sup> He applies it when he concludes in *United States v. Phellis*<sup>26</sup> that "in short, the question whether a dividend made out of company profits constitutes income of the stockholder is not affected by antecedent transfers of the stock from hand to hand."<sup>27</sup> Perhaps the notion is useful and perhaps the application of it to the income tax on dividends is necessary. I am told that advisers of the Treasury sought to find some way by which recipients of extraordinary dividends might be taxed on no more than the gains which the dividends bring to them, and that they gave it up in despair because of the practical difficulties involved in the computation. The same difficulties would seem to be presented when a recipient of a stock dividend later sells the stock thus received.<sup>28</sup> Some of them, at least, appear when there is a sale of a portion of stock bought at different times at varying prices.<sup>29</sup> One can appreciate, however, that these unavoidable difficulties

<sup>24</sup> Note 7, *supra*.

<sup>25</sup> 247 U. S. 339, 344 (1918).

<sup>26</sup> Note 16, *supra*.

<sup>27</sup> 42 Sup. Ct. 63, 66 (1921).

<sup>28</sup> See MONTGOMERY, INCOME TAX PROCEDURE, 1920, pp. 490-492.

<sup>29</sup> *Ibid.*, pp. 364-365.

may be so burdensome that officials will be reluctant to add to them when the Supreme Court does not insist upon it. There may be satisfactory reasons why the court should refrain from insisting upon it. These reasons may be based on the truth and substance underlying the conduct of corporate business and the transfers of corporate stock. Practical convenience may require that the kaleidoscopic shuffling of stockholders be disregarded, notwithstanding the occasional hardship that may be involved. There still remains, however, the anomaly of income without gain or profit as evidence of the magic that incorporation may work. To this may be added the sleight of hand by which a corporate reorganization puts stock into a hat and pulls out other stock so different that the Supreme Court cannot see the identity.

## II

If no dividend were regarded as income beyond the extent to which it brings a gain to the recipient, the distinctions between dividends that are realizations of income and those that are not would be a matter of minor concern. Nothing in the nature of things makes separation from capital one of the requisites of income from capital. From a practical common-sense point of view there is something strange in the idea that a man may indefinitely grow richer without ever being subject to an income tax. Idle land may increase in value \$10,000 a year because of realizable though unrealized increase in rent-producing capacity, yet under the realization requisite this land produces no income until it is sold. Then all the long-accruing gain becomes income for the year in which it is realized by sale and is subject to the same high surtax rates that would be applied to the same amount of annually recurring rent. The insistence that there is no income from capital prior to separation from capital may in practice work as much hardship on taxpayers as it prevents. Professor Haig has argued strongly for a broader conception of income which relaxes the test of realization or separation.<sup>30</sup> Mr. Eustace Seligman has pointed out the difficulties which the requirement of realization introduces.<sup>31</sup> Both

<sup>30</sup> "The Concept of Income — Economic and Legal Aspects," in *THE FEDERAL INCOME TAX* (Columbia University Press, 1921), pp. 1-28.

<sup>31</sup> In "Implications and Effects of the Stock Dividend Decision," 21 *COLUMBIA L. REV.* 313-332. In so far as the difficulties suggested by Mr. Seligman are predi-

writers recognize that wisdom and justice may dictate that income taxes on various kinds of gains should be postponed until those gains are realized. Their objections are to the judicial insistence that prior to realization there is no income within the meaning of that term in the Sixteenth Amendment. But the Supreme Court has willed and disposed of the constitutional issue. Gain is not income in the constitutional sense until it is "derived" or "drawn from" that in which it has been inhering. The *Stock Dividend Decision* has been discussed so fully<sup>22</sup> that further comment would be superfluous. It is sufficient here to accept its conclusion as a datum and to proceed to consider the extent to which the applications of the test of realization are the product of truth and substance and the extent to which they are the product of form.

cated on the assumption that the court holds that in order to have income, gain must result from the act of converting part or all of the principal, the difficulties vanish with the rejection of the unwarranted assumption. Other dangers foreseen by Mr. Seligman are also unreal. He suggests that the separation test precludes the imposition of an income tax on the recipient of gifts or inheritances or on profit realized by the sale of assets so received. Clearly any gift comes to a donee *ab extra* in a much truer sense than a cash dividend comes to a stockholder, as in *Lynch v. Hornby*, note 10, *supra*. A gift is neither the product of nor new evidence of a previously existing interest, as is a stock dividend. If the gift is not treated as income when received, the proceeds from its later sale may be treated as income under the decisions that a sale yields income to the extent that the price received exceeds the original cost to the seller. If the entire proceeds of the sale of property received by gift may be taxed as income, *a fortiori* the government may treat as income such part of the price as exceeds the value of the property when transferred by gift or such part as exceeds the original cost to the donor. The question whether the rental value of a house occupied by its owner may be taxed as income is more doubtful, but the *Stock Dividend Decision* is certainly not controlling against holding that use and occupancy is the equivalent of rent, as occupancy afforded by an employer is the equivalent of salary. Mr. Seligman is sound in his analysis that the separation test of the *Stock Dividend Decision* precludes the imposition of an income tax on dividends in preferred stock or in bonds of the declaring corporation or on the receipt of the right to subscribe for new shares and that it limits an income tax on the sale of such rights to the gain arising out of the entire transaction from the time of the purchase of the shares from which the rights issued.

<sup>22</sup> In addition to discussions cited elsewhere in this article see Charles E. Clark, "Eisner v. Macomber and Some Income Tax Problems," 29 *YALE L. J.* 735; Fred R. Fairchild, "The Stock Dividend Decision," 5 *BULLETIN OF THE NATIONAL TAX ASSOCIATION*, 208; Thomas Reed Powell, "The Judicial Debate on the Taxability of Stock Dividends as Income," 5 *BULLETIN OF THE NATIONAL TAX ASSOCIATION*, 247; and "Stock Dividends, Direct Taxes, and the Sixteenth Amendment," 20. *COLUMBIA L. REV.* 536; A. M. Sakolaki, "Accounting Features of the Stock Dividend Decision," 5 *BULLETIN OF THE NATIONAL TAX ASSOCIATION*, 212; Edward H. Warren, "Taxability of Stock Dividends as Income," 33 *HARV. L. REV.* 885; and editorial



In his dissent in *Eisner v. Macomber*<sup>23</sup> Mr. Justice Brandeis adduces the substantial similarity between two ways of cutting corporate melons without decreasing the assets of the corporation. One is a cash dividend coupled with a preferential right to subscribe for new shares. The cash dividend is held taxable income, and the fact that the cash is used to buy new shares is not material. The other method combines these two transactions. The corporation keeps its assets instead of paying them out and getting them back again, but it gives to its stockholders additional stock to represent the former corporate surplus now transferred to capital. The stockholder who receives a stock dividend is in the same situation as one who uses a cash dividend to buy new shares. In all substance, therefore, urges Mr. Justice Brandeis, since the latter has received income, the former has also. It cannot matter, he adds, that the dividend is in stock and not in cash, since it is already established that income is derived by a dividend paid by one corporation in the stock of another. On the other hand, Mr. Justice Pitney for the majority adduces the substantial similarity between the state of the recipient of a stock dividend and that of the recipient of no dividend. Neither receives assets from the corporation. The interest of each is still represented by stock in the corporation. One receives an addition to the number of his shares and the other does not, but the value of the new shares lessens *pro tanto* the value of the old. Stock dividends necessitate an increase in the number of outstanding shares of the corporation so that the fractional interest of the stockholder remains the same whether he gets a stock dividend or no dividend. If, therefore, one who gets no dividend receives no income, one who gets a stock dividend receives no income. Mr. Justice Pitney's substantial similarity is as substantial as Mr. Justice Brandeis's substantial similarity. When they lead to opposite results, we are inclined to suspect some intrusion of form as a criterion of income or no income.

This inclination is even more pressing when we come to the cases in which corporations have paid dividends in the stock of other corporations or in which corporations have rearranged their financial relations with other corporations. The two classes of cases

notes in 18 MICH. L. REV. 689, 4 MINN. L. REV. 462, 68 U. OF PENN. L. REV. 394, 6 VIRGINIA L. REG. (N. S.) 220, and 29 YALE L. J. 812.

<sup>23</sup> 252 U. S. 189 (1920).

present somewhat different problems, but the problems and their solution invite comparison. The first group of cases involves three parties; the second, only two. Both groups present the issue whether the relations between two corporations are such that they should be regarded as in substance identical. The issue in the second group of cases arose under the Act of 1913 by which intercorporate dividends were taxed as income of the receiving corporation. The taxation of such dividends was sustained in *Brushaber v. Union Pacific R. Co.*<sup>34</sup> as against the objection that it discriminated against corporations in favor of individuals when the latter did not have to include dividends in the assessment of the normal tax. No objection seems to have been made on the ground that the burden of all the taxes is borne by the stockholders of the corporation having the last place in the receiving line and that it is artificial in the extreme to treat every intercorporate payment as a distinct taxable gain. Congress, however, has recognized the force of this objection, and corporations are not now taxed on dividends received by them.<sup>35</sup>

When corporations were taxable on dividends, two corporations convinced the Supreme Court that what was in form a dividend was not one in substance and was therefore not within the intent of the term as used by Congress. In *Southern Pacific Co. v. Lowe*<sup>36</sup> the plaintiff corporation owned all the stock of the Central Pacific Railway Company and was the lessee and operator of all its property. The Central Pacific kept no bank account and all its funds were in possession of the Southern Pacific. Prior to 1913 the Central Pacific showed upon its books a surplus consisting chiefly of sums due from the Southern Pacific under the terms of the lease. In 1914 by bookkeeping entries the Southern Pacific acknowledged a dividend from the Central Pacific and the Central Pacific acknowledged payment by the Southern Pacific of its indebtedness. These bookkeeping entries were all that took place. The court held that the dividend was an appearance and not an actuality and that no taxable income was received thereby. The situation in *Gulf Oil Corporation v. Lewellyn*<sup>37</sup> was substantially similar except that the stockholding corporation did not manage the busi-

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<sup>34</sup> 240 U. S. 1 (1916).

<sup>35</sup> See section 234 (a) (6) of the Acts of 1918 and of 1921.

<sup>36</sup> 247 U. S. 330 (1918).

<sup>37</sup> 248 U. S. 71 (1918).

ness or have possession of the property of its subsidiaries. The dividend here took place only through bookkeeping entries. The parent corporation had allowed its subsidiaries to keep their earnings and thereby to accumulate a surplus. Part of this surplus was embodied in debts due from some subsidiaries to others. The so-called dividend was a transfer of these debts by the creditor subsidiaries to the parent corporation. This too was held to be mere bookkeeping and not a realization of income.

Turning to the reasoning of the opinions we may dismiss the reliance in the *Southern Pacific* case on the fact that the parent had all the assets and managed all the business of its child, since the absence of such elements in the *Gulf Oil* case was dismissed as immaterial. We should too, it would seem, dismiss the fact that the gain of the subsidiaries accrued prior to the effective date of the Sixteenth Amendment, since genuine dividends paid to stockholders after the Amendment may be taxable income even though they are the fruit of corporate gains accrued prior to the Amendment.<sup>38</sup> Yet Mr. Justice Pitney in the *Southern Pacific* case lays stress on what he calls the evident purpose of Congress "to refrain from taxing income that accrued prior to March 1, 1913."<sup>39</sup> There is room for dispute as to what he means by this. Since gains and profits are not income until received or realized, it is confusing to speak of "income accrued." If it means gain accrued but not realized, it is incorrect to call it income. If it means "income received," it is safer to say "income received." Though Mr. Justice Pitney leaves us somewhat uncertain as to just what he has in mind, the probability is that he means that the profits of the Central Pacific were in substance income received by the Southern Pacific when received by the Central Pacific.<sup>40</sup> If this is the Supreme

<sup>38</sup> *Lynch v. Hornby and Peabody v. Eisner*, note 4, *supra*.

<sup>39</sup> 247 U. S. 330, 334-335. Later at page 337 it is said:

"We base our conclusion in the present case upon the view that it was the purpose and intent of Congress, while taxing 'the entire net income arising or accruing from all sources' during each year commencing with the first day of March, 1913, to refrain from taxing that which, in mere form only, bore the appearance of income accruing after that date, while in truth and in substance it accrued before . . ."

<sup>40</sup> "That the dividends in question were paid out of a surplus that accrued to the Central Pacific prior to January 1, 1913, is undisputed; and we deem it to be equally clear that this surplus accrued to the Southern Pacific Company prior to that date, in every substantial sense pertinent to the present inquiry, and hence underwent nothing more than a change of form when the dividends were declared." (247

Court's idea, it follows that whenever two corporations are in substance identical, no transfer from one to the other can be income. Mr. Justice Pitney lends countenance to this inference,<sup>41</sup> but at the same time he warns us against it by saying that "the case turns on its very peculiar facts."<sup>42</sup> This warning leaves it open to the court to say that the case stands on a combination of the peculiar character of the dividend transaction and the peculiar interrelation of the corporations and not on the latter alone.

This opportunity is not foreclosed by anything in Mr. Justice Holmes's opinion in the *Gulf Oil* case. There is reference to the fact that the debts transferred from the subsidiaries to the holding company were "all enterprise debts due to members,"<sup>43</sup> and this is one of the circumstances which are said to "unite to convince us that the transaction should be regarded as bookkeeping rather than as 'dividends declared and paid in the ordinary course by a corporation.'"<sup>44</sup> Here, as in the *Southern Pacific* case, no checks were drawn. Entries on the books were all that was necessary to make the titular transfer. Thus neither case nor both combined can be said securely to establish that the complete identity of two corporations through ownership and management of one by the other prevents actual transfers from being taxable dividends. Nor do they establish that two corporations will be regarded as identical merely because one is completely owned by the other. The Southern Pacific Company ran the business of the Central Pacific, and the companies involved in the *Gulf Oil* case "constituted a single enterprise carried on by the petitioner."<sup>45</sup> Furthermore, it is to be

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U. S. 330, 335-336). The surplus that accrued to the Central Pacific came from earnings duly received and was therefore as to it realized income in the constitutional sense. The statement quoted above carries the thought that whatever happened to the Central Pacific happened contemporaneously to the Union Pacific since the two were one and the same.

<sup>41</sup> The quotation in note 39, *supra*, continues:

[We base our conclusion in the present case upon the view . . . ]; "and upon the fact that the Central Pacific and the Southern Pacific were in substance identical because of the complete ownership and control which the latter possessed over the former, as stockholder and in other capacities. While the two companies were separate legal entities, yet in fact, and for all practical purposes, they were merged, the former being but a part of the latter, acting merely as its agent and subject in all things to its proper direction and control."

<sup>42</sup> 247 U. S. 330, 338.

<sup>43</sup> *Ibid.*

<sup>44</sup> 248 U. S. 71, 72.

<sup>45</sup> *Ibid.*

noted that both cases rest solely on the interpretation of the statute. They do not hold that such transfers as they involved could not be income under the Sixteenth Amendment. Substance prevailed over form where form was filmy and where Congress had not explicitly declared that form should control, but the victory was only in a minor skirmish and not in a major engagement.

This brings us to the second group of cases, in which three parties are involved. A stockholder receives from a corporation a dividend in the stock of another corporation. In the three cases to be considered the dividend-receiving stockholder has been an individual and not a corporation. This individual was but one of many stockholders, so that there was no room for the contention that he was in substance identical with the dividend-paying corporation. Had the recipient of the dividend been a corporation taxable on intercorporate dividends under the Act of 1913, there might have been two alleged identities to take into account and these two might have merged into one. In addition to the substantial identity of the dividend-paying and dividend-receiving corporations, as in the *Southern Pacific* case and the *Gulf Oil* case, there might have been alleged identity of the corporation paying the dividend and the corporation in whose stock the dividend was paid and it might have been urged that all three corporations were in substance one and the same. Such triplicate corporate unity will not present itself in disputes under the Sixteenth Amendment as to the taxability of dividends so long as intercorporate dividends continue to be exempt from the federal income tax. It may of course intrude in complaints against state income taxes under statutes which take toll from intercorporate dividends. We may, too, get an alleged three-headed calf as an exhibit for recognition as a single calf under the Sixteenth Amendment if we have a case in which the individual stockholder controls and manages both the corporation whose stock he receives and the corporation from which he receives it. No such case has yet appeared. The problem to date is restricted to complaints that the identity of the corporation paying the dividend and the corporation in whose stock it is paid makes the dividend in substance one in the stock of the paying corporation and therefore not taxable income under the *Stock Dividend Decision*.

This complaint was not made in *Peabody v. Eisner*,<sup>46</sup> in which the Union Pacific Railroad Company paid to its stockholders an extraordinary dividend in the stock of the Baltimore & Ohio Railroad Company. The relations between the Union Pacific and the Baltimore & Ohio are not mentioned. Apparently Mr. Peabody contended that a dividend in stock is a stock dividend whether the stock be that of the declaring corporation or of some other. This was curtly answered by saying that "the dividend of the Baltimore & Ohio shares was not a stock dividend but a distribution *in specie* of a portion of the assets of the Union Pacific, and is to be governed for all present purposes by the same rule applicable to the distribution of a like value of money."<sup>47</sup> The *Southern Pacific* case, on which the district court had relied to spare Mr. Peabody, was distinguished by Mr. Justice Pitney on the ground that it involved the substantial identity of the payer and the receiver of the dividend, whereas in the present case the receiver was an ordinary stockholder whose right was "merely to have the assets devoted to the proper business of the corporation and to receive from the current earnings or accumulated surplus such dividends as the directors in their discretion may declare; and without right or power on his part to control that discretion."<sup>48</sup> This of course looks at the stockholders one by one and not collectively, though all of them receive a dividend when dividends are declared and all of them collectively have ultimate power to control the corporation. In this, however, there is no more lack of substance than in any case in which a corporation and its stockholders are treated as distinct. Nevertheless it suggests that a keen scent for the substantial might not lose the trail across the formal gulf between the complete ownership and control of one corporation by another and the complete ownership and control of the second corporation by its collective stockholders.

The cases in which a stockholder adduced the substantial identity of the corporation from which he received a dividend and the corporation in whose stock the dividend was paid were decided on November 21, 1921. The facts of *United States v. Phellis*<sup>49</sup> have already been stated. A New Jersey corporation gave birth to

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<sup>46</sup> 247 U. S. 347 (1918).

<sup>48</sup> *Ibid.*, 349.

<sup>47</sup> *Ibid.*, 349-350.

<sup>49</sup> 257 U. S. —, 42 Sup. Ct. 63 (1921).

a Delaware corporation, to which it turned over its assets and its business and from which it received all the stock issued. The New Jersey corporation remained in existence as an empty shell, retaining enough of the Delaware stock to maintain its original capital unimpaired and to provide for its outstanding obligations, and turning the rest over to its stockholders to the extent of two shares of Delaware for each share of New Jersey held by them. In *Rockefeller v. United States*<sup>50</sup> some oil companies organized new corporations to which they turned over their pipe lines. Some of the stock in the pipe-line companies went directly to the stockholders of the oil companies, and some of it went to them through the oil companies by way of dividends. The two methods of distribution were held to be substantially similar<sup>51</sup> and the stock of the newly created pipe-line companies thus received by the stockholders of the oil companies was held to be income to its full value without inquiry into the actual gain to the stockholders on their original investment.

How Congress now analyzes the substantial nature of such corporate shifts and segmentations is apparent from the provision in the Income Tax Act of 1921 as to the swap of stock in one corporation for that in another made from its rib or taking its place. Formerly such a swap was treated as an income-producing transaction to the extent that the new stock brings to its recipient a gain on his capital investment.<sup>52</sup> Later a compromise provision recognized the new stock as in effect a continuation of the old to the extent that the par value of the new does not exceed the par value

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<sup>50</sup> 257 U. S. —, 42 Sup. Ct. 68 (1921).

<sup>51</sup> "Under the facts as recited we deem it to be too plain for dispute that in both cases the new pipe-line company shares were in substance and effect distributed by the oil company to its stockholders; as much so in the case of the Kansas company, where the new stock went directly from the pipe-line company to the stockholders of the oil company, as in the case of the Ohio company, where the new stock went from the pipe-line company to the oil company and by it was transferred to its stockholders. Looking to the substance of things the difference is unessential. In each case the consideration moved from the oil company in its corporate capacity; the new company's stock issued in exchange for it was distributed among the oil company's stockholders in their individual capacity, and was a substantial fruit of their ownership of stock in the oil company, in effect a dividend out of the accumulated surplus." (42 Sup. Ct. 68, 69.)

<sup>52</sup> See Robert H. Montgomery, "Reorganizations and the Closed Transaction," in *THE FEDERAL INCOME TAX* (Columbia University Press, 1921), at page 126.

of the old.<sup>53</sup> Such disregard of actual values yields absurd incongruities. These are now done away with by Section 202 (c) (2) of the Act of 1921, which declares that no gain or loss shall be recognized when in the reorganization of two or more corporations a person exchanges his old stock for new. Moreover reorganization is liberally defined.<sup>54</sup> Thus henceforth when there is a fair approach to identity between the old corporation and the new, the exchange of the old stock for the new is not deemed a realization of the actual gain that has accrued to the stockholder since his original investment. The new statute extends no such grace to dividends arising out of corporate reorganizations. It leaves us with the absurd incongruity of exempting exchanges no matter how much the holdings of the stockholder have enhanced in value since their acquisition and of taxing dividends even though no enhancement has accrued.<sup>55</sup> The constitutional power to deal thus rudely with reorganization dividends is affirmed in the *Phellis* and *Rockefeller* cases in which the reorganizations involved were even more formal than ones which Congress now overlooks in its section dealing with exchanges of new stock for old.

The decisions in these cases were by votes of seven to two and six to two. In the *Rockefeller* case Mr. Justice Clarke did not sit. In both cases Justices McReynolds and Van Devanter dissented and the former filed a brief opinion in the *Phellis* case which appears to go on constitutional grounds when it says that the prin-

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<sup>53</sup> *Ibid.*, pp. 126-131.

<sup>54</sup> "The word 'reorganization,' as used in this paragraph, includes a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all classes of stock of another corporation, or of substantially all the properties of another corporation), recapitalization, or mere change in identity, form or place of organization of a corporation (however effected); . . .

<sup>55</sup> Not only this, but it apparently seeks to prevent its kindness towards exchanges from being transferred to dividends by the device of issuing stock dividends and then exchanging stock so received for stock in a new corporation born of a reorganization. Thus Section 201 (d) of the Act of 1921 declares:

"A stock dividend shall not be subject to tax but if after the distribution of any such dividend the corporation proceeds to cancel or redeem its stock at such time and in such manner as to make the distribution and cancellation or redemption essentially equivalent to the distribution of a taxable dividend, the amount received in redemption or cancellation of the stock shall be treated as a taxable dividend to the extent of the earnings or profits accumulated by such corporation after February 28, 1913." But for this provision, in such situations as those involved in the *Phellis* case and



ciple of *Eisner v. Macomber*<sup>56</sup> seems in conflict with the decision announced. This is preceded by quotation from the opinion of the Court of Claims which calls the transaction merely a financial reorganization and remarks that it seems incredible that Congress intended to tax as income a transaction that produced no gain or profit. This ought not to be so incredible to any one familiar with the previous status of extraordinary dividends in cash or property. It is high time that judges and scholars all join in singing a *requiescat* over the foolish idea that a conversion of wealth from one form to another must be a creator of gain in order to yield income. Mr. Justice McReynolds would have done well to have refrained from devoting a third of his opinion to repetition of this folly and to have used the space thus saved to elaborate his reliance on the *Stock Dividend Decision* and to expound more fully his declared assumption that "the statute was not intended to put an embargo upon legitimate reorganizations when deemed essential for carrying on important enterprises."<sup>57</sup> Congress has certainly shown no inclination to refrain from taxing any and every dividend that transfers corporate gains accrued since March 1, 1913. When doubt arose as to whether it meant to tax stock dividends, it removed the doubt by an explicit affirmative declaration. *A fortiori* it must have desired to tax dividends in the stock of another corporation to the full extent that the Supreme Court would permit. It still fails to modify this intention notwithstanding its kindlier

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the Rockefeller case, if the original corporations turn their surplus into capital and issue stock dividends and the stock thus received is then surrendered and the stock in the new corporations acquired, neither the stock dividend nor the subsequent exchange would yield taxable income. Possibly this provision might be construed not to apply to exchanges through reorganization. It may be argued that this method of change is not "redemption or cancellation" and with still more force it may be urged that the word "amount" indicates that Congress had in view a redemption for cash. If such arguments should prevail it would be because of judicial favor toward the result rather than because of any literary compulsion.

The constitutionality of the provision as applied to redemption for cash may be questioned. If the court thinks of the issue of the stock dividend as a dead and buried transaction that cannot be disinterred, it will hold that the cash received on redemption is income only to the extent that it brings a profit on the original investment in the corporation. It may, however, liken the enterprise to that of the Grand Old Duke of York and hold that the journey up the hill and down again is a little frolic that may be disregarded. The decision in the *Stock Dividend Case* was in terms confined to *bona fide* stock dividends.

<sup>56</sup> Note 33, *supra*.

<sup>57</sup> 42 Sup. Ct. 63, 68.

disposition towards profit from the exchange of stock in the course of a corporate reorganization. There can be no fair doubt that the only issue seriously before the court in the *Phellis* case and the *Rockefeller* case was one of constitutional law and not of statutory construction. This issue was whether or not the old and the new corporations were in substance one and the same so that the receipt of new stock for old is no more a realization of income within the requirement inferred from the Sixteenth Amendment than is the receipt of a dividend in the stock of the declaring corporation.

In meeting this issue Mr. Justice Pitney insists that the old and the new corporations are substantially separate and distinct. In the *Phellis* case he emphasizes the fact that the new corporation is organized in another state which, he says, necessarily imports a different measure of responsibility to the public and presumably different legal relations between the stockholders and between them and the corporation. He thinks it worth mentioning that the new corporation has an authorized capital four times that of the old, and he clinches the matter by saying that the very fact that the assets were transferred from the old corporation to the new evidences the actual separateness of the two. The identity of stockholders and of officers in the two companies is dismissed because not certain to continue.

There is more to the opinion, but when analyzed it is either mere assertion of the separateness of the two corporations or a description of the situation based on the assumption of such separateness. For example, it is said to be erroneous to test the question whether income has been derived by regarding alone the general effect of the reorganization on the aggregate body of stockholders, since the liability of the individual stockholder to pay an income tax depends on the effect of the transaction on him as an individual. The effect on the individual in the two cases is said to be that a part of the corporate surplus has become transferred from the corporation to him in such form that he may sell it and still retain his proportionate share of the old corporation. True enough, if the old and the new corporations are substantially distinct; false, under the *Stock Dividend Decision*, if the old and the new are substantially one and the same.

When in the *Rockefeller* case Mr. Justice Pitney says that the facts are in all essentials indistinguishable from those in the *Phellis*

case, he silently eliminates the importance there attached to the fact that the two corporations were organized in different states, since the oil companies organized their pipe-line companies in the same states to which they owed allegiance. In this case too the opinion assumes the point at issue when it says that the pipe-line stock represents assets of the oil companies capable of division among the stockholders as the assets themselves were not. If the pipe-line stock was in reality the same as newly created oil stock, all that was capable of division was a new evidence of an interest already possessed.

Further exposition of the opinions is unnecessary. The results speak for themselves. The issue was whether the dividend-paying corporations distributed in substance their own stock or the stock of a distinct corporation. The time of distribution was the time to determine whether the two corporations were in substance identical. At that time two of the old corporations owned all of the stock of two of the new. The other old corporation controlled the disposition of the stock of the new. The officers of one of the old corporations were the officers of one of the new. Continuing identity *vel non* of stockholders is beside the point. It took the distribution to create the initial identity. If the distribution was in substance in stock of the declaring corporation, it was in substance a stock dividend and so not duly realized income. As well might it have been said that the Southern Pacific and the Central Pacific were not in substance identical because the former might in the future part with some or all of its stock in the latter. They were identical then and that was enough. If it be said that their past identity was material, it may be said that the pipe-line companies came from the womb of the oil companies and that from birth until the time when their status ceased to be material they were completely subject to parental control.

It is worthy of note that Mr. Justice Pitney makes no attempt to distinguish the intercorporate relations in these two cases from those in the *Southern Pacific* case and in the *Gulf Oil* case. He refers to those two cases as evidence of the court's respect for substance and disregard of form, but this is all. The question arises: Would the court have held that a dividend paid by the Southern Pacific in the stock of the Central Pacific is a stock dividend rather than a dividend in stock? One suspects not. Would it have held

that a transfer from the Central Pacific to the Southern Pacific of cash or of a trolley line or of stock in still a third corporation was not income to the transferee? Here one is more doubtful. Such dividends could not be called mere bookkeeping transactions, as were those in the actual case and in the *Gulf Oil* case. Those cases could therefore be distinguished. Yet one suspects that the court might have recognized that intercorporate dividends of any kind are poor things to regard as income and so have held that any transfers between corporations substantially identical are to be treated as purely formal. The question will not arise for adjudication now that Congress leaves intercorporate dividends alone. In its wisdom it finds all such dividends purely formal, whether the corporations are identical or not.

No one with a spark of realism in his soul can doubt that the oil companies and the pipe-line companies, the New Jersey Dupont concern and the Delaware Dupont concern, were in all substance as completely one and the same as were the Southern Pacific and the Central Pacific, the Gulf Oil holding company and its subsidiaries. The fact that Mr. Justice Pitney does not venture on the perilous task of making any distinction is in itself significant. If the Supreme Court were ever to look through the corporate entity to extend the *Stock Dividend Decision* to dividends paid in the stock of a technically distinct corporation, it cannot justify its refusal to do so in the *Phellis* case and the *Rockefeller* case. It certainly would have held that the corporations in question were identical within the prohibitions of the Commodities Clause of the Hepburn Act.<sup>58</sup> It ventured no suggestion as to what was lacking to complete their identity. One sundering element stressed in one case was missing in the other and its absence was passed over in silence. The formal and unsubstantial recital and analysis in the opinions is pretty clear proof that form alone was regarded as sufficient to ward off the substantial implications of the *Stock Dividend Decision*. It is therefore difficult to resist the conviction that these most recent interpretations of the Sixteenth Amendment mean that Congress may always treat two corporations as separate and distinct for the purpose of taxing as income a dividend paid by one in the stock of the other.

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<sup>58</sup> See *United States v. Lehigh Valley R. R. Co.*, 220 U. S. 257 (1911).

With such a decision standing alone there need be no quarrel except as it adds to the instances in which gains or profits are not requisite to income. It has long been part of our law that the courts will disregard the corporate entity only in exceptional cases, and these chiefly to prevent the corporate cloak from shielding wrong. It would be going far, therefore, to declare that the Constitution requires Congress to disregard the corporate entity in deciding whether income has been realized, when the requirement of realization itself is not specifically set forth in the Constitution. Stockholders who are taxed only on their actual gains have little ground of complaint against a decision that a formal alteration of the evidence of their capital is a sufficient realization of that gain. It may be unpleasant and even painful to have to pay a tax now, but in the long run it is easier to bear progressive rates on gains accruing during brief periods than to wait till the gains are so great that they mount to the highest brackets of the schedule. The hope that realization may be postponed forever is certainly not one to foster. If realization is bound to come, it is easier to have it come in dribblets. The argument may not apply to Mr. Rockefeller with his sad prospect of the highest brackets for himself and his heirs forever, but it holds good for many of his more fortunate fellows. We may then commend a decision that dividends in stock of other corporations are dividends in property even though the two corporations involved are flesh of the same flesh.

The temptation to criticize assails us when this result has to be compared with others and we are asked to believe that the distinctions are distinctions of substance and not of form. The substance, if substance it be, is an arid, Pickwickian, legal sort of substance and not a common-sense, matter-of-fact, economic sort of substance. The mythical but discerning man on the street would be hard put to it to tell why Mr. Rockefeller's draught from the cruse is income when Mrs. Macomber's is not. He would be puzzled to know why the Gulf Oil Corporation and its satellites were one and the Standard Oil Company and its creature were two. He might when duly initiated into the mysteries perceive the distinctions of form which the cases recognize and establish; but when assured that they are distinctions in substance and in truth, he would ask Pilate's question in bewilderment and despair.

This is not to say that the applications of the distinctions are

without pragmatic merit. Take, first, the difference between a dividend paid by one corporation to another and a dividend paid to an individual by the second corporation in the stock of the first. If, as it seems, these two transactions will be treated differently even when the intercorporate relations are indistinguishable, there is wisdom in finding the intercorporate dividend mythical and the dividend to an individual authentic. We may well disregard the outpour from one reservoir to another and still heed the flow at the faucet. There is something to be said, too, for drawing the line between dividends in the stock of the declaring corporation and those in the stock of any other however closely associated with the first. The requisite of realization is in part wholesome and in part noxious. There are so many varying modes of altering the embodiment of one's wealth or profits that applications of the test of realization are necessarily somewhat arbitrary. If some favor the government and others favor the taxpayer, this appeals to a sense of fairness when the situation is such that practical considerations make it impossible to be fair and without favor in each individual case. The distinction between some formal payment from the corporate treasury and no payment therefrom is at least a workable one. Cases on opposite sides of the line will be alike in economic substance, but the line, however formal, is clear and straight so that corporate managers and stockholders are advised of the side on which their acts will fall.

So our criticism is not so much of what the judges have done as of what they have said and left unsaid by way of justification. The practical necessity of purely arbitrary distinctions is too seldom explicitly recognized. The practical wisdom of choosing one alternative rather than another is too seldom expounded. Consistency is professed when inconsistency is present and unavoidable. The situation often demands a series of compromises, and compromise is based on a balancing of opposing, not of concurring, considerations. The law knows a number of situations in which one suspects that courts seek to preserve a balance by leaning now to one side and now to the other. So it may well be in determining whether there has been an adequate realization of income. If the taxpayer is favored in respect to one type of dividend, why not favor the government in respect to another? Let one close deci-

sion go in favor of the home team and the next in favor of the visitors. Such considerations must influence judicial umpires as they influence others, but they introduce incongruities which are inconsistent with the conception of the law as a company of automatic universals that never encroach on each other's preserves. Therefore we have sophistical professions of the absence of incongruity bolstered up by recourse to artificiality. Instead of confessing that the artificialities are evoked to make desirable compromises without explicitly exposing the mythical assumption of perfect symmetry in the law, the judges too often exalt the artificialities as inherent substances that constrain them whether they will or not. Thus the substance of the law sometimes takes on the attributes of the substance of the schoolmen. Now and then this deters courts from reaching results that they know to be the best. Even when this is avoided the artificiality is not saved from sin. There still remains the reproach if not the contempt which the profane feel toward an institution whose votaries can revel in a realm of make-believe with such seriousness as to invite the comment that their art is that "of being methodically ignorant of what every one knows to be true."

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CRIMINAL CONSPIRACY<sup>1</sup>

IN those fields of industrial controversy where passion runs high and where class conscious groups are arrayed in bitter fight the one against the other, where each side with difficulty is restrained from open war and induced to substitute therefor settlement by judicial action, the law has a very difficult and delicate function to fulfill. Under the terrific thrust and strain of some of the most tremendous social issues of the day, it is of far more than usual importance that the law applicable to labor controversies should express principles of justice evident to and accepted by the great mass of mankind; above all else, such law must be thoroughly predicable. Otherwise class groups will see in legal decisions only the prejudice and bias of the individual judges; and popular respect for the law and its administration by the courts will wane to a possible danger point.

A doctrine so vague in its outlines and uncertain in its fundamental nature as criminal conspiracy lends no strength or glory to the law; it is a veritable quicksand of shifting opinion and ill-considered thought.<sup>2</sup> That this uncertain doctrine should be seized upon, perhaps because of its very vagueness, as one of the principal legal weapons with which lawyers press their attack in labor controversies and in which judges find an easy and frequent support

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<sup>1</sup> A most admirable book dealing with the subject of Criminal Conspiracy is that of R. S. WRIGHT, *THE LAW OF CRIMINAL CONSPIRACIES* (London, 1873). This has been much relied on in the preparation of this article.

A scholarly account of the early historical development of Conspiracy has just been published as one of the Cambridge Studies in English Legal History, by P. H. WINFIELD, *THE HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE* (1921), reviewed in 35 *HARV. L. REV.* 353.

<sup>2</sup> "The offence of conspiracy," says Mr. Sergeant Talfourd, "is more difficult to be ascertained precisely than any other for which indictment lies; and is, indeed, rather to be considered as governed by positive decisions than by any consistent and intelligible principles of law." Talfourd's edition of *DICKINSON'S QUARTER SESSIONS*, p. 200 (quoted by Wharton in 3 *CRIMINAL LAW*, 6 ed., p. 47, note (d)). "The law of conspiracy is certainly in a very unsettled state. The decisions have gone on no distinctive principle; nor are they always consistent." C. J. Gibson in *Miffin v. Commonwealth*, 5 Watts & S. (Pa.) 461 (1843).



for their decisions is nothing short of a misfortune. It would seem, therefore, of transcendent importance that judges and legal scholars should go to the heart of this matter, and, with eyes resolutely fixed upon justice, should reach some common and definite understanding of the true nature and precise limits of the elusive law of criminal conspiracy.

## I

The origin of the crime of conspiracy goes back to the very early pages of the history of our common law. Apparently it grew out of the effort of reformers to correct the abuses of ancient criminal procedure. During the thirteenth century, according to Bracton,<sup>3</sup> there were two modes of commencing prosecution for felonies — the one, by way of private appeal, generally involving trial by battle, and the other by way of public inquest before what later developed into the grand jury. False appeal was in a measure guarded against by the personal liabilities of the appellor; if the appellor were vanquished in the battle by which the truth of the accusation was tried, he was, in the words of Bracton, "committed to gaol, to be punished as a calumniator, but he shall not lose his life nor a limb, although according to the law he is liable to retaliation."<sup>4</sup> Furthermore, the vanquished was liable to a pecuniary penalty. "But upon the duel being finished a penalty of sixty shillings shall be imposed upon the vanquished party as a recreant, and besides he shall lose the law of the land (*legem terrae amittet*)."<sup>5</sup>

Nevertheless, abuses sprang up; children under twelve, who could not be outlawed and against whom no damages could be recovered, were sometimes incited to bring the appeal. The newer procedure of "indictment upon common report" by a grand jury lent itself to still greater abuse; one could bring to the jury false reports, and thus perhaps accomplish the downfall of his enemy,

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<sup>3</sup> BRACTON: *DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE*, f. 143. Compare GLANVILLE: *DE LEGIBUS*, bk. 14, ch. 1. For the brief survey of the criminal procedure of this period, see 1 STEPHEN, *HISTORY OF CRIMINAL LAW*, ch. 8; 1 PIKE, *HISTORY OF CRIME*, ch. 2.

<sup>4</sup> BRACTON, *DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE*, f. 137.

<sup>5</sup> GLANVILLE, *DE LEGIBUS*, bk. 2, ch. 3. See also 2 POLLOCK & MAITLAND, *HISTORY OF THE ENGLISH LAW*, 457, 538.

without incurring the personal risk dependent upon the outcome of the trial by battle. It soon became evident that measures must be taken to correct such practices. For this purpose there was passed in 1285 the statute of 13 Edw. I, c. 12, to the following effect:

"Forasmuch as many, through Malice intending to grieve other, do procure false Appeals to be made of Homicides and other Felonies by Appellors, having nothing wherewith to make Satisfaction to the King for their false Appeal, nor to the Parties appealed for their Damages; it is ordained, That when any, so appealed of Felony surmised upon him, doth acquit himself in the King's Court in Due Manner, either at the Suit of the Appellor, or of our Lord the King, the Justices, before whom such Appeal shall be heard and determined, shall punish the Appellor by one year's Imprisonment; and such Appellors shall nevertheless restore to the Parties appealed their Damages, according to the Discretion of the Justices, having respect to the Imprisonment or Arrestment that the Party appealed hath sustained, by reason of such Appeals, and to the Infamy that they have incurred by the Imprisonment or otherwise: and shall nevertheless make a grievous Fine unto the King. . . ."

Other statutes were passed allowing recovery by writ out of chancery,<sup>6</sup> and by inquest without writ.<sup>7</sup> This series of statutes culminated in the famous Third Ordinance of Conspirators, 33 Edw. I, passed in 1304, which in certain respects summed up the pre-existing law and gave a precise definition of conspiracy:

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<sup>6</sup> First Ordinance of Conspirators, TOMLIN'S STAT. AT L., 20 EDW. I, p. 399. "Our Lord the King [by] *Gilbert de Roubery*, Clerk of his Council, hath commanded that who ever will complain of Conspirators, Inventors and Maintainers of false quarrels and their Abettors and Supporters and having Part therein, and Brokers of Debates, [that Persons so grieved and complaining shall come to the Chief Justices of our Lord the King, and shall have a Writ of them, under their Seals, to attach such Offenders, to answer to the Parties grieved so complaining before the aforesaid Justices; and such shall be the Writ made for them]. . . . And if any be thereof convicted at the Suit of such Complainants, he shall be imprisoned till he hath made Satisfaction to the Party grieved, and shall also pay a grievous Fine to the King."

<sup>7</sup> Second Ordinance of Conspirators, 28 EDW. I, c. 10 (1300). "In regard to Conspirators, false Informers, and evil Procurers of Dozens, Assises, Inquests and Juries, the King hath ordained Remedy for the Plaintiffs by a Writ out of the Chancery. And notwithstanding, he willeth that his Justices of the one Bench and of the other, and Justices assigned to take Assises, when they come into the Country to do their Office, shall, upon every Plaint made unto them, award Inquests thereupon without Writ, and without Delay, and shall do Right unto the Plaintiffs."

"Conspirators be they that do confeder or bind themselves by Oath, Covenant, or other Alliance, that every of them shall aid and support the Enterprise of each other falsely and maliciously to indite, or cause to be indited [or falsely to acquit people] or falsely to move or maintain Pleas; and also such as cause Children within Age to appeal Men of Felony, whereby they are imprisoned and sore grieved; and such as retain Men with their Liveries or Fees for to maintain their malicious Enterprises; [and to suppress the truth] as well the Takers as the Givers. And Stewards and Bailiffs of great Lords, which, by their Seignory, Office, or Power, undertake to maintain or support [Quarrels, Pleas, or Debates] [for other Matters] than such as touch the Estate of their Lords or themselves.

"[This Ordinance and final Definition of Conspirators was made and finally accorded by the King and his Council in his Parliament the thirty-third Year of his Reign. . . .]"

Finally, the Statute of 4 Edw. III, c. 11 (1330), made conspiracy an offense open to ready prosecution, by providing that the justices of either bench or of assize in sessions "shall enquire, hear, and determine, as well at the King's Suit, as at the Suit of the Party," cases of conspiracy or maintenance "as Justices in Eyre should do if they were in the same county."

Thus, it will be seen that the offense of conspiracy did not originate as a general offense at common law, nor under Norman institutions, but in a series of statutes dating from the time of Edward I, enacted to remedy a specific abuse. The statutes themselves make clear how narrow and restricted was the early offense of conspiracy. The offense admitted of no broad common-law generalizations; it was limited to offenses against the administration of justice, and was strictly confined to the precise and definite language of the statutes. Combinations only to procure false indictments or to bring false appeals or to maintain vexatious suits could constitute conspiracies.<sup>8</sup>

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<sup>8</sup> "The earliest meaning of conspiracy was thus a combination to carry on legal proceedings in a vexatious or improper way, and the writ of conspiracy, and the power given by the *Articuli super Chartas* to proceed without such a writ, were the forerunners of our modern actions for malicious prosecution. Originally, therefore, conspiracy was rather a particular kind of civil injury than a substantive crime, but like many other civil injuries it was also punishable on indictment, at the suit of the king, and upon a conviction the offender was liable to an extremely severe punishment which was called 'the villain judgment.'" 2 STEPHEN, *HIST. OF THE CRIM. LAW*, 228.

We have the record of a case decided in 1351<sup>9</sup> wherein the court was called upon to decide whether the offense of conspiracy could be so broadened as to include combinations to commit acts of a generally illegal and oppressive nature. Upon a presentment of conspiracy in the Eyre of Derby grounded upon allegations that the defendants had imprisoned and generally oppressed the people, a judgment had been rendered against the defendants; and one of the defendants then sought to reverse the judgment of the lower court. Justice Shardelowe, pressed to brand the defendant's conduct as a conspiracy, stoutly refused; and, in spite of the arguments of counsel, reversed the former decision, partly because no specific year or day or place had been named in the presentment, and partly "because the principal matter of the conspiracy alleged is not conspiracy, but rather damage and oppression of the people." Although between the reigns of Edward III and Elizabeth a number of statutes were passed to suppress combinations for various specific purposes, such as treasonable designs, breaches of the peace, raising prices, and the like, yet prior to the seventeenth century there seems to have been no mention of any combination or confederacy having been held criminal under the common law except the crime of conspiracy as defined by the Ordinance of 1305.<sup>10</sup>

According to the older notions, the crime of conspiracy for procuring false indictments was not complete until the person falsely accused had been actually indicted and acquitted.<sup>11</sup> Nothing short of an acquittal following an indictment would do.<sup>12</sup> This seems to

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<sup>9</sup> Anon., Year Book, 24 Edw. III, f. 75, pl. 99.

<sup>10</sup> It is to be noted, however, that by the early part of the sixteenth century the courts had developed a common-law "Action upon the Case for a Conspiracy" for damages for cases of procuring false indictments where the facts would not strictly support a case under the Conspiracy Writs, as for example, where a single person had procured a false indictment. See FITZHERBERT, *NATURA BREVIIUM*, 114 D. See also the case of *Marsh v. Vauhan*, Cro. Eliz. 701. In that case two had been indicted for conspiracy, and one was found guilty and the other not. The court thereupon quashed the indictment; and the opinion of the whole court was "that a writ of conspiracy lies not, nor is maintainable upon this verdict. But an action upon the case, in nature of a conspiracy, might have been brought in this case."

<sup>11</sup> Where the conspiracy was for maintenance, however, it had been held as early as 1354 that the defendants might be held to answer for the conspiracy each to maintain the other though no suit had actually been commenced. See Anon., 27 Ass., f. 138 b, pl. 44.

<sup>12</sup> "A Writ of Conspiracy lieth where two, three or more persons of malice and covin do conspire and devise to indict any person falsely, and afterwards he who is so

case, he silently eliminates the importance there attached to the fact that the two corporations were organized in different states, since the oil companies organized their pipe-line companies in the same states to which they owed allegiance. In this case too the opinion assumes the point at issue when it says that the pipe-line stock represents assets of the oil companies capable of division among the stockholders as the assets themselves were not. If the pipe-line stock was in reality the same as newly created oil stock, all that was capable of division was a new evidence of an interest already possessed.

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that a transfer from the Central Pacific to the Southern Pacific of cash or of a trolley line or of stock in still a third corporation was not income to the transferee? Here one is more doubtful. Such dividends could not be called mere bookkeeping transactions, as were those in the actual case and in the *Gulf Oil* case. Those cases could therefore be distinguished. Yet one suspects that the court might have recognized that intercorporate dividends of any kind are poor things to regard as income and so have held that any transfers between corporations substantially identical are to be treated as purely formal. The question will not arise for adjudication now that Congress leaves intercorporate dividends alone. In its wisdom it finds all such dividends purely formal, whether the corporations are identical or not.

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<sup>58</sup> See *United States v. Lehigh Valley R. R. Co.*, 220 U. S. 257 (1911).

For instance, as Justice Holmes has pointed out, the mere agreement to murder a man fifty miles away could not possibly constitute an attempt, but might easily be indictable as a conspiracy.<sup>19</sup>

During the seventeenth century the courts took a second step in extending and broadening the limits of the crime of conspiracy of even greater importance than the one just described. Prior to this century, the crime had been confined very strictly to combinations to defeat the just administration of the law, such as the procuring of false indictments, embracery, and maintenance. During the seventeenth century the courts began to extend the offense so as to cover combinations to commit all crimes of whatsoever nature, misdemeanors as well as felonies.<sup>20</sup> This was a bold extension indeed. It was due in part to the abolition of the Court of Star Chamber, which cast upon the Court of King's Bench the duty, hitherto assumed by the Star Chamber, of dealing with misdemeanors; and the judges of King's Bench, groping their way through unfamiliar paths, tried new legal adventures. Perhaps it was due even more largely to the character of the period or stage through which the law was passing. People had felt the injustice of the hard, narrow formalism, the rigidity and unjust technicalities of the "Strict Law" period of the fourteenth, fifteenth, and sixteenth centuries. During the seventeenth and eighteenth centuries a reaction set in, in favor of a broader, more moral law. Fine-spun intricacies of pleading and the technicalities of formal writs began to give way before questions of right and wrong. It was a period when the courts were busy infusing morals into the law; and inevitably, as part of this process of infusion, there came to be a blurring of the line of distinction between law and morals, and a consequent confusion of the two. In 1616, in *Bagg's Case*,<sup>21</sup> the Court of King's Bench formally "resolved, that to this Court of King's Bench belongs authority, not only to correct errors in judicial proceedings, but other errors and misdemeanors extrajudicial, tending to the breach of peace, or oppression of the subjects, or to the raising of faction, controversy, debate, or to any

<sup>19</sup> *Hyde v. United States*, 225 U. S. 347, 388 (1912).

<sup>20</sup> The courts of this period even went so far as to hold criminal a combination to accuse one of an offense cognizable only in the spiritual courts. See *Rex v. Timberley & Childe*, 1 Sid. 68, 1 Keb. 203, 254 (1663).

<sup>21</sup> 11 Co. Rep. 93 b, 98 a (1616).

manner of misgovernment; so that no wrong or injury, either public or private, can be done, but that it shall be (here) reformed or punished by due course of law." So in *Rex v. Sidney*,<sup>22</sup> decided in 1664, twenty-four years after the abolition of the Court of Star Chamber, the Court of King's Bench, addressing the defendant indicted for several misdemeanors, "which were a great scandal of Christianity," reiterated much the same doctrine, declaring that "although there was not now a Star Chamber, still they would have him know that this court is *custos morum* of all the subjects of the King." Even as late as Lord Mansfield's time, such pretensions had not been entirely abandoned. In the case of *Jones v. Randall*,<sup>23</sup> Lord Mansfield re-echoed good seventeenth-century doctrine when he said: "Whatever is *contra bonos mores et decorum*, the principles of our law prohibit, and the King's Court, as the general censor and guardian of the public manners, is bound to restrain and punish."

Hence, during the latter part of the seventeenth century, when the tendency of the courts was in the direction of undertaking to punish acts immoral as well as those violative of express law, it was not strange that the idea should gain currency on many sides that courts should similarly undertake to punish conspiracies to commit immoral as well as those to commit illegal acts. The idea that a combination may be criminal, although its object would not be strictly criminal apart from the combination, first began to take articulate form towards the close of the seventeenth century in the arguments of counsel. Nevertheless, the judges stoutly refused to follow such suggestions. The doctrine seems to have been squarely repudiated by Lord Holt in 1704;<sup>24</sup> in fact, during the whole of the seventeenth century, when the courts were stretching and liberalizing legal principles and doctrines to extremely wide limits, there seems to be no evidence of a single case (apart from the doubtful exception of *Starling's Case*<sup>25</sup>) where the courts

<sup>22</sup> 1 Sid. 168 (1664).

<sup>23</sup> Loft, 383 (1774).

<sup>24</sup> *Daniell's Case*, 6 Mod. 99, 1 Salk. 380 (1704).

<sup>25</sup> *Rex v. Starling*, 1 Sid. 174 (1665). But apparently even in this case the defendants were convicted because of the criminal nature of what they were conspiring to do, i. e., to interfere with the farming of the public revenues. As Lord Holt said in *Reg. v. Daniell*, 6 Mod. 99, 100, "the case of *Starling* was directly of a publick nature, and levelled at the government; and the gist of the offense was its influence on the publick. . . ."



allowed a conspiracy conviction for a combination to commit an act not itself criminal.<sup>26</sup>

After the seventeenth century, when the courts receded from their extreme seventeenth-century pretensions, the indefensible doctrine suggested by arguing counsel might well have been forgotten had it not been for an unfortunately ambiguous statement made by Hawkins in his *Pleas of the Crown*, published in 1716. Concerning the crime of conspiracy, Hawkins said: "There can be no doubt, but that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law."<sup>27</sup>

What did Hawkins mean by "wrongfully"? If he meant by criminal means it was exceedingly unfortunate that he did not choose terms confined to such a meaning; if he meant by tortious or merely immoral means, the authorities which he cites in support of his statement by no means sustain him,<sup>28</sup> and almost his only support is to be found in the loose *dicta* of seventeenth-century courts and in the arguments of counsel. Nevertheless, Hawkins' erroneous statement lived on, partly because of the acknowledged authority of the writer, partly because of the seventeenth and eighteenth century confusion of law and morals, partly because of the very ambiguity of the statement which rendered it the less liable to be challenged and the more difficult to disprove. In the

<sup>26</sup> WRIGHT, *LAW OF CONSPIRACY*, 67.

<sup>27</sup> HAWKINS, *PLEAS OF THE CROWN*, 6 ed., bk. 1, c. 72, § 2, p. 348.

<sup>28</sup> Hawkins cites in support of his statement only four cases and two notes. These are *Rex v. Timberley*, 1 Sid. 68, 1 Keb. 254, 1 Lev. 62; *The Poulterers' Case*, 9 Coke 55 b; *Reg. v. Best*, 6 Mod. 185; and *Starling's Case*, 1 Lev. 125, 126, 1 Sid. 174; 1 Keb. 650; and the two brief notes in 27 Ass. 44 (6) and 2 Rol. Ab. 77 pl. 2, 3. (Two of Hawkins' citations are erroneous. For 1 Keble 350, he evidently means 1 Keble 650, and for 1 Mod. 185, he evidently means 6 Mod. 185.) With the possible exception of *Starling's Case*, not one of these cases or notes supports Hawkins' statement. All except *Starling's Case* fall within the terms of the Ordinances of Conspirators or are conspiracies to achieve some criminal object, and therefore prove nothing as to the criminality at common law of a "confederacy wrongfully to prejudice a third person." *Rex v. Timberley* and *The Poulterers' Case* concern conspiracies to procure false indictments; *Reg. v. Best* concerns a conspiracy falsely to charge another with being the father of a bastard in order to extort money. Even the two notes do not support Hawkins' statement. Hawkins' only possible support is *Starling's Case*; and a careful reading of that case would seem to prove exactly the opposite of Hawkins' statement. As Wright states (*LAW OF CRIMINAL CONSPIRACY*, p. 38): "[*Starling's Case*] appears to amount to a decision that a combination to impoverish a man (other than the king) by means not criminal in themselves, is not criminal."

course of time, the statement came to be regarded as authoritative and thus furnished the foundation of later *dicta* and judicial opinion.

From this time on, the well-acknowledged formula that the conspiracy constitutes the gist of the offense came to be infused with quite a new meaning in order to support the statement of Hawkins interpreted in its erroneous sense. In the case of *Rex v. Edwards*,<sup>29</sup> decided in 1724, eight years after the publication of Hawkins' book, certain defendants were indicted for having entered into a conspiracy to marry off a pauper woman to the inhabitant of another parish so that their own parish might escape further liability for her support. The counsel indulged in the usual arguments, the defense insisting that no one could be convicted for conspiring to achieve something not a crime, and the prosecution, quite regardless of any distinction between law and morals, arguing that "a conspiracy to do a lawful act, if it be for a bad end, is a good foundation for an indictment." The decision, it is true, was correctly rendered for the defendant; but the court by way of *dictum* echoed the loose ideas of Hawkins, stating that a "bare conspiracy to do a lawful act to an unlawful end is a crime, though no act be done in consequence thereof," citing as its only authority *Reg. v. Best*,<sup>30</sup> which in reality lends no support to the doctrine that one can be convicted for conspiring to commit some illegal but non-criminal act.

Another case often quoted in support of the Hawkins doctrine is *Rex v. Journeymen Tailors*,<sup>31</sup> decided in 1721, where certain journeymen tailors were indicted and found guilty of a conspiracy to raise their wages. In the course of the opinion the court is reported as saying that "a conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any of them, to do, if they had not conspired to do it, as appears in the case of *The Tubwomen v. The Brewers of London*." A careful search of the authorities has failed to reveal the existence of any such case as the one cited. Those who rely upon *Rex v. Journeymen Tailors* as a support for the Hawkins doctrine forget that at the time of the decision there was in force in England a

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<sup>29</sup> 8 Mod. 320 (1724).

<sup>30</sup> 6 Mod. 185; 2 Ld. Ray. 1167 (1705).

<sup>31</sup> 8 Mod. 10 (1721).

statute,<sup>32</sup> passed the preceding year, which expressly made it criminal for journeymen tailors to enter into any agreement "for advancing their Wages or for lessening their usual Hours of Work"; under this statute and under 2 & 3 Edw. 6, c. 15, the defendants' conduct would have been criminal quite apart from any conspiracy doctrine.

Apart from the fraud cases, where the Hawkins doctrine crept into the decisions during the latter part of the seventeenth and the early eighteenth centuries, and from which it has never been eliminated, the vast majority of actual decisions still continued to adhere to the long-established law that there could be no conspiracy conviction unless the object conspired for or the means used was criminal. For instance, in the much-quoted case of *Rex v. Turner*,<sup>33</sup> decided by the King's Bench in 1811, an indictment was brought for conspiracy for "unlawfully and wickedly devising and intending to injure, oppress and aggrieve" a certain property-owner by "unlawfully and wickedly" conspiring to poach upon his preserve for hares with "divers bludgeons and other offensive weapons," and for breaking into the said preserve and "carrying into execution their unlawful and wicked purposes." The prosecution relied on the now familiar arguments, quoting in support of their position both Hawkins and *Rex v. Edwards*. But Lord Ellenborough would have none of such arguments, and made absolute a rule to arrest the judgment upon a verdict of guilty, saying: "I should be sorry to have it doubted whether persons agreeing to go and sport upon another's ground, in other words, to commit a civil trespass, should be thereby in peril of an indictment for an offence which would subject them to infamous punishment."

Nevertheless, in spite of square decisions, such as *Rex v. Turner*, holding that combinations to commit non-criminal acts cannot apart from statute themselves be criminal, the seventeenth-century ideas persisted. Now and again in arguments of counsel, in *dicta*, in epigrammatic statements, in occasional actual decisions,

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<sup>32</sup> 7 GEO. I, c. 13, p. 403 (1720). This statute fixed the daily hours of work for journeymen tailors as running from six o'clock in the morning to eight o'clock at night; the wages were fixed from March 25 to June 24 at "any sum not exceeding Two Shillings per Diem, and for the Rest of the Year One Shilling and Eight Pence per Diem."

<sup>33</sup> 13 East, 228 (1811).

the ghost of Hawkins still walked. Hawkins' language was literally adopted and transcribed into Burn's *Justice*,<sup>34</sup> which was first published in 1755 and which, in succeeding editions, was so widely read during the eighteenth and nineteenth centuries. It was also copied into Wilson's *Works*.<sup>35</sup> Chitty, in his *Criminal Law*,<sup>36</sup> again repeats the Hawkins formula, saying: "In a word, all confederacies wrongfully to prejudice another are misdemeanors at common law, whether the intention is to injure his property, his person, or his character." And in Christian's edition of Blackstone's *Commentaries*,<sup>37</sup> it is said: "Every confederacy to injure individuals, or to do acts which are unlawful, or prejudicial to the community, is a conspiracy." A reincarnation of the doctrine took form in Lord Denman's famous epigram that a conspiracy indictment must "charge a conspiracy either to do an unlawful act or a lawful act by unlawful means."<sup>38</sup>

Like the magic jingle in some fairy tale, through whose potency the bewitched adventurer is delivered from all his troubles, this famous formula was seized upon by judges laboring bewildered through the mazes of the conspiracy cases as a ready solution for all their difficulties. It would fit any conspiracy case whatever; it was, so to speak, ready to wear, and obviated the necessity of carefully thinking through or correctly analyzing the doctrine of conspiracy. As a consequence, judges gave to it the widest use. In spite of the fact that Lord Denman himself later apparently repudiated it,<sup>39</sup> it came to be considered as a sacred and final dispensation of the law. The real difficulty was that it contained the same kind of ambiguity as did Hawkins' statement in the preceding century; "unlawful" might be interpreted so as to mean "criminal," in which case it correctly stated the law according to the great majority of decisions; or it might

<sup>34</sup> 1 RICHARD BURN, *THE JUSTICE OF THE PEACE*, 4 ed., p. 276.

<sup>35</sup> 3 JAMES WILSON, *WORKS*, 118.

<sup>36</sup> Vol. 3, 1 ed., p. 1139.

<sup>37</sup> Vol. 4, p. 136 (Christian's note 4).

<sup>38</sup> See *Jones' Case*, 4 B. & Ad. 345, 349 (1832). Wright, in speaking of this famous statement says (*LAW OF CRIM. CONSPIRACY*, p. 63): "That antithesis was invented by Lord Denman . . . to express the very opposite of that for which it is sometimes cited." Compare *Rex v. Seward*, 1 A. & E. 706, 711, 713 (1834).

<sup>39</sup> In the subsequent case of *Reg. v. Peck*, 9 A. & E. 686, 690 (1839) Lord Denman said in reply to counsel quoting his own words to him: "I do not think the antithesis very correct."

without doing the least violence to the language, be interpreted to include "tortious" as well as "criminal," in which case eighteenth-century misconceptions would be still further perpetuated. Unfortunately, it was in the latter sense that it was too often interpreted, particularly in the loose *dicta* of the conspiracy cases.

The truth of the matter is that judges found the Hawkins conception of criminal conspiracy entirely too convenient an instrument for enforcing their own individual notions of justice to be lightly discarded. It enabled judges to punish by criminal process such concerted conduct as seemed to them socially oppressive or undesirable, even though the actual deeds committed constituted of themselves no crime, either by statute or by common law. And in cases where the actual deeds were of doubtful criminality, it saved the judges from the often embarrassing necessity of having to spell out the crime.

Illustrations of this among the nineteenth-century cases are not difficult to find. Thus, in *Rex v. Bykerdike*,<sup>40</sup> decided in 1832, the defendants were indicted for conspiracy for threatening a strike among the employees in a certain colliery unless certain other employees should be discharged. The action was brought after the Combinations Act of 1800<sup>41</sup> had been repealed; and it was popularly supposed that the effect of the Acts of 1824<sup>42</sup> and 1825<sup>43</sup> had been to free labor unions from the charge of criminality which had attached to them under the former Combinations Act. Quite possibly in *Rex v. Bykerdike*, the separate acts of the defendants, apart from conspiracy, might have been held to be criminal under the very ambiguous words of the Act of 1825, which prohibited in trade disputes a "molesting or in any way obstructing another." But the point is that the judge apparently never took the trouble to define, nor so far as appears from the report, to inquire into the precise meaning of these ambiguous words; instead he held the defendants as criminals under a vague conspiracy doctrine without any discussion or indication as to whether under the Act of 1825 criminality attached to the means they used or the object they sought, or both, or neither. The jury were informed simply that "a conspiracy to procure the discharge of any of the work-

<sup>40</sup> 1 Mood. & Rob. 179 (1832).

<sup>41</sup> 5 GEO. IV, c. 95.

<sup>42</sup> 40 GEO. III, c. 106.

<sup>43</sup> 6 GEO. IV, c. 129.

men would support the indictment. . . ."<sup>44</sup> The case illustrates, not necessarily a faulty decision, but the obvious convenience and consequent danger of a doctrine which will allow a judge to enforce by criminal punishment his individual ideas of what makes for or against the social welfare.

Similar illustrations are to be found among the American cases. In *State v. Donaldson*,<sup>45</sup> several employees had been indicted upon a conspiracy charge for notifying their employer that unless he discharged certain other employees, they would quit his employment. After a careful examination of the case, the court could find nothing criminal in the separate acts committed by the defendants. Nevertheless, relying partly upon *Rex v. Bykerdyke*,<sup>46</sup> and one other English case,<sup>47</sup> it refused to quash the indictment; and it proceeded to brand the defendants as criminals because of their participation in a combination which it regarded as illegal and criminal by reason of its generally oppressive nature. The court said:<sup>48</sup> "It may safely be said, nevertheless, that a combination will be an indictable conspiracy . . . where the confederacy, having no lawful aim, tends simply to the oppression of individuals." When and under what principles action which otherwise constitutes no violation of the criminal law may be said to be criminal because it "tends to the oppression of individuals" is a question upon which the court remained discreetly silent. The conduct of those who go on strike to compel their employer to discharge other non-union employees is clearly not criminal apart from any conspiracy doctrine. Indeed, in the majority of states it is held not even tortious.<sup>49</sup> Acts "tending to the oppression of

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<sup>44</sup> The Judge's only reference to the Act of 1825 was the last sentence of the opinion in which he said that, "the statute never meant to empower workmen to meet and combine for the purpose of dictating to the master whom he should employ, and that this compulsion was clearly illegal." But this summary reference leaves entirely undecided whether the criminality lay in the combination, or in some "molesting" of employees, or in some "obstructing" of the employer.

<sup>45</sup> 32 N. J. L. 151 (1867).

<sup>46</sup> The court quite disregarded or overlooked the fact that *Rex v. Bykerdyke* was decided under the English Act of 1825 which made criminal the "molesting or in any way obstructing another" in a trade dispute, — a statute which of course was not in force in New Jersey.

<sup>47</sup> See *Ibid.*, 156, 157.

<sup>48</sup> *Ibid.*, p. 154.

<sup>49</sup> See, for instance, *Cohn & Roth Electric Co. v. Bricklayers' Union*, 92 Conn. 161, 101 Atl. 659 (1917); *Jetton-Dekle Lumber Co. v. Mather*, 53 Fla. 969, 43 So. 590 (1907);

individuals" committed in other fields of trade competition have often been held entirely justifiable.<sup>50</sup> Yet in *State v. Donaldson*, Chief Justice Beasley held that defendants joining in such a strike were actual criminals.<sup>51</sup> Perhaps no case could better illustrate the vague menace of a criminal-law doctrine by means of which conduct usually regarded as perfectly lawful, and nowhere, apart from the conspiracy doctrine, regarded as criminal, can be turned by a judge who happens to be out of sympathy with the defendants' efforts into a criminal offense.

In *State v. Burnham*,<sup>52</sup> decided in 1844, a New Hampshire Court went so far as to declare that a combination to commit a merely immoral act might constitute a criminal conspiracy. Justice Gilchrist said:

"An act may be immoral without being indictable, where the isolated acts of an individual are not so injurious to society as to require the intervention of the law. But when immoral acts are committed by numbers, in furtherance of a common object, and with the advantages and strength which determination and union impart to them, they assume the grave importance of a conspiracy, and the peace and order of society require their repression. . . . When it is said in the books that the means must be unlawful, it is not to be understood that those means must amount to indictable offences, in order to make the offence of conspiracy

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*Kemp v. Division No. 241*, 255 Ill. 213, 99 N. E. 389 (1912); *Clemmitt v. Watson*, 14 Ind. App. 38, 42 N. E. 367 (1895); *Gray v. Bldg. Trades Council*, 91 Minn. 171, 185, 97 N. W. 663 (1903); *State v. Employers of Labor*, 102 Neb. 768, 774, 169 N. W. 768 (1918); *National Protective Ass'n v. Cumming*, 170 N. Y. 315, 63 N. E. 369 (1902); *Kissam v. United States Printing Co.* 199 N. Y. 76, 92 N. E. 214 (1910); *Bossert v. Dhuy*, 221 N. Y. 342, 117 N. E. 582 (1917); *State v. Van Pelt*, 136 N. C. 633, 49 S. E. 177 (1904); *Roddy v. United Mine Workers*, 41 Okla. 621, 139 Pac. 126 (1914); *Sheehan v. Levy*, 215 S. W. 229 (Tex. Civ. App., 1919). *Contra*: *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011 (1899), and numerous other Massachusetts cases; *Ruddy v. Plumbers*, 79 N. J. L. 467, 75 Atl. 742 (1910); *Bausbach v. Reiff*, 244 Pa. 559, 91 Atl. 224 (1914); *State v. Dyer*, 67 Vt. 690, 32 Atl. 814 (1894).

<sup>50</sup> *Mogul Steamship Co. v. McGregor*, [1892] A. C. 25; *Macaulay Bros. v. Tierney*, 19 R. I. 255, 33 Atl. 1 (1895); *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119 (1893).

<sup>51</sup> In the later New Jersey case of *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 762, 53 Atl. 230 (1902), the Court said: "The doctrine of the old cases, of which we have in New Jersey an interesting example in *State v. Donaldson* . . . which placed the employee, when acting in combination with his fellow-workmen, at a tremendous disadvantage as compared with his employer, I think may be regarded as entirely exploded."

<sup>52</sup> 15 N. H. 396, 402, 403 (1844).

complete. It will be enough if they are corrupt, dishonest, fraudulent, immoral, and in that sense illegal, and it is in the combination to make use of such practices that the dangers of this offence consist."

Such language sounds more as though it had been written by the Court of Star Chamber in the seventeenth century than by a judge in liberty-loving America more than half a century after the American Revolution. Yet in spite of the fact that the doctrine of *State v. Burnham* was apparently directly overruled in the later New Hampshire case of *State v. Straw*,<sup>53</sup> *State v. Burnham* is still quoted to-day in support of the Hawkins doctrine.<sup>54</sup> Thus, like an underground stream that ever keeps coming to the surface, the doctrine, constantly reiterated in the loose *dicta* of courts and the statements of text-writers, has kept appearing and reappearing ever since Hawkins' time, in spite of the fact that, apart from fraud cases, so far as actual decisions are concerned the doctrine finds almost no support.<sup>55</sup>

## II

Thus far the doctrine that a combination to commit a non-criminal act may constitute a criminal conspiracy has been examined solely from the historical viewpoint; and in the light of history the doctrine seems so manifestly founded upon misconceptions and erroneous applications of ambiguous statements that it is difficult to support. But many wholesome and salutary doctrines of the law have sprung up through misunderstandings of past decisions or without any historical basis whatsoever. To show the historical illegitimacy of a legal doctrine does not disprove its present right of existence or its usefulness. Quite apart from historical considerations, is the doctrine logically sound? Will it bear the test of careful analytical scrutiny?

An analytical examination of the doctrine raises new difficulties. If the object sought by a combination is in no way criminal, and if the means utilized are in no way criminal, just wherein lies

<sup>53</sup> 42 N. H. 393, 396 (5) (1861). The court in this case squarely held that a combination to commit a civil trespass did not constitute a criminal conspiracy.

<sup>54</sup> See, for example, 8 Cyc. 624, note 19; 12 C. J. 548, note 48; 2 BISHOP, NEW CRIM. LAW, 8 ed., § 181, note 2 (p. 103); 3 WEARTON, CRIM. LAW, 6 ed., 81, note (1), § 2326.

<sup>55</sup> See *infra*, p. 422 *et seq.*



any criminality? The mere act of combining can surely not be criminal, where no criminal end is sought nor criminal means used. It is no crime to combine to form a social club, a church, a political association. As was said by Serjeant Talfourd, in discussing the crime of conspiracy:<sup>56</sup>

"It is not easy to understand on what principle conspiracies have been holden indictable where neither the end nor the means are, in themselves, regarded by the law as criminal, however reprehensible in point of morals. Mere concert is not in itself a crime; for associations to prosecute felons, and even to put laws in force against political offenders, have been holden legal.<sup>57</sup> If, then, there be no indictable offence in the object; no indictable offence in the means; and no indictable offence in the concert, in what part of the conduct of the conspirators is the offence to be found? Can several circumstances, each perfectly lawful, make up an unlawful act? And yet such is the general language held on this subject, that at one time the immorality of the object is relied on; at another, the evidence of the means; while, at all times, the concert is stated to be the essence of the charge; and yet that concert, independent of an illegal object or illegal means, is admitted to be blameless."

The answer which naturally suggests itself to such arguments is that just as in chemistry the combination of A, B, and C, all non-poisonous substances, may form a new compound, D, poisonous and quite different from the elements of which it is composed, so in criminal law separate acts, each alone perfectly lawful, may, when combined together, constitute such an anti-social effect that the actors' conduct as a whole becomes criminal. The mere act of crooking a finger on the trigger of a gun is not of itself necessarily unlawful; neither is there necessarily any criminality in the mere act of pointing a gun, nor in the act of loading one. Yet when all these acts are combined, in certain circumstances the resultant effect may constitute a crime. So, a single man blowing a whistle on the streets at night might constitute no nuisance; but if a hundred men did identically the same thing in combination, they might easily be indictable for creating a public nuisance.

But such an answer does not explain away all of the difficulty.

<sup>56</sup> WM. DICKINSON, *A PRACTICAL GUIDE TO THE QUARTER SESSIONS*, 3 ed. by T. N. Talfourd (1829), p. 201.

<sup>57</sup> R. v. Murray, tried before Abbot, C. J., at Guildhall, 1823; cited in 1 BURN, *JUSTICE OF THE PEACE*, 30 ed., p. 976.

It leaves unexplained how it is that precisely the same effect which is perfectly lawful when procured by one becomes criminal when procured by two. When closely analyzed, criminality consists, not in detached separate acts, but in the anti-social *effect* of acts.<sup>58</sup> For instance, in the gun case above suggested, murder is committed, not where the finger is crooked upon the trigger, but where the anti-social *effect* of the act takes place, *i. e.*, where the bullet hits the victim's body;<sup>59</sup> and it is this particular anti-social *effect* which is labeled as the crime of murder. To convict a criminal defendant it is not necessary to prove that he was ever physically present or that he acted within the state; it is sufficient to show that the anti-social *effect* of his acts, committed elsewhere with *mens rea*, operated within the state.<sup>60</sup> If criminality then consists, not in mere acts, but in the anti-social effect of acts, must not criminality be measured by the nature of the effect,<sup>61</sup> and not by the character or number of those whose acts produce that effect? For instance, in the nuisance case suggested above, if a single man arranged by steam to blow the same hundred whistles on the street at night, no one would suppose that he would not be indictable for the nuisance. If criminality is to be measured by the character of the *effect* of the defendant's acts, how can it make any possible difference as to criminality whether the identical effect is procured by one or two or a hundred? How then can it be said that if a single individual procures a certain effect by certain means he is not a criminal, but if a combination of individuals procure the self-same effect by the self-same means, they are all criminals? Is such a doctrine logically defensible? <sup>62</sup>

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<sup>58</sup> Acts being defined, in the words of Mr. Holmes, as voluntary "muscular contractions." — HOLMES, THE COMMON LAW, p. 54.

<sup>59</sup> See, for example, *United States v. Davis*, 2 Sumn. (U. S.) 482 (1837); *State v. Hall*, 114 N. C. 909, 19 S. E. 602 (1894).

<sup>60</sup> Of course it is necessary also to show that the anti-social effect is such as constitutes, under the law of the prosecuting state, a criminal offense.

<sup>61</sup> If, for example, after the defendant had fired at his victim with full intent to kill him, the bullet had been deflected perhaps by another bullet, and the victim not hit, there would have been no crime of murder, although every single act and motive of the defendant would have been precisely the same.

<sup>62</sup> Adherents of the Hawkins doctrine sometimes seek to defend the logic of the doctrine by its analogy to the offenses of routs and riots. Routs and riots are crimes which by common law require the concurrence of three or more persons. No matter how great a tumult a single person may make, he cannot be indicted for a rout or a

## III

But the law, which after all exists primarily to achieve justice and thus to promote social peace and equilibrium, must not be bound down too arbitrarily by logical or purely analytical considerations any more than by the iron grip of historical precedents and correctly traced legal genealogies. If the purpose of legal doctrines is to promote the social security and well-being, they must be examined functionally and tested by the degree of protection which they afford to social and to individual interests or rights.

A law which protects must be a predicable law; indeed one of the most essential attributes of all law is predicability. It is perhaps this more than any other factor which makes justice according to law preferable to justice without law, as found for example in legislative or executive justice.<sup>68</sup> The excellence of justice according to law, or judicial justice, rests upon the fact that judges are not free to render decisions based purely upon their personal predilections and peculiar dispositions, no matter how good or how wise they may be; they are bound by principles embodying the accumulated wisdom and experience of past ages, and those principles furnish a fixed standard by which citizens of the state may measure or shape their conduct and by which the course of justice can be reasonably foreseen and predicted. Once rob the law of this predicability, and the state reverts to a government by men rather than by law. No one will be secure in his or her interests

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riot. But the analogy after all is rather superficial. Criminality, here as elsewhere, is measured by the anti-social effects of the defendants' acts; and in the inherent nature of things it is impossible for a single individual to produce the effect of a riot. In other words, a single person is not indictable for a riot, because it is inherently impossible for him to produce the anti-social effect or criminal consequence known as a riot; but as to cases of conspiracy it is in fact very frequently possible for a single individual to procure or cause identically the same criminal consequence as a combination may procure.

<sup>68</sup> Interesting examples of legislative justice will be found in the judicial powers exercised by American colonial legislatures and state legislatures immediately after the Revolution, such as the issue of bills of attainder, bills of pains and penalties, legislative granting of new trials, legislative divorce proceedings, insolvency proceedings, etc. See POUND, *OUTLINES OF LECTURES ON JURISPRUDENCE*, 3 ed., p. 75. Legislative justice has generally been recognized as capricious, uncertain, and therefore often unjust and tyrannical, and highly susceptible to prejudice and extra-legal considerations.

or rights, for no one can foretell what interests individual judges may see fit to protect or to disregard. If the criminal law permits judges to determine criminality by their own individual standards and prejudices, we must face again the anxious fears and troubled insecurity of the old Star Chamber days; decisions will lose their predicability, and the law will obviously cease to protect.

If a legal doctrine is to be tested functionally according to the degree of security which it affords to the individual and social interests which the law was created to protect, any doctrine which tends to rob the law of its predicability, therefore, must be accounted pernicious. It is hard to imagine a doctrine which would more effectively rob the law of predicability so far as it is applicable than the one that a criminal conspiracy includes combinations to do anything against the general moral sense of the community. Under such a principle every one who acts in co-operation with another may some day find his liberty dependent upon the innate prejudices or social bias of an unknown judge. It is the very antithesis of justice according to law. There will be a very real danger of courts being invoked, especially during periods of reaction, to punish, as criminal, associations which for the time being are unpopular or stir up the prejudices of the social class in which the judges have for the most part been bred.

Certain of the labor cases furnish striking illustrations. For example, in the case of the *Philadelphia Cordwainers*,<sup>64</sup> where a group of journeymen cordwainers were tried in 1806 on an indictment for criminal conspiracy for having agreed together not to work except for higher wages, the court trying the case was unable to discover anything criminal in the object of seeking higher wages or in the means used to obtain that end. Nevertheless, at that time there prevailed among the upper classes, both in England<sup>65</sup>

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<sup>64</sup> This, it is believed, was the first trial in America of wage-earners as such for trade-union conspiracy. The report of the case was printed as a pamphlet in 1806; it may be found reprinted in 3 COMMONS AND GILMORE, DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY, pp. 59-248.

<sup>65</sup> During this time the sentiment of the upper classes in England was so hostile to trade unions that there remained in force from 1800 to 1824 the drastic Combinations Act (40 GEO. III, c. 106), which made every journeyman workman who "enters into any combination to obtain an advance of wages or to lessen or alter the hours of work" liable to imprisonment.

In America, also, during the entire first third of the nineteenth century the crimi-

and America, a bitter feeling of hostility against the working classes; the generally accepted view was that any concerted action by the workers against their employers must be because of the very nature of things inherently criminal. One is not surprised, therefore, that in the *Philadelphia Cordwainers' Case* the defendants who had been bold enough to organize a strike for higher wages were found guilty and branded as criminals; the court was enabled to achieve the desired result by resorting to the convenient doctrine flowing from Hawkins' statement of the conspiracy law.

"A combination of workmen," said the court, "to raise their wages may be considered in a two fold point of view; one is to benefit themselves . . . the other is to injure those who do not join their society. The rule of law condemns both. . . . Hawkins, the greatest authority on the criminal law, has laid it down, that a combination to<sup>66</sup> maintaining one another, carrying a particular object, whether true or false, is criminal."<sup>67</sup>

When journeymen sought to apply the same doctrine against their employers combining to depress wages, the doctrine was flexible enough to allow the courts to exercise a very broad discretion. In the case of *Commonwealth v. Carlisle*,<sup>68</sup> decided in 1821, where journeymen sought to convict certain master shoemakers for combining to depress wages, Judge Gibson, groping for some sound principle upon which to rest the conspiracy cases, felt that a combination of employers should not be held illegal if it was formed to oppose a similar combination of employees seeking

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nal law was the accepted method for dealing with trade unions. See early cases in 3 & 4 COMMONS & GILMORE, DOCUMENTARY HISTORY.

<sup>66</sup> The evident omission appears in COMMONS & GILMORE.

<sup>67</sup> Quoted from 3 COMMONS & GILMORE, DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY, p. 233.

Compare the language used in the New York Hatters' Case of 1823. "Journemen confederating and refusing to work, unless for certain wages, may be indicted for a conspiracy, . . . for this offence consists in the conspiracy and not in the refusal; and all conspiracies are illegal though the subject-matter of them may be lawful. . . . Journeymen may each singly refuse to work, unless they receive an advance in wages, but if they refuse by preconcert or association they may be indicted and convicted of conspiracy. . . . The gist of a conspiracy is the unlawful confederation, and the offence is complete when the confederacy is made, and any act done in pursuit of it is no constituent part of the offence." Quoted from GROAT, AN INTRODUCTION TO THE STUDY OF ORGANIZED LABOR IN AMERICA, p. 38.

<sup>68</sup> Brightly's N. P. Rep. (Pa.) 36 (1821).

artificially to raise their wages; his conclusion was that "a combination to resist oppression, not merely supposed but real, would be perfectly innocent; for where the act to be done and the means of accomplishing it are lawful, and the object to be attained is meritorious, combination is not conspiracy."<sup>69</sup> The court finally decided that the defendants were not guilty unless they should be proved "to have been actuated by an improper motive."

It may be that these two decisions were right or it may be they were wrong; the point is that the application of the Hawkins doctrine of criminal conspiracy rendered the law applicable to labor combinations either very unpredictable or highly unjust. Since that day some of the prejudice and much of the bitterness against labor unions has passed away. The courts have in a measure corrected their mistakes; they universally to-day declare the legality and even the social necessity under modern industrial organization of trade-union associations and organized effort on the part of employees.<sup>70</sup> But in spite of all, there still lurks in many minds considerable of the ancient feeling; and even to-day decisions are to be found where the courts have resorted to the same vague conspiracy doctrine in order to hold criminal the members of trade unions whose concerted conduct tended in the judge's eyes to injure the social welfare, but in whose individual conduct

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<sup>69</sup> *Brightly's N. P. Rep. (Pa.) 42 (1821).*

<sup>70</sup> See, for instance, the recent pronouncement of the United States Supreme Court in the case of *American Steel Foundries v. The Tri-City Central Trades Council*, U. S. Sup. Ct., October Term, 1921 (decision rendered Dec. 5, 1921), where Mr. Chief Justice Taft, rendering the opinion of the court, says (at page 13): "Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects. They have long been thus recognized by the courts. They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital."

the court could find nothing criminal.<sup>71</sup> The consequence of such decisions is that trade-union members, forced by our competitive system to fight bitter economic battles both against non-union employees and against employers intent upon driving down the price of labor, feel themselves in constant danger of being sent to jail as conspirators and criminals; and the consequent fear and sense of injustice bred by such cases has clearly not made for social peace.

Among those who depart from the historically correct doctrine that either criminal means or a criminal end must be proved to constitute a criminal conspiracy, there is, almost inevitably, the widest disagreement. Some would hold criminal a combination to commit any act *contra bonos mores* or offensive to the general moral sense of the community. Others would confine the crime of conspiracy to combinations to commit only *illegal* acts, including under "illegal" breaches of contract as well as torts; still others would confine the offense to combinations to commit torts; and a fourth group would find a crime in the case of some torts and not of others. The wideness of this disagreement itself makes for great unpredictability. If the doctrine includes combinations to commit acts *contra bonos mores*, it amounts to nothing more nor less than a device to convict defendants who concededly have violated no pre-established law whenever individual judges deem it for the interest of society so to do, — a return to justice without law. If the doctrine is confined to combinations to commit some kinds of torts but not all, there is an almost equal lack of predicability; for the courts which have suggested this have found it so impossible to draw the line between those torts which will make a combination to procure them criminal and those which will not that they have scarcely even attempted it; and utter unpredictability results. If the doctrine covers combinations to commit *all* torts, the objections based on lack of predicability lose much of their weight. But new objections arise. The result would be practically to turn every tort, planned by more than one person, into a crime. That is, the courts would be adding to the penalty worked out by the law of torts (compensation), an added criminal punishment (imprisonment) wherever more than one helped to procure the act which constitutes the tort. This would mean a

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<sup>71</sup> See, for example, *State v. Dalton*, 134 Mo. App. 517, 114 S. W. 1132 (1908).

revolutionary step in the law, and one of very questionable policy, to say the least.<sup>72</sup> Have courts, in the entire absence of legislation, a right by judicial decision alone to take such a revolutionary step?

In spite of countless assertions in the older cases that judges find the law but do not make it, we must recognize frankly that courts do make law or legislate, and further that that is a necessary part of their judicial function. Nevertheless, one must not lose sight of the fact that judicial legislation must always differ fundamentally from legislative law making. The latter is governed purely by expediency. The legislator's only guiding principles are the economic or social or political welfare of his people. His eye must be to the future; precedents mean nothing to him. The judge, on the other hand, in making new law is not free to follow his own ideas of what would make for the social or economic welfare of the people. He is bound and restrained by established and recognized legal doctrines and principles. For instance, no matter how firmly convinced a common-law judge might be that the Anglo-American doctrine that consideration is necessary to make a promise binding is immoral and unsocial, no matter how strongly he may feel that the continental doctrine requiring no consideration for contracts would better promote the general welfare, the judge would have no right by judicial legislation to overturn at a stroke the established and well-recognized principle underlying the common law of contracts. No one has stated this better than Justice Holmes, in the case of *Stack v. New York, etc. Railroad*.<sup>73</sup>

"We agree," he says, "that, in view of the great increase of actions for personal injuries, it may be desirable that the courts should have the power in dispute. We appreciate the ease with which, if we were careless or ignorant of precedent, we might deem it enlightened to assume that power. We do not forget the continuous process of developing the law that goes on through the courts, in the form of deduction, or deny that in a clear case it might be possible even to break away from a line of decisions in favor of some rule generally admitted to be based upon

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<sup>72</sup> There would seem to be little room for doubt that no court or legislature, squarely facing and comprehending the situation, would be willing to turn every tort planned by more than one, into a crime.

<sup>73</sup> 177 Mass. 155, 158, 58 N. E. 686 (1900).



a deeper insight into the present wants of society. But the improvements made by the courts are made, almost invariably, by very slow degrees and by very short steps. Their general duty is not to change but to work out the principles already sanctioned by the practice of the past. No one supposes that a judge is at liberty to decide with sole reference even to his strongest convictions of policy and right. His duty in general is to develop the principles which he finds, with such consistency as he may be able to attain."

Seventeen years later, speaking in the United States Supreme Court, in the case of *Southern Pacific Co. v. Jensen*,<sup>74</sup> Justice Holmes again admirably expressed the same idea.

"I recognize without hesitation," he said, "that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court. No more could a judge exercising the limited jurisdiction of admiralty say I think well of the common-law rules of master and servant and propose to introduce them here *en bloc*."

Thus it would seem clear that even were it wise to take such a step as to turn into crimes when planned by more than one person all those acts<sup>75</sup> which through long-established usage have come to be held tortious but not criminal, no judge by the method of judicial legislation has the right to do so. A step of so very questionable a nature and so revolutionary and sweeping in its character must be taken, if at all, by the legislature. During the seventeenth century, when the law was undergoing a period of exceptional and vigorous growth, when morals were being largely infused into the law and many new doctrines introduced, the courts went much further in judicial legislation than to-day. Yet even the seventeenth-century judges never went so far as to lay down the doctrine that all combinations to commit torts are criminal.

Those who preach the doctrine that a conspiracy may be criminal although neither the means used nor the end pursued is criminal, resort for the most part to an argument founded upon the danger of combinations to the community. If it is the function of the

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<sup>74</sup> 244 U. S. 205, 221 (1917).

<sup>75</sup> As is readily apparent from the context, the word "acts" here is used in its common sense of including not simply "voluntary muscular contractions," but the immediate and direct effects of such voluntary muscular contractions as well.

criminal law to protect the social welfare, they argue, whatever causes peculiar danger to the social welfare should come under the ban of the criminal law. Although a single individual's design to commit a tort is not usually criminal because not of sufficient danger to the state, yet where several combine and conspire to commit a tortious act, the increased power for wrong is so magnified, the danger to the public welfare which arises from such a nefarious plotting is so threatening, that the criminal law should be extended to cover this increased danger. As Bishop says in his *Criminal Law*,<sup>76</sup> adopting the words of the English Criminal Law Commissioners of 1843:

"The general principle on which the crime of conspiracy is founded is this, that the confederacy of several persons to effect any injurious object creates such a new and additional power to cause injury as requires criminal restraint; although none would be necessary were the same thing proposed, or even attempted to be done, by any person singly."<sup>77</sup>

Such forms of statement are very persuasive. One does not wonder that the idea has gained many adherents. Yet the danger argument is open to serious objection. The short answer to it is that if every combination to commit a tortious act does in fact so increase the danger to the state that the criminal law should undertake to prevent it, it is for the legislature, and not for the courts, to make the first move in the matter. It is always open to the legislature to declare what is so dangerous to the state that it should be branded as criminal. It is not open to the courts by sweeping judicial legislation to turn into common-law crimes every combination to commit a tortious act.

But there is another objection to the danger argument which

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<sup>76</sup> 2 BISHOP, NEW CRIMINAL LAW, § 180, quoting from Seventh Rep. Crim. Law Com., 1843, p. 90.

<sup>77</sup> A number of judges have expressed the same idea. See, for instance, *State v. Dalton*, 134 Mo. App. 517, 535, 114 S. W. 1132 (1908), where Justice Nortoni, rendering the decision in a lower Missouri court, says: "It may be stated as a general proposition that where an additional power or enhanced ability to accomplish an injurious purpose arises by virtue of the confederation and concert of action, an element of criminal conspiracy is thereby introduced which will render sufficiently criminal either the means or the purpose otherwise merely unlawful, to sustain a conviction, although the means or the end were not such as are indictable if performed by a single individual." See also *Comm. v. Judd*, 2 Mass. 329, 337 (1807), per Parsons, C. J.; *United States v. Lancaster*, 44 Fed. 896 (1891) (per Spear, J.).

perhaps strikes still deeper. The whole argument is based essentially upon a false premise. It is based upon the sweeping generalization that the design to commit acts which are tortious or which are *contra bonos mores* is of far greater danger to the state when conceived by a combination than when conceived by a single person. But in these days of huge and powerful corporations, which form in the eyes of the law single persons, such a generalization would seem far too sweeping to accord with the actual facts of every-day life. Why should the law be such that if two steel workers plan a certain act which the law regards as tortious, they should be subject to fine and imprisonment; but if, let us say, the United States Steel Corporation plans and executes the self-same act, the criminal law should be unable to touch it? Is the danger to the state really greater in the first case than in the second? Why should a combination of individuals to commit an act which the law regards perhaps as tortious but not as criminal constitute a crime if the individuals are not incorporated, but be free from crime if they are incorporated? Is that justice? Is not the generalization upon which the danger argument is based, after all, far too hastily made and too frequently out of accord with existing facts, to furnish a sound basis for an all-important legal doctrine?

#### IV

So far as the state of authorities goes, apart from one outstanding exception it is exceedingly doubtful whether the majority of actual decisions, either in England or America, supports the constantly reiterated statement that to constitute a criminal conspiracy neither the object pursued nor the means used need necessarily be criminal. The fraud cases constitute the exception. They follow the doctrine which arose out of the seventeenth century development of the law of cheats. During the seventeenth and the earlier part of the eighteenth centuries the law of cheats was very unsettled; and numerous cases were prosecuted, some under individual indictments and others under indictments for conspiracy, which did not involve public frauds and which did not fall strictly under the statute of false tokens.<sup>78</sup> Unconsciously, these seventeenth and eighteenth century courts were greatly ex-

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<sup>78</sup> 33 HEN. VIII, c. 1.

tending the law of cheats so as to make the law conform more closely to prevailing ideas of morality. When, later in the eighteenth century, the courts began to recede from their seventeenth-century pretensions, several cases were decided holding that private unfair dealings where no false token was used were not indictable in the case of individuals;<sup>79</sup> but in the case of conspiracies, the courts reserved their criminality. What followed was perhaps only natural. The notorious deficiencies of the criminal law of cheats provoked the judges into supplying its gaps through the method of criminal conspiracy; what really amounted to judicial legislation to cure the shortcomings of the misshapen criminal law and the silence of the legislators, was hidden behind the convenient Hawkins doctrine. The judges felt the injustice of allowing bands of manifest criminals, combining to defraud others of their property, from escaping punishment because of the criminal law's absurd deficiencies; and the result was that hard cases made bad law. In view of what has already been said the doctrine of these fraud cases, allowing conspiracy indictments where the fraud would not of itself be indictable would theoretically seem open to very serious question; but in view of the numerous decisions supporting this doctrine in cases of fraudulent representations, the fraud cases must be recognized as an acknowledged exception to the general rule. The effect of the doctrine upon modern law is in many respects very unfortunate. The law of criminal conspiracy as to fraud cases has lost well-nigh all predicability; it is almost impossible to-day to foretell whether a conspiracy conviction can be had for concerted misrepresentation or not. No one knows exactly what constitutes the fraud necessary to support such a conviction. Must it be such fraud as would be good ground for setting aside a contract? Or must it be such as would support an action for damages? Does it differ from the kind of pretense necessary to support an indictment for obtaining property by false pretenses, and if so, in just what respect? Will a mere false promise suffice? Where the purpose to cheat is plain, but the proposed deceit is such that it could not possibly actually deceive the victims, may a conspiracy indictment be had? A glance through the innumer-

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<sup>79</sup> See, for instance, *Rex v. Wilders*, cited in 2 Burr. at 1128 (1720); *Rex v. Bryan*, 2 Stra. 866 (1730); *Rex v. Wheatley*, 2 Burr. 1125 (1761).

able fraud cases is sufficient to reveal the legal morass into which the law has strayed as a result of following in these cases the Hawkins doctrine.

Quite apart from the fraud cases, the notion gleaned from the Hawkins statement and from the leading text-writers who have been following in Hawkins' footsteps ever since, has gained the widest currency. If one were to consider all the *dicta* and unsupported statements of judges and text-writers, he would unquestionably find the very great majority in support of the doctrine that to constitute a conspiracy neither the end pursued nor the means used need necessarily be criminal. Such is the common statement, which in the words of Hobbes passes "like gaping from mouth to mouth." Yet the actual decisions, apart from the fraud cases, lend small support to the prevalent conceptions. Statements are copied from one text-book into another, and then into the encyclopædias of law; and long and formidable lists of cases are cited to support the statements. But when these lists of cases are carefully analyzed, it will be found that frequently the majority of them are cited for mere *dicta* or loose general remarks; and that of the actual decisions, not since overruled, almost all are fraud cases.

Two illustrations will suffice. Bishop in his *Criminal Law*, speaking of the crime of conspiracy, says:<sup>80</sup> "The unlawful thing proposed, whether as a means or an end, need not, to constitute a punishable conspiracy, be such as would be indictable if proposed or even done by a single individual." In support of this statement he cites three American and two English cases. Of the three American cases, *State v. Rowley*,<sup>81</sup> is a conspiracy to cheat and defraud and apparently fell directly within the terms of a state statute against cheating by false pretenses; *State v. Burnham*,<sup>82</sup> has been in effect apparently overruled by *State v. Straw*;<sup>83</sup> and *People v. Richards*<sup>84</sup> seems to have been also overruled by *Alderman v. People*.<sup>85</sup> The American cases cited, therefore, furnish very doubtful support for Bishop's statement. Of the two English cases cited both are conspiracies to cheat and defraud.

<sup>80</sup> 2 BISHOP, NEW CRIM. LAW, 8 ed., § 181 (1).

<sup>81</sup> 15 N. H. 396 (1844).

<sup>82</sup> 1 Mich. 216 (1849).

<sup>83</sup> 12 Conn. 101 (1837).

<sup>84</sup> 42 N. H. 393 (1861).

<sup>85</sup> 4 Mich. 414, 432 (1857).

Among the more recent statements is that in the encyclopædia of law now being prepared under the name of *Corpus Juris*. Under the heading of "Conspiracy" occurs the following unqualified statement:<sup>86</sup> "It is not essential, however, to criminal liability that the acts contemplated should constitute a criminal offense for which, without the elements of conspiracy, one alone could be indicted." This statement is supported by so long a list of cases (with none cited *contra*) that he must be bold of heart who would venture to deny the authority back of the statement. Yet if one has the patience to analyze the decisions, case by case, as authorities for the statement quoted they fall like a house of cards. In all, thirty-seven American cases are cited. Of these, no less than ten are apparently conspiracies to commit *criminal* offenses, and therefore have no authority beyond that of mere *dicta*; seven are indictments under state statutes relating to conspiracy; three are civil actions; two have in effect been overruled by later cases within the jurisdiction; and in two the defendants were held not guilty. Sixteen of the decisions were fraud cases. When one thus analyzes the long list of authorities, he finds that, apart from the fraud cases, there are at most six or seven actual decisions supporting the statement. Of these, two were early cases for seducing or enticing away an infant girl without her father's consent, — cases which, like the fraud decisions, should perhaps be recognized as another exception to the ordinary doctrine;<sup>87</sup> two were in lower state courts, and should therefore hardly be regarded as authoritative, at least outside of Missouri and New Jersey, where they were decided. Of the two remaining cases, one is *State v. Donaldson*,<sup>88</sup> which was said in the later New Jersey case of *Jersey City Printing Co. v. Cassidy*,<sup>89</sup> to embody a doctrine which "may be regarded as entirely exploded,"<sup>90</sup> and the other was *State v. Bienstock*,<sup>91</sup> which probably should be classed among the fraud cases. "We think,

<sup>86</sup> 12 C. J. 547.

<sup>87</sup> Such cases seem to rest largely upon the authority of the English eighteenth-century case of *Rex v. Delaval*, 3 Burr. 1434 (1763). But, as Wright remarks (CRIMINAL CONSPIRACY, p. 32): "It can hardly be doubted that . . . the acts proposed were indictable at the date" of that case, "independently of combination, on the principle . . . that conduct grossly contrary to public morals or public decency was punishable irrespectively of combination."

<sup>88</sup> 32 N. J. L. 151 (1867).

<sup>89</sup> 63 N. J. Eq. 759, 762, 53 Atl. 230 (1902).

<sup>90</sup> See quotation in note 51, *supra*.

<sup>91</sup> 78 N. J. L. 256, 73 Atl. 530 (1909).

therefore," said the court in reaching its decision <sup>92</sup> "that the object of the conspiracy was unlawful, . . . and that this unlawful object was designed to be accomplished by deceit and fraud, was a cheat reaching large numbers of persons and tended to their oppression." <sup>93</sup>

On the following page of *Corpus Juris* the further statement is made <sup>94</sup> that "it will be enough if the acts contemplated are corrupt, dishonest, fraudulent, or immoral, and in that sense illegal." But five American cases and one English case are cited in support of this. Of the five American cases, the first is one where the defendants were held not guilty; the second is the decision of merely a lower state court; the third case seems to have been later overruled; the fourth was the case of a conspiracy to commit an act which was illegal; <sup>95</sup> and the fifth was a conspiracy to commit a criminal offense. The English case of *Rex v. Delaval* was a conspiracy to commit what was probably a criminal offense. <sup>96</sup>

These examples will suffice to show how plentiful and common are loose *dicta* scattered through the cases following the Hawkins doctrine, but how few actual decisions, apart from the fraud cases, can be actually mustered out in its support. On the other hand, decisions are not lacking which squarely decide against the Hawkins doctrine. In *Rex v. Turner*, <sup>97</sup> already discussed, Lord Ellenborough clearly rejects the doctrine; and although the decision has been criticized by some, <sup>98</sup> it has been followed by later cases, such as *Rex v. Pywell*. <sup>99</sup> Similar decisions are to be found among the American cases. In the case of *Commonwealth v. Prius*, <sup>100</sup> for instance, Justice Bigelow refused to convict for a conspiracy to over-insure certain goods, saying: "It was not a crime in the de-

<sup>92</sup> 78 N. J. L. 256, 274, 73 Atl. 530 (1909).

<sup>93</sup> One other possible decision in support of the text statement, not a fraud case, is *Lanasa v. State*, 109 Md. 602, 71 Atl. 1058 (1909). This was an indictment for a conspiracy willfully and maliciously to injure and destroy property. But in this case the evidence seems abundantly to prove the commission of acts which would be criminal quite apart from the combination or conspiracy.

<sup>94</sup> 12 C. J. 548.

<sup>95</sup> See 78 N. J. L., 256, 274, where the court says, "We think therefore that the object of the conspiracy was unlawful."

<sup>96</sup> See note 87, *supra*.

<sup>97</sup> 13 East 228 (1811).

<sup>98</sup> See, for instance, Lord Campbell, C. J., in *Reg. v. Rowlands*, 5 Cox 436, 490 (1851).

<sup>99</sup> 1 Starkie, 402 (1816).

<sup>100</sup> 9 Gray (Mass.) 127 (1857).

fendants to procure an over-insurance on their stock in trade. It was at most only a civil wrong. The charge of a conspiracy to do so does not therefore amount to a criminal offence."

## V

In some jurisdictions special statutes have been passed to regulate the law of conspiracy; certain of these set at rest such questions as have formed the subject of the foregoing discussion. In the federal courts, for instance, the Hawkins doctrine no longer lives. The federal conspiracy statute<sup>101</sup> provides that

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, imprisoned not more than five years, or both."

This important statute, as is evident from its terms, follows in the main sound principles of law, and except in cases of defrauding makes impossible a federal conspiracy conviction where no federal criminal offense has been conspired. What uncertainty has arisen from the act has centered chiefly in the somewhat doubtful meaning of the words, "defraud the United States."<sup>102</sup> It will be noticed that the statute, unlike the common law, requires the commission of some overt act other than the mere act of conspiring.<sup>103</sup>

In conclusion, the fundamental similarity may be pointed out between the principles of the law of criminal and those of civil conspiracy. The one is a crime and the other a tort, and naturally, therefore, certain marked differences must exist between them.<sup>104</sup>

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<sup>101</sup> U. S. COMP. STAT., 1918, § 10201.

<sup>102</sup> See 2 ZOLINE, *FEDERAL CRIMINAL LAW*, §§ 1038 *et seq.*

<sup>103</sup> In a number of states important conspiracy statutes exist, which must often be referred to in order to avoid misunderstanding the significance of decisions rendered within such states. See, for example, the New York Conspiracy statute (N. Y. PENAL LAW, § 580).

<sup>104</sup> The differences between criminal and civil conspiracy need not here be dwelt upon. The most striking difference is as to the necessity of some overt act. Since civil conspiracy is a tort, and since the tort remedy is compensation paid for damages suffered, no right of action exists without proof of damage; and damage comes through overt acts. In other words, unlike the law of criminal conspiracy, in civil conspiracy some overt act other than the mere conspiring must be proved. As the courts say,



Yet the fundamental principles underlying the two are essentially the same. Just as in criminal conspiracy acts not criminal when committed by individuals should not be held criminal when committed by combinations, so in civil conspiracy acts not tortious when committed by individuals should not be held tortious when committed by combinations. The mere combination cannot add illegality in the latter case any more than it can add criminality in the former. Yet, as in the criminal conspiracy cases, there is a prevalent and widespread notion abroad that in some mystical way a combination can be called a conspiracy and conspiracy lends illegality. It is only another phase of the same confusion of thought already discussed. In the case of *Lindsay and Company v. Montana Federation of Labor*,<sup>106</sup> the court squarely rejects such a doctrine in these words:<sup>106</sup>

"There can be found running through our legal literature many remarkable statements that an act perfectly lawful when done by one person becomes by some sort of legerdemain criminal when done by two or more persons acting in concert, and this upon the theory that the concerted action amounts to a conspiracy. But with this doctrine we do not agree. If an individual is clothed with a right when acting alone, he does not lose such right merely by acting with others, each of whom is clothed with the same right. If the act done is lawful, the combination of several persons to commit it does not render it unlawful. In other words, the mere combination of action is not an element which gives character to the act."

So, Justice Holmes, in his dissenting opinion in the case of *Vegeahn v. Guntner*,<sup>107</sup> said:

"But there is a notion which latterly has been insisted on a good deal, that a combination of persons to do what any one of them lawfully might do by himself will make the otherwise lawful conduct unlawful. It would be rash to say that some as yet unformulated truth may not be hidden under this proposition. But in the general form in which it has been presented and accepted by many courts, I think it plainly untrue, both on authority and on principle."

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the gist of the action is the damage, and not the conspiracy. In *Savile v. Roberts*, 1 Ld. Raym. 374, 378, it was said: "An action will not lie for the greatest conspiracy imaginable, if nothing be put in execution; but if the party be damaged, the action will lie." See also *Adler v. Fenton*, 24 How. (U. S.) 407 (1860).

<sup>106</sup> 37 Mont. 264, 96 Pac. 127 (1908).

<sup>107</sup> *Ibid.*, 273.

<sup>107</sup> 167 Mass. 92, 107, 108, 44 N. E. 1077 (1896).

And Chief Justice Parker, rendering the opinion of the court in *National Protective Association v. Cumming*,<sup>108</sup> expressed the same idea when he said: "Whatever one man may do alone, he may do in combination with others provided they have no unlawful object in view. Mere numbers do not ordinarily affect the quality of the act."<sup>109</sup>

Perhaps enough has been said to make it evident that it is high time to abandon the prevalent and often repeated idea that mere combination in itself can add criminality or illegality to acts otherwise free from them. Such a doctrine grew out of an historical mistake, and has no real basis in our law. It is logically unsound and indefensible. Moreover, it is dangerous. It tends to rob the law of predicability, and to make justice depend too often upon the chance prejudices and convictions of individual judges. It has tended to make the law chaotic and formless in precisely those situations where the salvation of our troubled times most demands a precise and understandable law. Because under its cover judges are often free to legislate or to decide great social issues largely in accordance with their personal convictions, it has rendered the courts open to the bitter and constant cry of class partisanship. It is a doctrine as anomalous and provincial as it is unhappy in its results. It is utterly unknown to the Roman law; it is not found in modern Continental codes; few Continental lawyers ever heard of it. It is a fortunate circumstance that it is not encrusted so deep in our jurisprudence by past decisions of our courts that we are unable to slough it off altogether. It is a doctrine which has proved itself the evil genius of our law wherever it has touched it. May the time not be long delayed in coming when it will be nothing more than a shadow stalking through past cases, — when the Hawkins doctrine at last will be conclusively laid to rest! *Requiescat in pace!*

Francis B. Sayre.

HARVARD LAW SCHOOL.

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<sup>108</sup> 170 N. Y. 315, 63 N. E. 369 (1902).

<sup>109</sup> See also *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 234, 55 N. W. 1119 (1893); *Macauley Bros. v. Tierney*, 19 R. I. 255, 264, 33 Atl. 1 (1895); *Clemmitt v. Watson*, 14 Ind. App. 38, 42 N. E. 367 (1895). Needless to say, numerous statements are also to be found holding to the contrary.

## THE PROGRESS OF THE LAW, 1919-1922

## EVIDENCE. II

PRELIMINARY TOPICS (*Continued*)

**ADMISSIONS.** A valuable contribution to the theory of admissions by Edmund M. Morgan<sup>56</sup> treats them as affirmative evidence against the admitter of the truth of the facts stated, which escape the operation of the hearsay rule only because there is an exception to that rule for all admissions. He attacks Wigmore's view,<sup>57</sup> that admissions are not hearsay because they are not affirmative proof, but operate only destructively to shake the admitting party's case just as the prior inconsistent statements of a witness come in only to shake the witness's testimony. As often in the law, while it is important for purposes of analysis to ascertain the correct explanation of a common legal phenomenon, it makes no practical difference in most situations which view be adopted. Here legal research enters upon the fascinating process of finding or devising situations where it will make a difference.<sup>58</sup> Ordinarily, whether the admission is a minus quantity on the admitter's side of the case, as Wigmore contends, or a plus quantity on the opponent's side, as Morgan contends, it is allowed in evidence and its effect on the admitter's chances of victory is equally damaging. Morgan, however, cites a case<sup>59</sup> where a verdict against the admitter resting on no evidence but the admission, was sustained, a result incorrect on Wigmore's theory, because then there would have been no evidence at all to support the verdict; and two criminal cases<sup>60</sup> where a statute required the prosecutrix's testimony to be corroborated and the defendant's admission was held corroboration, although on Wigmore's theory it would not be evidence on behalf of the

<sup>56</sup> "Admissions as an Exception to the Hearsay Rule," 30 YALE L. J. 355 (1921).

<sup>57</sup> 2 EVIDENCE, §§ 1048, 1049; *accord*, "Can an Admission by Silence while under Arrest be Used as Supporting Evidence?" 34 HARV. L. REV. 205 (1920).

<sup>58</sup> For the use of a similar method in the law of negotiable instruments, see Z. Chafee, Jr., "Acceleration Provisions in Time Paper," 32 HARV. L. REV. 747.

<sup>59</sup> *M'Kewen v. Cotching*, 27 L. J. Exch. (N. S.) 41 (1857).

<sup>60</sup> *State v. Jonas*, 48 Wash. 133, 92 Pac. 899 (1907); *People v. Cascia*, 191 App. Div. 376, 181 N. Y. Supp. 855 (1920), disapproved by 34 HARV. L. REV. 205, 210.

state. Unfortunately none of these three cases discusses the point in controversy. Morgan also cites many judicial statements in support of his position. He shows that the affirmative use of admissions which are against interest when made cannot be explained by the recognized hearsay exception of declarations against interest, because (a) the declarant is usually available, (b) admissions are not limited to pecuniary or proprietary interest. It may be added that declarations against interest may be introduced by either party, whereas admissions are good only against the declarant. On the other hand, this one-sided aspect makes admissions so different from all the recognized hearsay exceptions, that it is questionable whether they have any place there. Morgan argues forcibly that admissions are free from the main objections to hearsay testimony. There is abundant opportunity to test the accuracy of the report of what the declarant said and the truth of what he did say, because he himself is usually in the case and directly interested to weaken the effect of the admission.

The silence of an arrested person in the presence of those who make grave charges against him may be interpreted as an admission of the charges or as insistence upon his constitutional privilege against self-incrimination. Perhaps if he makes no express claim of privilege, the former interpretation is permissible,<sup>61</sup> but this is clearly wrong when he said, "Our counsel gave us orders not to talk about the case until we were taken into court."<sup>62</sup> In a civil suit against the driver of an automobile, the damaging remark of a bystander after the accident to which the defendant made no reply was admitted against him.<sup>63</sup> However, an unanswered letter is not usually an admission against the recipient, because the probability of a denial is much less than in the case of damaging oral statements.<sup>64</sup>

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<sup>61</sup> *People v. Cascia*, *supra*, one judge dissenting on this point; *People v. Wilson*, 298 Ill. 257, 131 N. E. 609, (1921); *State v. Claymonst*, 114 Atl. (N. J.) 155 (1921).

<sup>62</sup> Yet the silence was held an admission in *People v. Graney*, 32 Cal. App. 1098, 192 Pac. 460 (1920), noted in 30 YALE L. J. 300, 9 CAL. L. REV. 66, 69 U. PA. L. REV. 280.

<sup>63</sup> *Baldarachi v. Leach*, 30 Cal. App. 742, 186 Pac. 1060 (1919), noted in 18 MICH. L. REV. 705; *accord*, *Ollert v. Ziebell*, 114 Atl. 356 (N. J. Eq., 1921).

<sup>64</sup> *Thomas v. Jones*, [1921] 1 K. B. 22 (C. A.); see also, "Admissibility in favor of writer of unanswered letter not part of mutual correspondence," 8 A. L. R. 1163, note.

Vicarious admissions mainly involve the effect of the substantive law upon the existence of the requisite privity or authority to make the statement.<sup>65</sup> When a railway requires a conductor to report accidents to the company, it leaves the details of the report to his independent observation and opinions, often based on hearsay, and does not adopt him as the mouthpiece of the company for this job, as he is when he tells passengers to alight. Consequently, such a report is not properly an admission by the company.<sup>66</sup> Statements of the defendants' counsel outside of court that his client will probably be convicted are not admissible on behalf of the state, because this is not the kind of talking for which the attorney was hired.<sup>67</sup>

Are an agent's admissions by conduct excluded unless the conduct is within the scope of the employment? In *Molino v. New York*,<sup>68</sup> the driver of an automobile truck jumped from it after striking a boy, and started to run away. This was held inadmissible evidence against the employer to prove the driver's negligence, because it was not "a part of the *res gestæ*," any more than the arrest of the driver or his declaration after the accident. The court has confused widely separated problems under one ambiguous Latin phrase. The fundamental principle is, all relevant evidence is admitted unless excluded by some definite rule. If the driver's conduct is relevant to prove his negligence, what rule excludes it? (a) His declarations that he was negligent would be hearsay, and excluded unless they fell within some hearsay exception, *e. g.*, the so-called "*res gestæ*" exception or Morgan's exception for admissions; but conduct is not hearsay and all talk of hearsay exceptions drops out. Flight may have the same logical force as the words, "I am negligent," but it is not subject to the same legal objections, because it is not a communication of thought, but an independent act, admissible like any other fact if it is probative. The distinction is not between words and action, because wigwagging or deaf-and-dumb signs might also be hearsay; but between

<sup>65</sup> Use of admissions by holder of life insurance policy after issue against beneficiary, 4 MINN. L. REV. 359; 5 *ibid.*, 316.

<sup>66</sup> *Bell v. Milwaukee Electric R. & L. Co.*, 169 Wis. 408, 172 N. W. 791 (1919), noted in 33 HARV. L. REV. 113.

<sup>67</sup> *State v. Edins*, 187 Pac. 545 (N. M., 1920), noted in 8 A. L. R. 1334.

<sup>68</sup> 186 N. Y. Supp. 742 (1921), criticized adversely in 30 YALE L. J. 866.

action for its own sake, and action to communicate thought. The latter must ordinarily be tested by cross-examination. (b) His arrest is excluded by the Opinion Rule because it expresses the opinion of persons who may not have observed the facts and were affected by hearsay. The driver's flight expresses an opinion of negligence by the person most directly involved in the events. Therefore, the flight should have been admitted unless its logical effect was too slight. It would have been sufficiently probative, if the driver himself had been sued, and so should come in. The question whether the admission is within the scope of authority does not affect its tendency to prove the driver's negligence, though it does determine its admissibility if it is subject to the Hearsay Rule.

*Law and fact.* While questions of fact involved in the issue are usually for the jury, some are for the judge because of historical reasons, but the tendency for these to gravitate into the hands of the jury is exemplified by a New York case of probable cause in malicious prosecution,<sup>69</sup> and an Oklahoma statute making contributory negligence and assumption of risk in all cases a question of fact for the jury.<sup>70</sup> When a question arises whether certain facts fall within a statute, this may be a problem of statutory construction for the court, to ascertain whether the legislative language means enough to cover the facts; or a problem of inferences of facts for the jury or other fact-tribunal, to ascertain whether the facts should be understood to satisfy a given statutory meaning. Thus the question of whether a certain beverage is "intoxicating"<sup>71</sup> or whether the advocacy of the general strike is "advocacy of force and violence"<sup>72</sup> is extremely hard to classify.

<sup>69</sup> *Grew v. Mountain Home Telephone Co.*, 192 App. Div. 863, 183 N. Y. Supp. 840 (1920), noted in 20 COLUMBIA L. REV. 897.

<sup>70</sup> Held valid in *Chicago, etc. Ry. Co. v. Cole*, 251 U. S. 54 (1919), noted in 90 CENT. L. J. 167.

<sup>71</sup> Held fact for the jury, *Commonwealth v. Sooke*, 128 N. E. 788 (Mass., 1920), noted in 19 MICH. L. REV. 566; held fact for administrative ruling, *Hoffman, etc. Co. v. McElligott*, 259 Fed. 525 (C. C. A., 2d Circ., 1919), reversing 259 Fed. 321 (1919), noted in 19 COLUMBIA L. REV. 506, 18 MICH. L. REV. 159.

<sup>72</sup> Held fact for final determination by an administrative official, *United States ex rel. Abern v. Wallis*, 268 Fed. 413 (S. D. N. Y., 1920); held law, for judicial review, *Colyer v. Skeffington*, 265 Fed. 17 (D. C. Mass., 1920), reversed, Jan. 11, 1922; see 12 A. L. R. 197, 30 YALE L. J. 625. Cf. *People v. Gitlow*, 187 N. Y. Supp. 783 (App. Div., 1921), noted in 30 YALE L. J. 861.

Where the evidence in a civil case is insufficient to support a verdict for one side, the court can direct a verdict for the opponent. In a recent equity case<sup>73</sup> the chancellor rejected the uncontradicted testimony of the complainant because he disbelieved him. This was held erroneous, and *a fortiori* a direction of a verdict for such a reason would be reversed. But it was said that if a witness's testimony was contradictory to the laws of nature or universal human experience, so as to be incredible and beyond the limits of human belief, or if facts stated by the witness demonstrate the falsity of the testimony, the court is not bound to believe him. Under such circumstances a directed verdict would also be proper.

Criminal cases are different. Although the undisputed facts show that the defendant is guilty, and thus there is no evidence to support an acquittal, the court has no power to direct a verdict. The jury has an inalienable right to go wrong. In *Horning v. District of Columbia*,<sup>74</sup> a minority of four justices of the Supreme Court regarded this right as violated by a trial judge, who charged,

"a failure by you to bring in a verdict in this case can arise only from a wilful and flagrant disregard of the evidence and the law as I have given it to you, and a violation of your obligation as jurors. . . . Of course, gentlemen of the jury, I cannot tell you, in so many words, to find defendant guilty, but what I say amounts to that."

Justice Brandeis read the dissenting opinion. Justice Holmes delivered the opinion of the court, and sustained the conviction, because in such a case "the function of the jury if they do their duty is little more than formal," and they still had the power, or "the technical right if it can be called so, to decide against the law and the facts"; "if the defendant suffered any wrong it was purely formal." Justice Brandeis replied that "whether a defendant is found guilty by a jury or is declared to be so by a judge is not, under the federal Constitution, a mere formality." A recent decision in the English Court of Criminal Appeal seems to agree

<sup>73</sup> *Kelly v. Jones*, 290 Ill. 375, 125 N. E. 334 (1919), noted in 14 ILL. L. REV. 664. See also W. L. David, "The Scintilla Rule of Evidence," 55 AM. L. REV. 122 (1921).

<sup>74</sup> 254 U. S. 135, 140 (1920), noted with varying views in 34 HARV. L. REV. 443, 21 COLUMBIA L. REV. 191, 30 YALE L. J. 421, 5 MINN. L. REV. 231. A verdict was directed for the plaintiff in a civil action in *Agricultural Insurance Co. v. Higginbotham*, 274 Fed. 316 (1921), noted in 20 MICH. L. REV. 240.

with Justice Brandeis.<sup>75</sup> The trial judge in the *Horning* case undoubtedly attained substantial justice, and perhaps the jury should lose its power to render general verdicts in criminal cases, but even undesirable laws ought to be faithfully observed so long as they exist.

#### REMOTE AND PREJUDICIAL EVIDENCE <sup>76</sup>

If it were possible for the judicial mind to operate in a purely mathematical fashion, we might lay down the formula: that the admissibility of evidence varies directly with its probative force and the absence of better evidence on the point, and inversely with its prejudicial effect and tendency to occupy time. At all events this expresses the principle of balancing considerations which is applied to doubtful evidence, though in a less exactly quantitative manner. Thus, in a criminal prosecution if the defendant is shown to have committed other crimes than that specified in the indict-

<sup>75</sup> *Rex v. Hendrick*, [1921] W. N. 87 (C. C. A.), noted in "Whist Drives," 151 L. T. 159.

<sup>76</sup> The following recent material, not discussed in the text, bears on this heading: Bloodhounds, 33 HARV. L. REV. 864, 54 AM. L. REV. 109, 26 W. VA. L. Q. 91, 5 MINN. L. REV. 228. Skull of victim of homicide, 31 YALE L. J. 107. Value evidence, "What is Admissible Evidence of Value in Eminent Domain?" Nathan Matthews, 35 HARV. L. REV. 76 (1921); 20 COLUMBIA L. REV. 845. "Proof of other defamatory statements in civil action for libel or slander," 12 A. L. R. 1026, note. Habitual intoxication, *So. Traction Co. v. Kirksey*, 110 Tex. 190, 222 S. W. 702 (1919), noted in 30 YALE L. J. 195, 91 CENT. L. J. 280, 9 A. L. R. 1405, note. Habitual carelessness, *Wallis v. Southern Pacific R. R. Co.*, 61 Cal. Dec. 82, 195 Pac. 408 (1921), noted in 9 CAL. L. REV. 242. Absence of previous accidents, *Kansier v. Billings*, 56 Mont. 250, 184 Pac. 630 (1919), noted in 68 U. PA. L. REV. 293. Occurrence of similar accidents, *Charles v. Mayor, etc. of Baltimore*, 114 Atl. 565 (Md., 1921), noted in 31 YALE L. J. 330. Violation of rules to prove negligence, *Louisville & N. R. Co. v. Stidham's Admx.*, 187 Ky. 139, 218 S. W. 460 (Ky., 1920), noted in 34 HARV. L. REV. 213. Non-consent to killing of animal, *State v. Parry*, 194 Pac. (N. M.) 864 (1920), noted in 19 MICH. L. REV. 150. Uncommunicated threats in homicide, *Mott v. State*, 123 Miss. 729, 86 So. 514 (1920), noted in 34 HARV. L. REV. 675. Peaceable character of decedent to rebut self-defense, *DeWoody v. State*, 21 Ariz. 613, 193 Pac. 299 (1920), noted in 5 MINN. L. REV. 230. Corroboration, *Thomas v. Jones*, [1921] 1 K. B. 22 (C. A.), noted in 34 HARV. L. REV. 667, 69 U. PA. L. REV. 180; *People v. Whitson*, 185 N. Y. Supp. 590 (1921), noted in 21 COLUMBIA L. REV. 382; *Freed v. United States*, 266 Fed. 1012 (1920), noted in 34 HARV. L. REV. 443; *Leon v. State*, 21 Ariz. 418, 189 Pac. 433 (1920), noted in 5 MINN. L. REV. 76; 9 A. L. R. 1397, note. Evidence of ante-nuptial immoral character of defendant's wife, whose intimacy with the victim of homicide is set up in mitigation, *State v. Bereal*, 225 S. W. 252 (Tex. Cr. App., 1920).



ment, he has a propensity to commit crimes, which makes his guilt of this particular offense more probable, especially if his other offenses are of the same general nature. This logical effect is, however, slight, and is outweighed by the objections, (a) that the tribunal has enough on its hands in trying one crime and cannot distract itself by the investigation of several others; (b) the jury would be inclined to convict the defendant even though they doubted his guilt of the offense for which he was on trial, because they thought him a bad man who had better be locked up anyway. Consequently, such evidence is always inadmissible, if it shows only a criminal nature.<sup>77</sup> On the other hand, the proof of other crimes may have an independent logical effect in establishing some essential element of this specific crime. For instance, if a pawnbroker indicted for receiving a stolen watch says he did not know it was stolen, the fact that he has repeatedly been found with stolen jewelry in his possession makes it improbable that he remained in continuous ignorance of the nature of his clients. It is sometimes said that if a fact is independently probative and admissible if not a crime, its criminal quality is immaterial and does not exclude it. Possibly this goes too far. The criminality is a prejudicial factor to be weighed in the balance against admission, and might well keep out somewhat remote evidence which would otherwise just squeeze in, but this factor is frequently outweighed by the strong logical force of the other crimes to prove intent, guilty knowledge, motive, or some other element of the crime under trial.<sup>78</sup> The principle is clear, but those who established it have, like Captain Jack Bunsby, left its application to others, and there the trouble begins.

The difficulty of application is well brought out by two cases of army contract frauds in the United States Circuit Court of Appeals for the First Circuit. In *Sears v. United States*,<sup>79</sup> the defendants were indicted for conspiracy in furnishing outer and inner soles

<sup>77</sup> Recent examples are, *State v. Fisher*, 114 Atl. 247 (N. J., 1921); *Payne v. State*, 232 S. W. 802 (Tex. Cr. App., 1921); *Steele v. Commonwealth*, 232 S. W. 646 (Ky., 1921).

<sup>78</sup> Recent examples are: *State v. Israel*, 114 Atl. 314 (N. J., 1921); *Gerber v. State*, 232 S. W. 334 (Tex. Cr. App., 1921); *State v. Carroll*, 232 S. W. 699 (Mo., 1921); *State v. Rathie*, 199 Pac. 169 (Ore., 1921); *McClelland v. State*, 114 Atl. 584 (Md., 1921), disapproved by 20 MICH. L. REV. 235.

<sup>79</sup> 264 Fed. 257 (C. C. A., 1st Circ., 1920). Both cases are approved in 69 U. PA. L. REV. 180.

of shoes below specifications, and bribing inspectors to pass them. Evidence that inferior middle soles were simultaneously supplied on the same contract was held admissible to rebut the possibility of honest mistake. In *Macdonald v. United States*,<sup>80</sup> the general manager of a shoe factory was indicted with others for conspiracy in using counterfeits of certain inspectors' stamps on shoes. The manager's defense was that he did not know his associates were using these counterfeit stamps. The government proved that another inspector, the manager's chief corroborative witness, had been placed by him on the company's pay roll while inspecting another contract in the factory. The majority of the court held that this testimony should have been excluded, because the manager's misconduct on one contract did not tend to show his knowledge of an entirely different kind of fraud on a different contract. Judge Anderson, who had delivered the opinion in the *Sears* case, filed an exhaustive dissenting opinion in the *Macdonald* case, declaring that the manager's contemporaneous bribing of one inspector had a direct tendency to prove his guilty knowledge of the use of the counterfeit stamps of unbribed inspectors. Further, since the bribed inspector was the manager's chief witness, the guilty relations between them were just as material for purposes of impeachment as the marital relationship of a witness to the defendant. There was no unfair surprise, for the defendant came to court fully prepared to meet all the government's contentions as to his relations with his chief corroborating witness.

"The evidence was competent as tending to show a purpose and design then and there by Macdonald to defraud the government by causing either by dishonest or by counterfeit inspection rejected or uninspected leather to be put into shoes as good and approved leather. . . . It did not 'tend to show that Macdonald had an evil disposition' etc., as the majority argue; but it did tend to show that he was then and there intending to cheat the government by getting around its inspection system. . . . The two projects were cognate. They were not, fairly viewed, independent crimes. . . . Singularly enough, this decision — reverting to the most technical rules of the most scholastic period in the administration of our law — is made just after Congress

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<sup>80</sup> 264 Fed. 733 (C. C. A., 1st Circ., 1920), Anderson, J., *diss.* The case also involves an interesting point whether inadmissibility is cured by the introduction of rebutting evidence.

has, after a long agitation for reform, enacted a statute intended to prevent such reversals on merely technical grounds." <sup>81</sup>

An unusual reason for the admission of other crimes was presented by the facts of an English case.<sup>82</sup> A husband testified that he called upon the defendant to arrange an illegal operation for his wife, on the recommendation of another married woman. The defendant, who was on trial for causing the wife's death, denied the operation and advanced the innocent explanation that the husband came to his house to look for apartments. The prosecution was allowed to corroborate the husband's evidence by the testimony of the other woman, that she had made the recommendation and that the defendant had previously performed a similar operation upon her. It is obvious that while criminality does not exclude the relevant testimony in such a case, on the other hand it is not the ground of its admission. The woman's corroboration would have been probative even if it had not involved an additional crime on the defendant's part, and the counterbalancing prejudicial element would have been lacking. Consequently, in a New Mexico abortion case,<sup>83</sup> where the defense was the necessity of the operation to save the mother's life, the court seems to have gone too far in excluding the evidence that the defendant had performed another abortion on the same unmarried woman a few months later, on the ground that the state did not prove that the second child was quick, an essential element of the crime in that jurisdiction. The evidence seems relevant. When the defendant alleged that two such operations were necessary to save life, his defense became increasingly improbable, especially as the nature of his practice was made clearer. That the second act was possibly not criminal does not weaken its logical effect, unless we adopt the argument of the court that the mental attitude involved in the subsequent conceivably legal act was so entirely different from the intention to kill a child unnecessarily after independent life develops, that the evidence has no force to render the crime probable. Opposed

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<sup>81</sup> 264 Fed. 733, 752, 753, 756 (1920). The statute referred to is discussed at the close of the last installment of this article.

<sup>82</sup> *Rex v. Lovegrove*, [1920] 3 K. B. 643 (C. C. A.).

<sup>83</sup> *State v. Bassett*, 194 Pac. 867 (N. M., 1921), adversely criticized by 69 U. P. A. L. Rev. 383.

in principle is a Vermont case,<sup>84</sup> rejecting the contention of a bank commissioner who was prosecuted for willful failure to report errors in books for certain years, that his willfulness could not be proved by similar omissions in previous years because these former offenses were now outlawed by the Statute of Limitations.

The use of intent-evidence in disloyalty proceedings has already been mentioned in the first installment of this survey.<sup>85</sup>

Telephone conversations are admissible if a sufficient identification of the speaker is established as a foundation.<sup>86</sup> Four different situations are presented by some recent cases.

(a) In an English criminal trial<sup>87</sup> Justice Darling admitted the evidence, if the witness recognized the speaker's voice over the wire, after this colloquy with the defendant's counsel:

"*Beresford*: Someone may personate someone else, and it would be extremely difficult to subsequently deal with an interview of that sort.

"DARLING, J. — Of course when the first crime was committed there were no telephones. Has it ever been laid down that as science improves and wrong-doers make use of scientific means, you may not make use of any of the modern discoveries far more recent than the first crime?

"*Beresford*: Does it not come rather to this: — If it were a telegram it would be necessary to produce the original telegram and to prove that it is in the handwriting of the prisoner.

"DARLING, J. — Because there is a handwriting. But where there is no handwriting you do not prove that. Suppose a person says, 'I was in the dark and I heard the defendant say this to me. I knew his voice' — a very common thing — or suppose a man goes to commit a burglary or murder, 'I know the defendant's voice. I have known him for years. I know his voice. I heard him say, "Money or your life."' Would not that be evidence because the witness could not see the person speaking?

"*Beresford*: I quite agree, my lord; but I put it on the ground that on the telephone the voices of persons one knows very well sound en-

<sup>84</sup> *State v. Williams*, 111 Atl. 701 (Vt., 1920), noted in 34 HARV. L. REV. 787 (1921).

When intent is in issue the defendant should be given as wide a scope of proof as the prosecution, *Lindgren v. United States*, 260 Fed. 772 (C. C. A., 9th Circ., 1919), noted in 18 MICH. L. REV. 427. For intent in civil actions, see *McKenney v. Davis*, 178 N. W. (Ia.) 330 (1920), noted in 6 IA. L. BULL. 123. See also pages 443 to 447, *infra*.

<sup>85</sup> 35 HARV. L. REV. 304 and note 12.

<sup>86</sup> See "Admissibility of Telephone Conversations," 31 HARV. L. REV. 794.

<sup>87</sup> *Rex v. Lewis*, 84 J. P. Rep. 64 (1920).

tirely different. If, in an ordinary room, you hear the voice of a person you knew you would be able to come and say, 'I know that voice. I have known that person for years,' but when it comes to a voice speaking over the telephone it is a different thing. It is common knowledge, I think, that people's voices do sound different on the telephone.

DARLING, J. — It seems to me that is a matter of degree which the jury may take into consideration. You may cross-examine the witness as to whether he was acquainted with Hickman's voice and whether he could say he knew it on the telephone or not."

(b) A Minnesota <sup>88</sup> decision goes beyond this "voice test." The witness, W, put in a telephone call in the usual manner for X. Somebody answered and said he is X. Although W does not know X's voice, this person's conversation may be related as that of X. It was probably his because of the usual success of the telephone system in securing the desired person, and because of the invisible speaker's statement.

(c) If, however, W was called up by somebody who said he was X, the first proof of identification is lacking, because any person masquerading as X would have found it equally easy to reach W. The conversation is inadmissible without further supporting evidence, such as recognition of voice.<sup>89</sup>

(d) When W merely heard an associate go to the telephone and ask for X, the Hearsay Rule obviously prevents W from testifying as to what X said, since he did not hear it himself.<sup>90</sup>

Experiments are often unsatisfactory evidence, because the experimenters may neglect to be sure that the essential conditions of proof are present. This often happens even in science, as when Pasteur's opponents demonstrated the existence of spontaneous generation to their own satisfaction without sealing the vessels sufficiently to prevent the entrance of bacteria. The risk is much greater in judicial proceedings where there is no scientific training, and the experimenter usually gets the result which he wanted when he started out. However, the experiment may be reported if the court believes that the conditions under which it was conducted resembled those of the event involved in the trial. Recent cases admitted tests to see how many hogs could be loaded into

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<sup>88</sup> *Wetmore v. Hudson*, 183 N. W. 672 (Minn., 1921).

<sup>89</sup> *Miller v. Kelly*, 183 N. W. 717 (Mich., 1921).

<sup>90</sup> *Bernstein v. State*, 183 N. W. 576 (Neb., 1921).

a wagon,<sup>91</sup> and how far smoke discharged from a rifle loaded with a certain kind of cartridge could be seen.<sup>92</sup> However, when a trial judge, anxious to ascertain whether a large truck could have skidded at a certain corner while going at a lawful speed, experimented with his "small" passenger car to see how closely he could keep to the curb while turning, conditions were too dissimilar for him to consider the experiment, apart from the problem of the scope of judicial notice.<sup>93</sup>

### CONFESSIONS

The use of the "third degree" has been justly penalized in Illinois.<sup>94</sup> The accused was "questioned during the greater part of three days and four nights by the state's attorney, two of his assistants, his private secretary, and several police officers." Although no force or threats or promises were proved, his confession was held inadmissible. The court rested on the unsatisfactory ground, that a promise should be implied because the accused must have understood that if he made statements satisfactory to the state's attorney he would receive immunity from prosecution. It seems more probable that he confessed in order to get some sleep. A better reason is, that even if no threat or promise can be construed, nevertheless there was a violation of the privilege against self-incrimination, for he was undoubtedly compelled by the unbroken strain to give evidence against himself. In Louisiana a constitutional amendment has been proposed:<sup>95</sup> "No person under arrest shall be subjected to any treatment designed by effect on body or mind to compel confession of crime." While exclusion of evidence secured by the "third degree" is a slight protection against its use, a good additional sanction for the constitutional right violated in the Illinois case would have been the disbarment of the state's attorneys and the discharge of the policemen. Although greater severity toward this practice is needed, signs of

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<sup>91</sup> *Kohlhagen v. Cardwell*, 93 Ore. 610, 184 Pac. 261 (1919), exhaustively annotated in 8 A. L. R. 11. For a valuable essay on the general topic, see Irving Browne, "Practical Tests in Evidence," in his *SHORT STUDIES IN EVIDENCE*, N. Y., 1847.

<sup>92</sup> *State v. Holbrook*, 98 Ore. 43, 188 Pac. 947 (1920).

<sup>93</sup> *Saari v. Wells Fargo Express Co.*, 109 Wash. 415, 186 Pac. 898 (1920).

<sup>94</sup> *People v. Vinci*, 295 Ill. 419, 129 N. E. 193 (1920), noted in 19 MICH. L. REV. 655.

<sup>95</sup> 12 J. CRIM. L. & CRIM. 292 (1921).

fewer technical exclusions of confessions are also welcome, *e. g.*, the admission of a confession elicited by advice to tell the truth.<sup>96</sup>

### THE HEARSAY RULE <sup>97</sup>

*Judgments and pleadings inter alios.* The hearsay rule excludes judicial determinations of strong probative value unless they were obtained in a proceeding between the parties to the present trial.<sup>98</sup> A conviction for arson is not admissible in an action for fire insurance, a conviction for adultery in a divorce suit, a conviction for murder in a proceeding to deprive the murderer of the property inherited from his victim, although it is admissible to affect the appointment of an administrator of the victim's estate, since the court then has discretionary powers to consider general unfitness and is not adjudicating rights.<sup>99</sup> Indeed, if the person against whom the conviction is offered was himself the accused, it ought to be admissible under the hearsay rule, since he has had full opportunity to cross-examine the witnesses whose testimony led to the verdict. Of course, such a judgment would not be conclusive evidence; it is not *res adjudicata*. Even if we go further and carve out a new exception for solemn adjudications generally, we should hardly include the verdicts of coroner's juries in that class. Recent

<sup>96</sup> *People v. Foster*, 211 Mich. 486, 179 N. W. 295 (1920), noted in 30 YALE L. J. 418. See also "Whose promises are contemplated by rule excluding confession made under promise of immunity," 7 A. L. R. 419, note; and "Use of confession improperly obtained, for purpose of impeaching defendant as a witness," 8 A. L. R. 1358, note.

<sup>97</sup> Additional material on hearsay: Declarations made through an interpreter as verbal acts, *In re Coburn*, 207 Mich. 350, 174 N. W. 134 (1919), noted in 29 YALE L. J. 459. Testimony at former trial, illness admits, *Blackwell v. State*, 86 So. 224 (Fla., 1920), approved by 69 U. PA. L. REV. 179. Confrontation waived, *Denson v. State*, 150 Ga. 618, 104 S. E. 780 (1920), approved 19 MICH. L. REV. 439. "Admissibility of dying declaration with respect to transaction prior to homicide," 14 A. L. R. 757, note. Dying declarations in civil cases, H. W. Humble, "Departure from Precedent," 19 MICH. L. REV. 608 (1921). Pedigree, only declarations by the rich relative admitted, *Nolan v. Barnes*, 294 Ill. 25, 128 N. E. 293 (1920), adversely criticized by Wigmore, 15 Ill. L. Rev. 334. "Recital in ancient deed as evidence of facts recited against stranger to title," 6 A. L. R. 1437, note. Examples of situations where the hearsay rule obstructed justice are, *Sprague v. Sampson*, 114 Atl. 305 (Me., 1921); *San Francisco Bar Ass'n v. Oppenheim*, 198 Pac. 1069 (Cal., 1921).

<sup>98</sup> 2 WIGMORE, EVIDENCE, § 1347; 5 *ibid.*, § 1347.

<sup>99</sup> *Re Crippen*, [1911] P. 108.

cases excluding such verdicts in Workmen's Compensation proceedings and actions under Lord Campbell's Act because of the inadequate character of the investigation reach a desirable result.<sup>100</sup> Aside from the hearsay rule, the probative value is small, and the prejudicial effect of the outspoken riders often attached to these verdicts is great. "Crown's 'quest law" may be left to the grave-diggers.<sup>101</sup>

The suggested hearsay exception would, however, have admitted evidence excluded in *Illinois Steel Company v. The Industrial Commission*,<sup>102</sup> which held that the finding of a probate court that a woman was the widow of a man killed in an industrial accident was not admissible to prove the marriage in an action by her against the employer to obtain compensation. Such an exception would not extend to pleadings in a separate suit, which must come in, if at all, under some other exception. In *Richardson v. State*,<sup>103</sup> a man prosecuted for killing his son-in-law as the latter was approaching his own wife and child, alleged that the homicide was in self-defense to prevent the victim from kidnapping the child, and was held entitled to introduce the victim's pleadings in his bill for divorce, charging the wife with adultery and unfitness to have custody of the child. If these pleadings showed that the defendant had a reasonable apprehension of an outrageous injury to his grandson, they might be admissible as verbal acts, but under the circumstances the opinion of the dissenting judges that the evidence was irrelevant and properly excluded at the trial seems sound.

*Public documents.* An encouraging tendency to regard records and reports made by a public official in the performance of his

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<sup>100</sup> *Barnett v. Cohen*, [1921] 2 K. B. 461; *Calmenson v. Merchants' Warehousing Co.*, [1921] W. N. 59 (H. L. Ir.); *Spiegel's House Furnishing Co. v. Industrial Commission*, 288 Ill. 422, 123 N. E. 606 (1919), noted in 5 CORNELL L. Q. 182 and 6 A. L. R. 540, overruling *Morris v. Industrial Board*, 284 Ill. 67, 119 N. E. 944 (1918), noted in 32 HARV. L. REV. 83. See "The Functions of a Coroner's Jury," 84 JUST. P. 358 (1920); Horace Binney, "The Jurisdiction of Coroners in Pennsylvania," in VEEDER, *LEGAL MASTERPIECES*, 451.

<sup>101</sup> *Hamlet*, Act V, Scene 1; for a vivid description of a coroner's inquest in fiction, see A. S. M. HUTCHINSON, *IF WINTER COMES*; see also WILFRED SCAWEN BLUNT, *MY DIARIES*, II. 208.

<sup>102</sup> 290 Ill. 594, 125 N. E. 252 (1919), noted in 33 HARV. L. REV. 850.

<sup>103</sup> 204 Ala. 124, 85 So. 789 (1920), three judges dissenting, adversely criticized in 21 COLUMBIA L. REV. 192.



work as sufficiently trustworthy for use in a court of justice is exemplified by a Texas case<sup>104</sup> admitting a census report to prove that a boy had reached the age of criminal responsibility, and a thoughtful Utah opinion<sup>105</sup> admitting a physician's certificate to prove the cause of a death, in reliance upon "Wigmore's unexcelled work." Missouri, however, excluded a fire captain's report of an injury to one of his men, because he was ordered to keep a record of accidents by his chief and not by any ordinance or statute.<sup>106</sup> Public duty ought to be enough, whether imposed by executive order or a legislative rule, or even if the official decides to keep the record himself because he favors systematic business methods. In many instances, the hearsay exception of regular entries should reinforce the public document exception.

Income tax returns present a similar problem. Although they are not strictly public documents, since the writer is not an official, the same guarantees of trustworthiness exist, since they are required by statute, and accuracy is enforced by heavy penalties. The only sound objection to their admission is the statutory requirement of secrecy, which prevents any one but the taxpayer from using them in a private litigation. It is perhaps unfair to let him introduce the return when it helps him, since his adversary can not use it against him. A Kentucky accident case<sup>107</sup> did not allow the plaintiff to bring in the return to prove earning power, calling it a self-serving declaration. On the contrary, it might have been termed a declaration against interest, since the taxpayer would not report a dollar more of income than he could help.

*Entries in course of business; account-books.*<sup>108</sup> Judge Cardozo

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<sup>104</sup> *Jefferson v. State*, 85 Tex. Crim. App. 614, 214 S. W. 981 (1919), adversely criticized in 33 HARV. L. REV. 865.

<sup>105</sup> *Bozicevich v. Kenilworth*, 199 Pac. 406 (Utah, 1921), two judges dissenting. The evidence might also have come in as past recollection recorded. Cf. *Williams v. Metropolitan Life Ins. Co.*, 108 S. E. 110 (S. C., 1921), excluding the certificate as to matters outside the physician's knowledge.

<sup>106</sup> *Gass v. United Rys.*, 232 S. W. 160 (Mo. App., 1921).

<sup>107</sup> *Veach's Adm. v. Louisville & I. Ry. Co.*, 190 Ky. 678, 228 S. W. 35 (1921), noted in 30 YALE L. J. 854, which points out that the income from a business would be relevant only if the portion derived from invested capital and good-will were segregated from the actual reward for personal services.

<sup>108</sup> On account books of parties, see *Mansfield v. Gushee*, 114 Atl. 296 (Me., 1921); "Death of adverse party as affecting evidence with respect to book account," 6 A. L. R. 756, note.

has lately emphasized the need in all states of a rule that entries in books of account should be admissible as *prima facie* evidence upon proof that they were made in the usual course of business, thus dispensing with the expensive formality of requiring the particular clerk who made each entry to testify.<sup>109</sup> Fortunately, many states are working in this direction, by decision or statute. A recent California case<sup>110</sup> did not even require a book, but admitted detached time-cards made out by workmen in an automobile repair-shop, when the signatures were identified by the bookkeeper who was accustomed to receive the cards for posting in the ledger. A narrower view was taken by a Pennsylvania decision,<sup>111</sup> excluding a single card from a physician's card system, which constituted his only account books, when this was offered to prove the number of visits to the patient named on the card. The English courts also take a narrow view of this hearsay exception, refusing to regard regularity of entry as a sufficient guarantee of trustworthiness, unless there is also a duty owed to somebody to keep the books. Consequently, entries made by a doctor in his case book were not admitted after the doctor's death to show the nature of a patient's disease, although if the doctor had been practicing in partnership the judge intimated that they would have come in because then he would write under a duty to his partner.<sup>112</sup> This case proves that our technical attitude toward rules of Evidence has not wholly disappeared in the English courts.

*Physical or mental condition, and intention.* This is the most interesting exception to the hearsay rule, because of the fascinating difficulties of analysis. Four problems may be distinguished:

(1) A person's declarations are usually admissible to show his present state of mind, when mental state is in issue. Sometimes these are not hearsay at all but verbal acts, *e. g.*, a man's utterances are material to prove his sanity regardless of their truth or

<sup>109</sup> Benjamin N. Cardozo, "A Ministry of Justice," 35 HARV. L. REV. 113, 121 (1921). Examples of the existing burdensome insistence on the entrant's testimony are *Forrester v. Locke*, 231 S. W. 897 (Ark., 1921); *Loveman v. McQueen*, 203 Ala. 280, 82 So. 530 (1919), reluctant opinion, noted in 52 CINC. L. N. 220.

<sup>110</sup> *Patrick v. Tetzlaff*, 31 Cal. App. Dec. 559, 189 Pac. 115 (1920), noted in 8 CAL. L. REV. 440.

<sup>111</sup> *Daniel's Est.*, 77 LEG. INT. 134 (1919), disapproved by 33 HARV. L. REV. 982, and 68 U. PA. L. REV. 397.

<sup>112</sup> *Mills v. Mills*, 36 T. L. R. 772 (P., 1920).

falsity.<sup>113</sup> Generally, however, the speaker's veracity is an element in the value of the declarations. Statements of existing pain, for example, are worthless if the speaker lies, and the frequency of such imposture has led some courts to show great suspicion toward this evidence.<sup>114</sup> In the absence of such special considerations of policy, the hearsay comes in.

(2) When mental condition is in issue, it may also be proved by a former or subsequent statement of the speaker's thoughts at the time of the statement. Thus letters written from three to five years after an alleged deed of gift were admitted to show that no delivery had been intended.<sup>115</sup> The stream of consciousness has enough continuity so that we may expect to find the same characteristics for some distance up or down the current. But there is a point beyond which such evidence becomes irrelevant. Hudson River water at West Twenty-third St. Ferry is no proof of its quality above Fort Edward. Yet the abusive language of a former German under the stress of war in 1916 and 1917 was held to show fraudulent intent at the time of his naturalization in 1904, over sixteen years before.<sup>116</sup>

(3) In the preceding situations, present intent comes in to prove past or future *intent*. The *Hillmon* case<sup>117</sup> goes one step further and admits present intent to prove the happening of a future *act*. Some jurisdictions, notably Illinois,<sup>118</sup> have refused to adopt the *Hillmon* extension of the mental condition exception, and where an external fact is in issue do not admit declarations of intention, unless they fall under the *res gesta* exception, because they accompanied some act. In a murder trial the decedent's declaration of

<sup>113</sup> "Evidence of declarations of accused on issue of insanity," 8 A. L. R. 1219, note. Uncommunicated threat of victim of homicide, *Mott v. State*, 123 Miss. 729, 86 So. 514 (1920), noted in 34 HARV. L. REV. 675.

<sup>114</sup> Statements of physical condition not made to physician, admitted, *Williams v. Bus Co.*, 32 Cal. App. Dec. 280, 190 Pac. 1036 (1920), noted in 34 HARV. L. REV. 88. Distinguish declarations of past condition, which fall in class (4) and are inadmissible: *People v. Bray*, 29 Cal. App. Dec. 428, 183 Pac. 712 (1919), noted in 5 CORNELL L. Q. 333; *Magill v. Boatmen's Bank*, 232 S. W. 448 (Mo., 1921).

<sup>115</sup> *Coles v. Belford*, 232 S. W. 728 (Mo., 1921).

<sup>116</sup> *Schurmann v. United States*, 264 Fed. 917 (C. C. A., 9th Circ., 1920), disapproved in 20 COLUMBIA L. REV. 800. *Accord*, *United States v. Herberger*, 272 Fed. 278 (W. D. Wash., 1921).

<sup>117</sup> *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285 (1892).

<sup>118</sup> *Nordgren v. People*, 211 Ill. 425, 71 N. E. 1042 (1904); see W. G. Hale, "The Hearsay Rule and its Exceptions," 2 ILL. L. B. 65, 66, 94 (1919).

intention to commit suicide was admitted because it accompanied the act of keeping whisky and poison in her room.<sup>119</sup> The Pennsylvania Supreme Court has recently followed the Illinois reasoning in *Commonwealth v. Palma*.<sup>120</sup> In a prosecution for murder, the state to rebut an alibi offered evidence that the deceased on leaving home an hour before he was killed told his wife that he intended to meet the defendant. This would have come in easily under the *Hillmon* doctrine, but Pennsylvania admitted it "as part of the *res gesta*," to explain the husband's ambiguous act of departure. In short, if he had spoken the words to his wife twenty minutes before going out, they would have been just as probative of the identity of the man who was with him at his death, but would have been excluded by the Illinois-Pennsylvania test because they accompanied no act. Would they have come in if he had spoken them in the act of hunting for his overcoat? That has about as much or as little bearing on the identity of the murderer as the act of leaving the house. Under the true *res gesta* exception, the transaction which drags in its constituent declarations ought to be a material event in the case. The admissibility of a declaration of intention should not turn on the mere accident that it accompanies any act, however insignificant.

(4) Can present mental state come in as evidence of a *past* fact? If the *Hillmon* case, as proof that A went to Boston, admits his words "I am going to Boston," because his intention was probably carried out, why exclude his subsequent words, "I have been to Boston," inasmuch as he would not remember it unless he really had been? The objection that he may be lying applies equally well to his announcement of his intention. Indeed, even an honest statement of intention may not be carried out, and so is weaker evidence of the act intended than an honest memory would be. Eustace Seligman<sup>121</sup> thinks the two classes of evidence are indistinguishable, and should both be excluded. Wigmore would admit both, regarding the subsequent consciousness as an indication that the fact took place.<sup>122</sup> The trouble is, that this gets much hearsay in by the back door. On the other hand, it is difficult to defend the

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<sup>119</sup> *Nordgren v. People*, *supra*.

<sup>120</sup> 268 Pa. 434, 112 Atl. 26 (1920), noted in 69 U. PA. L. REV. 384.

<sup>121</sup> "An Exception to the Hearsay Rule," 26 HARV. L. REV. 146 (1912).

<sup>122</sup> 3 EVIDENCE, § 1736.

*Hillmon* case against Seligman's argument. The best reply is, that declarations of memory of a past fact are usually cast in testimonial form, just as if the declarant were testifying to the fact on the witness stand, and so would be very liable to be treated by the jury like real testimony, whereas declarations of intention differ in form from a witness's narration, and consequently will not be confused with testimony, but will receive a slighter weight, especially as the jury, being practical men, know the possibilities of non-fulfillment of intentions. The House of Lords in 1914 went very far in Wigmore's direction, admitting a workman's statements that he intended to marry a girl because her expected child was his, not to prove the fact of marriage — that would be the *Hillmon* case — but to entitle her illegitimate child to compensation, as a dependent, for his death while still unmarried.<sup>123</sup> This has been recently followed in the Chancery Division by *In re Wright*.<sup>124</sup> An exercise of a power of appointment was alleged to be a fraud on the power, and a letter was offered in which the appointor stated that she had made a bargain to appoint to a certain person in return for an annuity from him, and would carry out her bargain. This was admitted, not to prove the past fact, but to show her improper motive. Inasmuch as her motive was not improper unless the bargain was made, it comes to much the same thing.

Another example of the "past act" problem is *Gilmore v. Gilmore* in South Dakota.<sup>125</sup> A woman sued her husband's parents for alienating his affections by false charges against her chastity. Her proof that they had made such charges consisted largely of her testimony as to declarations by her husband that he had left her because his parents told him he was not the father of her child. The majority of the judges held that, although his declarations would have been proper to show what he believed about her, they were inadmissible to prove the facts causing that mental condition, *viz.*, that his parents were the source of his information. The minority applied the *res gesta* exception, regarding the words as contemporaneous with the material fact of his diminishing affection.

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<sup>123</sup> *Lloyd v. Powell Duffryn Steam Coal Co.*, [1914] A. C. 733. See the adverse criticism in 28 HARV. L. REV. 299.

<sup>124</sup> [1920] 1 Ch. 108, P. O. Lawrence, J.

<sup>125</sup> 173 N. W. 865 (S. D., 1919), two judges dissenting, noted in 33 HARV. L. REV. 315, and 68 U. PA. L. REV. 187.

The declarations of a testator about his will are sometimes admitted under the mental state exception, although some writers<sup>126</sup> advocate an independent exception under which all ante-testamentary and post-testamentary declarations would come in regardless of the obstacles to non-testamentary declarations in such situations as the *Palma*<sup>127</sup> and *Gilmore*<sup>128</sup> cases. Whatever the theory, testamentary hearsay is viewed with increasing indulgence, whether to prove that a missing will was not destroyed with an intention to revoke and is therefore entitled to probate,<sup>129</sup> or to corroborate other evidence that an unproduced will was executed,<sup>130</sup> or that the signature to a disputed will is genuine.<sup>131</sup>

*Declarations a part of a transaction; res gestæ.*<sup>132</sup> There are two theories on the admissibility of various declarations which are alleged to be part of the *res gestæ*, or as James Bradley Thayer preferred to say, *res gesta* (transaction). Thayer's view<sup>133</sup> is that the declarations must be substantially contemporaneous with the action of a material transaction, and must explain the acts. He bases their admission on the need of telling a complete story of the event. Wigmore's view<sup>134</sup> goes farther and does not require contemporaneousness with an event. He favors the admission of statements or exclamations by an injured person, or by any other person present at any exciting occasion, immediately after the event, describing the circumstances as observed by him. In the cases the word "immediately" undergoes a considerable stretching. The confusion in the decisions is illustrated by the position

<sup>126</sup> E. g. the note by Alfred L. Finkelstein, 6 CORNELL L. Q. 201 (1921).

<sup>127</sup> Note 120, *supra*.

<sup>128</sup> Note 125, *supra*.

<sup>129</sup> *In re Sweetman's Estate*, 195 Pac. 918 (Cal., 1921), three judges dissenting, disapproved in 35 HARV. L. REV. 95; *Holler v. Holler*, 298 Ill. 418, 131 N. E. 663 (1921), *semble*, approved by Wigmore in 16 ILL. L. REV. 244.

<sup>130</sup> *State v. Nieuwenhuis*, 178 N. W. 976 (S. D., 1920), two judges dissenting, noted in 6 CORNELL L. Q. 201.

<sup>131</sup> *In re Johnson's Est.*, 175 N. W. 917 (Wis., 1920), noted in 29 YALE L. J. 681.

<sup>132</sup> See also the preceding exception; note 68, *supra*, under Admissions; complaint of assaulted woman in civil action, 6 A. L. R. 1029; Scotch law of *res gesta*, *Gilmour v. Hansen*, 57 Sc. L. R. 518 (1920); statements of third persons admitted, *Birmingham Macaroni Co. v. Tadrick*, 88 So. 858 (Ala., 1921).

<sup>133</sup> "Bedingfield's Case — Declarations as Part of the Res Gesta," J. B. THAYER, LEGAL ESSAYS, 207; S. C., 14 AM. L. REV. 817; 15 *ibid.*, 1, 71 (1880, 1881).

<sup>134</sup> 3 TREATISE ON EVIDENCE, § 1745 ff., "Spontaneous Exclamations (Res Gestæ)."

of the United States Supreme Court, which supported Wigmore's view in *Insurance Company v. Moseley*,<sup>125</sup> and Thayer's view in *Vicksburg, etc. R. R. v. O'Brien*.<sup>126</sup> Recent discussion in the cases and law reviews inclines toward Wigmore's view. In *Washington-Virginia Railway Company v. Deahl*<sup>127</sup> the declarations of a motor-man as he stepped from the trolley car after a collision with a truck that he had tried to hit the truck were probably admissible even on Thayer's view, and the *Vicksburg* case is cited; but in *Solice v. State*<sup>128</sup> the victim of a homicide walked a quarter of a mile before he described the affray. His statements, though conceded not to be contemporaneous, were admitted on the ground of spontaneity. Wigmore is cited, and the dissenting opinion in the *Vicksburg* case erroneously called the opinion of the court. On either view, the declarations are excluded if the event has terminated and the nervous excitement has been succeeded by reflective powers.<sup>129</sup> The whole subject is clarified by an article just published by Edmund M. Morgan, "A Suggested Classification of Utterances Admissible as *Res Gestæ*."<sup>140</sup>

#### OPINION<sup>141</sup>

The subject matter of expert testimony has already been touched on in the first installment of this article.<sup>142</sup> New types of experts, such as chiropractors,<sup>143</sup> are making their appearance, and new

<sup>125</sup> 8 Wall. (U. S.) 397 (1869), two judges dissenting.

<sup>126</sup> 119 U. S. 99 (1886), four judges dissenting.

<sup>127</sup> 126 Va. 141, 100 S. E. 840 (1919), approved (with incorrect citation) on Wigmore's theory in 7 VA. L. REV. 666.

<sup>128</sup> 21 Ariz. 592, 193 Pac. 19 (1920), approved on Wigmore's theory in 19 MICH. L. REV. 442.

<sup>129</sup> *Mayeur v. J. R. Crowe Coal & Mining Co.*, 106 Kan. 123, 186 Pac. 1035 (1920); *Seebold v. State*, 232 S. W. 328 (Tex. Crim. App., 1921).

<sup>140</sup> 31 YALE L. J. 229 (1922).

<sup>141</sup> See also "Fact and Opinion in an Action of Tort for Deceit," 1 BOSTON UNIV. L. REV. 117 (1921); "Development of the Opinion Rule in Iowa Cases," 6 IOWA L. B. 168 (1921); Wigmore, "Expert Opinion as to Cause of a Physical Ailment," 14 ILL. L. REV. 519 (1920); expert opinion based on all the evidence, 6 CORNELL L. Q. 428 (1921); value experts in Roman law, Nathan Matthews, "The Valuation of Property in the Roman Law," 34 HARV. L. REV. 229, 256 (1921).

<sup>142</sup> 35 HARV. L. REV. 307 (1922).

<sup>143</sup> *Voight v. Industrial Commission*, 297 Ill. 109, 130 N. E. 470 (1921), approved in 5 MINN. L. REV. 556.

ideas like dual personality intrude into the old field of handwriting,<sup>144</sup> though unfortunately the archaic prejudice against scientific investigation of disputed signatures by comparison of hands still prevails in some jurisdictions.<sup>145</sup>

A new kind of opinion evidence was offered by the defense in a recent California murder trial.<sup>146</sup> Skilled motion-picture actors performed the entire homicide, according to a description based on the testimony of witnesses for the defense. The trial judge refused to allow the film to be run off before the jury, even though an eyewitness would testify that it accurately depicted the events as he saw them. This has led Wigmore<sup>147</sup> to compile an additional section for his treatise dealing with artificial reconstruction of a complex series of movements by moving pictures. Of course, an actual moving picture of an event would be evidence as much as a "still" photograph.

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*(To be concluded.)*

<sup>144</sup> Webster A. Melcher, "Dual Personality in Handwriting," 11 J. CRIM. L. & CRIM. 290 (1920).

<sup>145</sup> *Texas Bank v. Scott*, 225 S. W. 571 (Tex. Civ. App., 1920), disapproved in 34 HARV. L. REV. 788, 30 YALE L. J. 324. The sensible view, under statute, is shown in *State v. Smith*, 180 N. W. 4 (Ia., 1920), noted in 6 IOWA L. B. 185. See also "Knowledge derived from family correspondence as qualifying one to testify as to genuineness of handwriting," 7 A. L. R. 261, note; "Proof of authenticity or genuineness of letter other than by proof of handwriting or typewriting," 9 A. L. R. 984, note; Gordon L. Elliott, "Instruction to the Jury Where Handwriting is Identified by Expert Testimony," 7 IOWA L. B. 55 (1921).

<sup>146</sup> 23 LAW NOTES (N. Y.) 203 (1920); cf. *Feeney v. Young*, 191 App. Div. 501, 181 N. Y. Supp. 481 (1920), to be discussed in the next installment of this article; *Dailey v. Superior Court*, 112 Cal. 94, 44 Pac. 458 (1896); *People v. Durrant*, 116 Cal. 179, 223, 48 Pac. 75 (1897).

<sup>147</sup> 15 ILL. L. REV. 123 (1920); see 24 LAW NOTES (N. Y.) 143 (1920).



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ADMINISTRATIVE DETERMINATION OF PRIVATE RIGHTS.—Administrative bodies may, in the course of performing their ultimate administrative duties, be called upon to entertain proceedings which will in some manner determine private rights. There are at least three types of statute under which this situation may arise. Under the first,<sup>1</sup> the board makes only preliminary findings, which it certifies to a court, and which the court enters as a judgment, unless exceptions are taken, in which case it may, after a further hearing, either approve or modify the findings. Thus, they become effective, if at all, as in form the decision of a regular judicial tribunal. The second type of statute<sup>2</sup> makes the board's findings themselves final, unless, within a specified time, an appeal is taken to the courts, but if such an appeal is taken, the courts have full power to review. Under the third type,<sup>3</sup> the administrative findings are final. If, in any case, the ultimate purpose for which the findings are made is not truly governmental,<sup>4</sup> they are, of course, wholly

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<sup>1</sup> See 3 LORD'S OREGON LAWS, title XLIII, c. 6; 1913 OREGON LAWS, c. 82, 86, 97.

<sup>2</sup> See TEXAS REV. CIV. STAT. (1920), title 73, c. 1, arts. 5011½ *f et seq.*

<sup>3</sup> See 28 STAT. AT L. 372, 390.

<sup>4</sup> For what may be, see Wambaugh, "The Present Scope of Government," 20 REP. AMER. BAR ASSN. (1897), 307. Compare the two opinions in *South Carolina v. United States*, 199 U. S. 437 (1905). Cf. *The Amalgamated Society of Engineers v. The Adelaide Steamship Co., Ltd.*, 28 Com. L. R. 129 (1920), criticizing the majority opinion in the former case.

ineffective.<sup>5</sup> But assuming that it is governmental, may an administrative body, incidentally to reaching its end, determine private rights without being chargeable with an improper exercise of powers constitutionally conferred upon the judiciary?<sup>6</sup>

Proceedings of the first type have been almost uniformly upheld. Courts have found them to be "preliminary and administrative, not judicial,"<sup>7</sup> and have likened them to proceedings before a referee.<sup>8</sup> In doing so, however, they have disregarded the fact that the courts to which the findings are certified must approve them unless exceptions are taken. Such a judgment, though it may indeed constitute the efficient medium of finality, is no more than an unsubstantial appearance of a real judicial pronouncement.<sup>9</sup> So far as the exercise of power by the administrative body is concerned, therefore, this type differs only in form from the second, where the findings themselves become final unless there is an appeal. The constitutionality of this latter type has recently been denied,<sup>10</sup> on the ground that the finality of the findings, unless appealed from, made them judicial.<sup>11</sup> But this seems to involve a misapprehension of the true nature of the board's action. It is true

<sup>5</sup> *Kilbourn v. Thompson*, 103 U. S. 168 (1880). Cf. *Colonial Sugar Refining Co. v. The Att'y Gen'l*, 15 Com. L. R. 182 (1912); *Cock v. The Att'y Gen'l*, 28 N. Z. L. R. 405 (1909). "In effect the New Zealand court held . . . that the examination as well as the determination of matters of rights before extraordinary tribunals was within the mischief provided against by 42 Edw. III, c. 3 (1368), and the Act for the Abolition of the Star Chamber, 16 CAR. I, c. 10 (1640)." See W. Jethro Brown, "The Separation of Powers," 31 YALE L. J. 24, 27.

<sup>6</sup> TEXAS REV. CIV. STAT., *supra*, art. 5011½ f, states that "in case suit is started in any court for the determination of [these] rights . . . , the case may, in the discretion of the court, be transferred to the [board] for determination. . . ." This might lead one to reason that, since the power formerly exercised by the court was judicial, that now exercised by the board must also be judicial. It must be admitted that the character of an administrative organ may not be so impressed upon every power which it may conceivably exercise as to affect the power with a nature like its own. But whereas the sole purpose of the adjudication before the court was undoubtedly judicial, the determination before the board differs at least to the extent that it is merely incidental to a further and concededly administrative end. Looked upon in their entirety, there is a distinct difference between the two proceedings.

<sup>7</sup> *Pacific Live Stock Co. v. Lewis*, 241 U. S. 440 (1915). See also *Bergman v. Kearney*, 241 Fed. 884 (D. Nev., 1917).

<sup>8</sup> *In re Willow Creek*, 74 Oreg. 592, 144 Pac. 505 (1914), 146 Pac. 475 (1915). The court encountered no difficulty in the fact that the board was charged with a duty ordinarily performed by a judicial officer, apparently because it was making only such findings as it was obliged to make to carry out the purpose for which it was created.

<sup>9</sup> It would be interesting to know the result if the court should refuse to approve the findings. The question would thus be whether the court was not charged with the performance of administrative functions. See *Hayburn's Case*, 2 Dall. (U. S.) 409 (1792); *United States v. Ferreira*, 13 How. (U. S.) 40, 49-51 (1851); *Yale v. Todd*, 13 How. (U. S.) 52, note (1794). See also note 17, *infra*.

<sup>10</sup> *Board of Water Engineers v. McKnight*, 229 S. W. 301 (Tex., 1921). For the facts of this case see RECENT CASES, *infra*, p. 470.

<sup>11</sup> The Constitution of Texas provides (Art. 2, § 1): "The powers of the government of the state of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of the magistracy, . . . and no person or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted." It seems immaterial in the principal case that the separation of powers was here express rather than implied, as in constitutions of the federal type, since the action of the board was, on the grounds stated *infra*, clearly not judicial.

that the board does make a determination with regard to private rights, but this is a determination in the sense not of an adjudication, but rather of an ascertainment, which is to form the basis of subsequent regulative measures. After it has been reached, pre-existing rights remain as they were before, in no wise extinguished. It is true that they are now in a position in which they may be lost or curtailed if an action, in the form of a trial *de novo*, is not brought within the prescribed period. But in any case, the findings themselves do not destroy them. They operate as an assertion by the state as to what the rights are. This assertion may be disputed only within a short period of limitations which the state has created, actuated by a public policy which demands that the administrative end be speedily and efficiently achieved. It is by the operation of this limitation of remedy that the rights are cut off.<sup>13</sup> Meantime they are fully protected by the provision for appropriate proceedings *de novo* in regular courts.<sup>14</sup>

A more difficult question is raised by a statute which makes the administrative action final. The difficulty here is with the doctrine of the separation of powers. When the Federal Constitution was framed, it was well recognized that the powers of the three great departments shade almost imperceptibly into one another and apparently overlap.<sup>15</sup> The constitution does provide for three separate departments of government, each of which it vests with one of the three kinds of powers, but it does not expressly provide anywhere that the three shall be kept entirely distinct.<sup>16</sup> On the other hand, it contains certain express provi-

<sup>13</sup> The statute might be attacked on the ground that the length of this period did not afford due process. In the Texas statute, persons who appeared before the board were given six months in which to bring an action, and those who did not, three years. This seems sufficient. See *Bragg v. Weaver*, 251 U. S. 57 (1919).

<sup>14</sup> 10 STAT. AT L. 99 contains provisions very similar to those of the Texas statute. Under it, the board itself is required to file an appeal with the district court, but if a notice of intention to prosecute the appeal is not filed by an aggrieved party within six months, the appeal will be regarded as dismissed. It may thus happen that the administrative findings are not put into the form of a judicial decree or judgment, and the act, therefore, gives them substantially the same finality as they receive by virtue of the Texas statute.

The act was upheld by the Supreme Court in *United States v. Ritchie*, 17 How. (U. S.) 525 (1854). See also *Degge v. Hitchcock*, 229 U. S. 162 (1912).

For a collection of cases under similar statutes, see 2 WIEL, WATER RIGHTS, 3 ed., §§ 1192-1194; LONG, IRRIGATION, c. 12.

<sup>15</sup> See THE FEDERALIST, No. 47; FARRAN, THE FRAMING OF THE CONSTITUTION, 49 *et seq.* This fact has become increasingly apparent with the expansion of the scope of governmental, especially administrative, activities. See Green, "The Separation of Powers," 29 YALE L. J. 369.

<sup>16</sup> In 1908, only six state constitutions approximated the federal type. That of Rhode Island, however, merely provided that the powers of government should be distributed among three departments. The provision of the New Hampshire Constitution is interesting. It reads: "The three essential powers . . . ought to be kept as separate from, and as independent of, each other as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity." (Pt. I, Art. 37.) The thirty-seven others expressly provide that the three departments shall be distinct, almost always with the added restriction that no person or persons belonging to one of the departments may exercise any power properly belonging to one of the other departments. See THORPE, FEDERAL AND STATE CONSTITUTIONS, etc. The constitutions of the three new states, Oklahoma (1907), Arizona (1910), and New Mexico (1911) are all of the last type. This type seems to go beyond the doctrine of the sepa-

sions to the contrary. Some of these may be explained on the ground that they form part of the system of checks and balances,<sup>16</sup> but this does not explain others, *e. g.*, legislative determination of disputed elections of members, trial of members, etc. Furthermore, apart from express provisions, there have always been some matters as to which there has apparently been an exception. An example directly in point is the final administrative determination of assessments, duties, and other matters incident to the collection of revenues. The question, therefore, arises as to just what the doctrine really means in practice. Throughout its history, powers have been defined in terms of the ends to be accomplished by their exercise.<sup>17</sup> Accordingly, in its essence, the doctrine is a doctrine of the separation of ends. This perhaps does little more than restate the problem, yet it does to a certain extent clarify it; for once it is clear that an end is administrative, it follows, under a constitution of the federal type at least, that whatever action is incidental to the accomplishment of that end may properly be taken by an administrative body even though it be of a type ordinarily regarded as exclusively associated with one of the other departments, provided it is necessary to the effective<sup>18</sup> accomplishment of the end<sup>19</sup> that it be engaged in by the first.<sup>20</sup> But to go beyond this would be to allow an encroachment upon a field expressly granted to another department.<sup>21</sup> Thus the critical problem becomes one of the nature of the ends. To solve it, resort must be had to analogies existing at the time of the adoption of the Constitution.<sup>22</sup> A mere list of the ends delegated to each of the different depart-

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ration of powers both as it was originally stated and as it was incorporated into the Federal Constitution. With reference to this type, it would probably be difficult to support all the contentions here made in respect to constitutions of the federal type. Nevertheless, despite the language, there are apparently some exceptions to the doctrine even under them. See *City of Indianapolis v. State*, 132 N.E. 165 (Ind., 1921).

<sup>16</sup> For example, the veto power of the President, the power of Congress over impeachment, etc.

<sup>17</sup> The doctrine had its origin in the political philosophies of Aristotle, Locke, and Montesquieu. See ARISTOTLE, *POLITICS* (Jowett's Translation), Book VI, c. XIV; LOCKE, *TWO TREATISES ON GOVERNMENT*, Book II, c. VIII and XII-XIV; MONTESQUIEU, *L'ESPRIT DES LOIS*, Livre XI, c. VI; 1 THAYER, *CASES ON CONSTITUTIONAL LAW*, 1-3; 30-34. Cf. W. J. BROWN, *supra*, 31 YALE L. J. 24.

In the article last cited it is suggested that the nature of a power is determined by both end and process. The doctrine of the separation of powers itself, however, certainly contains no exact conception of process. If there is a requirement as to process, it is superadded to the essential part of the doctrine and is applicable only after the end has been determined proper to one department or another.

<sup>18</sup> The use of such a word as "effective" while unavoidable in stating a general proposition, gives rise nevertheless to a multitude of questions. It is the idea at the root of the controversy over the *Ju Toy* case. *United States v. Ju Toy*, 198 U. S. 253 (1904).

<sup>19</sup> "The effect of the inquiry, and the decision upon it, is determined by the nature of the act to which the inquiry and the decision lead up," per Holmes, J., in *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 227 (1908). See also Hughes, J., in *Louisville etc. R. R. Co. v. Garrett*, 231 U. S. 298, 307 (1913). Cf. *Local Government Board v. Arlidge*, [1913] 1 K. B. 463, [1914] 1 K. B. 160, [1915] A. C. 120. See L. Curtis, "Judicial Review of Commission Rate Regulation," 34 HARV. L. REV. 862.

<sup>20</sup> *Mutual Film Corporation v. Ohio*, 236 U. S. 230 (1914); *Intermountain Rate Cases*, 234 U. S. 476 (1913); *Field v. Clark*, 143 U. S. 649 (1891).

<sup>21</sup> See Pound, "Spurious Interpretation," 7 COL. L. REV. 379.

<sup>22</sup> Two things are to be considered, both analogy to what was considered proper when the constitution was adopted, and also analogy to what was considered improper.

ments is not, however, sufficient. The principles which determined their distribution must be sought. The principle most applicable in determining whether an end is administrative is that it is so where the public interest in the summary disposition of rather technical or extremely complex matters overrides the individual and social interests in the judicial protection of private rights.<sup>23</sup> As administrative machinery becomes more efficient, the force of the objection to its determination of such rights is weakened. But at no time is a final solution of the problem possible. Changes in judicial and political philosophy, influencing the weight given to these various interests, must constantly modify the conception of what are, properly, administrative ends.<sup>24</sup>

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A DISTINCTION IN THE *RENOI* DOCTRINE. — Broadly stated, the doctrine of the *renvoi* is that, when by its rules of the conflict of laws a court must apply the law of some other legal unit, it must apply not only the internal law of that unit, but also its rules of the conflict of laws. This might result in the application of the internal law either of the forum or of a third country. Take the Englishman domiciled in France who dies intestate leaving movables in England and Italy. By English law distribution is according to the law of the domicile, but if the *renvoi* doctrine is accepted, that law would include the French conflict-of-laws rule that English law, as the national law, should govern. And if Italy accepted the *renvoi* doctrine it would be directed from English law to French law.<sup>1</sup> What is the proper rule? Juristic speculation has been almost infinite.<sup>2</sup>

The discussion has hitherto been largely confined to cases like that

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Compare, for example, the case of *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531 (1913), with the cases of *Wong Wing v. United States*, 163 U. S. 228 (1895), and *Ex parte Milligan*, 4 Wall. (U. S.) 2 (1866).

<sup>23</sup> See Field, J., in *Hagar v. Reclamation District No. 108*, 111 U. S. 701 (1883). Cf. *Cary v. Curtis*, 3 How. (U. S.) 236 (1845); *Central of Georgia Ry. Co. v. Wright*, 207 U. S. 127 (1907).

The recent case of *City of Indianapolis v. State*, in note 15, *supra*, also furnishes an excellent example of this kind. There the statute provided that, in a contest over paying assessments, upon petition of the property owners the court should appoint a board of appraisers. The decision of this board was to be final, and its determination was to be "entered as a judgment upon the records of the court." The statute was upheld. The court recognized that taxation has been generally held to be a purely administrative end, and the determination of the value of property merely an incident thereto.

<sup>24</sup> See Pound, "Executive Justice," 55 AM. L. REV. 137; Pound, "The Revival of Personal Government," PROC. N. H. BAR ASSN. (1917) 13; Goodnow, "The Growth of Executive Discretion," 2 PROC. AM. POL. SCI. ASSN., 29; Powell, "Judicial Review of Administrative Action in Immigration Proceedings," 22 HARV. L. REV. 360.

<sup>1</sup> Since this is really a sending on, it is called in German, *Weiterverweisung*, as distinguished from the former case of sending back, called *Rückverweisung*.

<sup>2</sup> For a list of all the writings, see Ernest G. Lorenzen, "The *Renvoi* Doctrine in the Conflict of Laws," 27 YALE L. J. 509, 531 *et seq.* To those in English may now be added, Ernest O. Schreiber, Jr., "The Doctrine of the *Renvoi* in Anglo-American Law," 31 HARV. L. REV. 523.

given above, where succession to movables within the jurisdiction of the forum is in question. In such cases the arguments against acceptance of the doctrine seem persuasive, especially under the American theory of territorial law. Nothing but New York law can be law in New York.<sup>3</sup> When the New York lawgiver orders succession to New York movables according to the law of France, the French lawgiver is not to be allowed to say that some other law should govern.<sup>4</sup> Moreover, if the reference from the forum to the foreign law includes the conflict-of-laws rule of that law, the next reference includes it just as well and so on *ad infinitum* in what has appropriately been described as "international lawn tennis."<sup>5</sup> For purposes of decision the break must come somewhere, and the only logical place is at the first reference.

At the same time there is a feeling that certain exceptional cases exist where acceptance of the *renvoi* doctrine would be desirable.<sup>6</sup> It is submitted that "the explanation of" these suggested exceptions (generally dealing with marriages and titles to land) involves a fundamental distinction, hitherto apparently overlooked. This distinction is between a case where the law of the forum creates a new right, and one where it merely enforces a right created elsewhere. In the former case, as shown above, it is for the law of the forum, and it alone, to designate the internal law applicable. But the latter is vastly different. "If an American court, having according to the territorial theory to apply its own law to existing rights, finds that a right has, by its law, arisen under another law, it has only to learn the terms of that law and the nature of the right which it created."<sup>7</sup> The statement furnishes its own support. If the law of the forum provides that a right created by a foreign law be enforced, a just adjudication can be made only by deciding as to that right as the foreign court would have decided.<sup>8</sup> This means that all the law which that court would apply must be applied. All the cases in America and England involving the *renvoi* under such circumstances have reached this result.<sup>9</sup>

A recent New York case<sup>10</sup> adds to the authorities tacitly supporting this principle. The facts, slightly simplified, were as follows: A man

<sup>3</sup> See STORY, *CONFLICT OF LAWS*, 6 ed., § 18; BEALE, *CONFLICT OF LAWS*, §§ 73, 74.

<sup>4</sup> *In re Tallmadge*, 109 Misc. 696, 181 N. Y. Supp. 336 (Surr., 1919).

<sup>5</sup> Buzzati, in 18 *ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL*, 146; cited, Schreiber, *op. cit.*, at 528.

<sup>6</sup> Lorenzen, *op. cit.*, at 529. See also 31 *YALE L. J.* 191, 193.

<sup>7</sup> See BEALE, *CONFLICT OF LAWS*, 77.

<sup>8</sup> It has been suggested that this way of looking at the matter begs the question. "The argument that the foreign law having jurisdiction under the *lex fori*, has created rights which must be recognized involves in effect a *petitio principii*. The very question is whether the *lex fori* should recognize alleged rights created not by the territorial law of the foreign country referred to, but by that of another state which is incompetent under the *lex fori*." See Ernest G. Lorenzen, "The *Renvoi* Theory and the Application of Foreign Law," 10 *COL. L. REV.* 190, 205, n. 49. It is sufficient answer that the *lex fori* does not consider the right as created by this third law to which reference is made. If it did, it would itself have turned directly to it.

<sup>9</sup> *Armitage v. Att'y Gen'l*, [1906] P. 135; *Guernsey v. Imperial Bank of Canada*, 188 Fed. 300 (8th Circ., 1911); *White v. Holly*, 80 Conn. 438, 68 Atl. 997 (1908); *In re Baines* (1903) cited in DICKY, *CONFLICT OF LAWS*, 2 ed., 723.

<sup>10</sup> *Ball v. Cross*, 132 N. E. 106 (N. Y.). For the facts of this case see *RECENT CASES*, *infra*, p. 468.

and his wife were domiciled in A. He left her and secured a divorce upon constructive service in B. The wife married a New York citizen, who later brought suit against her to annul this marriage. The court held that the decision should depend upon the effect which A would give to such a divorce,<sup>11</sup> although New York would not recognize a divorce so obtained against one of its citizens.<sup>12</sup> The right here sought to be enforced is the status of the second marriage. This right depended upon the law of A. It is obvious that the court could not decide properly as to the right created in another jurisdiction without taking into consideration all the law which would there be applied. In addition, this view of the question has the important practical benefit that the woman considered divorced at her domicile will not be considered elsewhere as married, and *vice versa*.

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**TITLE TO PERSONALTY BY ESTOPPEL.**—A purports to sell a chattel to B. It is well settled that—unless exceptional circumstances make the transaction the equivalent of a quitclaim—A's conduct impliedly involves an assertion that he has title to the chattel.<sup>1</sup> The assertion or warranty has two aspects: (1) a representation of fact; and (2) an assumption of liability in case the representation is not true.<sup>2</sup> Suppose that at that time A is not the owner of the chattel but later acquires title thereto. It seems quite clear that as between himself and B he cannot be heard to say that the after-acquired title did not promptly inure to B's benefit.<sup>3</sup> *A fortiori* he is thus estopped if the assertion of title is express. So far it is practically immaterial whether by virtue of the estoppel "title passes" from A to B or not. The same results are predicated in either case. But if innocent third parties have claims to the chattel as against A, then it is at once important to know whether legal title passed to B in such wise as to protect B against these claims.

If the subject matter of the sale be land and the representation or warranty be expressed in the deed, the weight of judicial opinion—subject to some dissent because of an inconsistency of the rule with the

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<sup>11</sup> It should be noted that the principal case does not raise the question of a court applying some internal law other than that of the country to whose law its conflict-of-laws rule directed it, but does raise the question of the *renvoi* doctrine as broadly stated, assuming that the rule as to recognition of a divorce rendered at the domicile of only one party is a rule of the conflict of laws.

<sup>12</sup> *People v. Baker*, 76 N. Y. 78 (1879); *Olmsted v. Olmsted*, 190 N. Y. 458, 83 N. E. 569 (1908).

<sup>1</sup> See WILLISTON, *SALES*, §§ 218–220.

<sup>2</sup> These different aspects are illustrated in the rule allowing an action for breach of warranty to be either in tort as upon a false representation or in contract as upon the undertaking of responsibility. See *Farrell v. Manhattan Market*, 198 Mass. 271, 274, 84 N. E. 481, 485 (1908).

<sup>3</sup> See WILLISTON, *SALES*, § 131. *Accord*: as to sale of a trade secret, *Vulcan Co. v. The Amer. Can. Co.*, 67 N. J. Eq. 243, 58 Atl. 290 (1904). Perhaps the most accurate statement is that A is estopped to deny that he had title at the time of the original sale. As A does not hold any title under B he can assert none against him, for such an assertion would rest upon facts inconsistent with those which he is bound to admit as true.

theory of the registry system<sup>4</sup>—is that B will hold free and clear of all such claims as did not attach prior to or at the very moment when A acquired title. Thus, although if A obtain title from X by fraud, X's right of rescission will prevail even against B,<sup>5</sup> nevertheless, if A take free of all incumbrances and equities, no conveyance which he may thereafter make, even though to a *bona fide* purchaser, can affect the now fixed rights of B.<sup>6</sup> The title "shoots" into B at the moment of its acquisition by A and is therefore beyond the power of A to subject it to adverse rights. The *modus operandi* of this doctrine, commonly called estoppel by deed, has been variously stated as (1) a transfer of title by estoppel resting upon the false recital in the deed;<sup>7</sup> or (2) a specific enforcement at law of the promise to convey implied in the covenant of warranty;<sup>8</sup> or (3) "a technical effect of a technical representation."<sup>9</sup> On any alternative it is an extraordinary rule, altering the title to land in a way which must find its support apart from the general principles of conveyancing.

A diversity makes the question as to chattels a different problem and paves an easier way to even broader results. Title to land cannot pass by mere assent of the parties. Title to most kinds of personal property, however, can do so as between vendor and vendee, and when the necessary change of possession<sup>10</sup> has been consummated the efficacy of the sale is not confined to disputes in which they alone are interested. In the attempted sale of a chattel from A to B, the former for consideration assents once for all<sup>11</sup> to B's having title thereto. If then, when A acquires

<sup>4</sup> *Calder v. Chapman*, 52 Pa. St. 359 (1866). See RAWLE, COVENANTS FOR TITLE, 5 ed., § 259.

<sup>5</sup> *Eyre v. Burmester*, 10 H. L. Cas. 90 (1862).

<sup>6</sup> *Ayer v. Phila., etc. Face Brick Co.*, 159 Mass. 84, 34 N. E. 177 (1893). See RAWLE, *op. cit.*, §§ 248, 252, 259.

<sup>7</sup> See *Nelson, J.*, in *Van Rensselaer v. Kearney*, 11 How. (U. S.) 297, 325-326 (1850); *Jessel, M. R.*, in *General, etc. Co. v. Liberator, etc. Society*, L. R. 10 Ch. 15, 22 (1878); *Buckley, L. J.*, in *Poulton v. Moore*, [1915] 1 K. B. 400, 413.

<sup>8</sup> See RAWLE, *op. cit.*, § 250. This explanation of the rule is doubted by the learned author. *Id.*, § 251.

<sup>9</sup> *Holmes, J.*, in *Ayer v. Phila., etc. Face Brick Co.*, *supra*, at 86.

<sup>10</sup> Three classes of cases are to be distinguished. In two of them, — (1) where the sale is attacked by a creditor of the vendor, and (2) where there is a claim by a subsequent purchaser from the vendor who had remained in possession — the question of change of possession is significant, although the jurisdictions vary in the accuracy with which the two are distinguished. See WILLISTON, SALES, § 349 *et seq.* But (3) change of possession does not seem necessary to pass title as against persons having a prior claim against the vendor. Therefore in cases of personality a result opposite to that reached in *Eyre v. Burmester*, *supra*, may be expected even without change of possession. Cf. *Frazer v. Hilliard*, 2 Strob. (S. C.) 309 (1847). And *a fortiori* where there is change of possession. *Rowley v. Bigelow*, 12 Pick. (Mass.) 307 (1832).

<sup>11</sup> A's apparent assent apparently continues.

But it may be suggested that before acquiring title A may unequivocally notify B that his assent is for the future recalled. If so, (1) in a controversy between A and B this will avail A nothing, as he is estopped to deny that he had title from the outset; (2) in a controversy between B and a subsequent purchaser from A the case is more doubtful. If in this latter case B has possession, his position is much like that of the buyer in a conditional sale after the condition has been performed. The transfer of possession may be said to have been accompanied by an indefeasible right to acquire title: in the conditional sale, by the performance of the condition — see WILLISTON, SALES, § 331; in the case here put, upon the acquisition of title by A.



title, B or some one holding under him has possession or obtains it before rights of third parties intervene, it is not difficult to say that a title passes good against all persons as to whom B is a purchaser for value and without notice. This view of the transaction dispenses with the question whether the analogy of estoppel by deed is to be taken over into this branch of personal property law. But there are a respectable number of decisions which reach this result in cases of sales<sup>12</sup> and pledges<sup>13</sup> upon the theory or language of the last mentioned analogy.<sup>14</sup> And this analysis is not here objectionable provided it be recognized that the requirement of change of possession as against subsequent purchasers and creditors is not to be dispensed with in this way.

But the analogy of estoppel by deed passing title to after-acquired realty is obviously inapplicable to many cases. The alternative explanation suggested above may be tested by applying it to such a case. If it should appear to be a generally workable theory for other cases in which heretofore resort has been had to "estoppel *in pais*," then the validity of its application as presented above is strengthened. Suppose A owns jewels but knowingly permits X to hold himself out as owner or as authorized to sell them, and B buys in reliance upon the apparent situation. Once there has been the requisite change of possession to B or his successors in interest, it ought to be clear that A cannot thereafter affect the title to them even by an attempted sale to a *bona fide* purchaser.<sup>15</sup>

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In other words there may be an irrevocable assent, and this would eliminate the use of estoppel in the solution of (1) *supra*. Then the question remains whether transfer of possession is necessary to have this irrevocable assent. It is submitted that it should be necessary only to the extent that it is necessary against third persons in all cases of sale.

<sup>12</sup> *Whitehorn Bros. v. Davison*, [1911] 1 K. B. 463; *The Idaho*, 93 U. S. 575 (1876); *Rowley v. Bigelow, supra*; *Frazer v. Hilliard, supra*; *Gookin v. Graham*, 5 Humph. (Tenn.) 480 (1844). See also *Davis v. Tingle*, 8 B. Mon. (Ky.) 539, 543 (1848). Cf. *Coolidge v. Ayers*, 76 Vt. 405, 57 Atl. 970 (1904).

In *The Idaho, supra*, and *Rowley v. Bigelow, supra*, goods were delivered to carriers and thereby appropriated to bills of lading which had been previously issued and negotiated. There were therefore no specified goods until the date of delivery and to justify the decision on any ground it is necessary to presume the buyer's assent to the appropriation. In *Frazer v. Hilliard, supra*, however, the goods were specified from the beginning of the dealings although they were not owned by the seller until after the giving of the delivery order by which he attempted to transfer title. And in the other cases, which did not involve transfers by documents of title, there was the assent of both parties to the purported sale.

<sup>13</sup> *Blundell-Leigh v. Attenborough*, [1921] 3 K. B. 235. For the facts of this case, see RECENT CASES, *infra*, p. 471. *Accord*, *Goldstein v. Hort*, 30 Cal. 372 (1866).

<sup>14</sup> In the case of chattels the sale will usually contain the equivalent of both recital and covenant. Thus most of the decisions would not require a discussion of which of three explanations of the doctrine of estoppel by deed is applicable. But the third explanation may well be eliminated on the ground that there is not the historical background in the law of personal property which probably in the law of real estate called forth Judge Holmes' version. And the second theory, while rational when applied to pledges or other security transactions, breaks down when applied to the ordinary case of a sale of a chattel, a contract for which is not usually specifically enforceable. Therefore if the land analogy is to be used it may probably be best rested upon the anomalous basis of a transfer of title by estoppel, which seems to prevail in England. The English view has also especial weight in that it is in a jurisdiction where the question as to land is not complicated by the registry system.

<sup>15</sup> The question is badly confused by the formula that an estoppel binds the person primarily estopped and his privies, and the lack of accord as to who are "privies"

And yet this is a situation quite different from that of the case first put above. Here A has never entered into the relation of sale at all. But is there not an ample substitute for his actual assent?<sup>16</sup> It is reasonably apparent assent that is significant in contractual relationships.<sup>17</sup> And is not A's representation — whether by silence or positive affirmation — the equivalent from B's point of view of saying that A assents to the transfer by X of any interest which A has in the jewels? If this is so, the coincidence of assent of the owner and the change of possession effect a change of title precisely as in the first case above, and no adversion to estoppel is necessary to explain those results. It is admitted that this is not the language of the decisions; but it is suggested as a justification of them which does not partake of the somewhat nebulous nature of doctrines of "estoppel."

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LABOR ORGANIZATIONS AND THE ANTI-TRUST LAWS. — A crucial problem of labor-union development was presented in the case of *Borderland Coal Corporation v. Gasaway*.<sup>1</sup> A West Virginia corporation sought an injunction on the ground that a combination to unionize the non-union coal mines of West Virginia and so to destroy their competitive advantage in the interstate bituminous coal market was in violation of the Sherman Act. In the District Court, Judge Anderson enjoined all unionization regardless of the methods employed, and enjoined the Central Competitive Field operators from collecting union dues under the check-off system. The Circuit Court of Appeals held that the injunction was too broad, since it included legitimate activities of the United Mine Workers, and that it should be confined to specific illegal methods of unionization, such as violent destruction of property, intimidation of employees, or inducing employees to violate "yellow dog" contracts.<sup>2</sup> The injunction against the check-off was also removed.

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within the meaning of the rule. See EWART, ESTOPPEL, pp. 195 *et seq.* It is said that, "It is not the office of an estoppel to pass a title." See BIGELOW, ESTOPPEL, 5 ed., p. 609. But it is significant that Mr. Bigelow, whose thesis seems to be that a *bona fide* purchaser from the estopped owner is not bound by the estoppel, qualifies his example of this: "If a person stand by and allow his goods to be sold as the goods of another to one *who does not take possession*." See BIGELOW, *op. cit.*, p. 609. Italics are taken from Mr. Ewart's quotation of the passage. See EWART, ESTOPPEL, p. 203.

<sup>16</sup> Mr. Ewart distinguishes cases where (1) there is an inference that the owner is an actual party to the sale, and (2) there is only a representation. See EWART, ESTOPPEL, pp. 196, 248-249. This tends to answer the question in the negative.

<sup>17</sup> See WILLISTON, SALES, § 5.

<sup>1</sup> *Borderland Coal Corporation v. Gasaway*, U. S. (Dist. Ct. Ind.), decided Oct. 31, 1921, and *Gasaway v. Borderland Coal Corporation*, U. S. Circ. Ct. of Appeals (7th Circ.), decided Dec. 15, 1921. Both opinions may be found in the CHICAGO LEGAL NEWS for Dec. 22, 1921. For the facts of this case see RECENT CASES, *infra*, p. 474.

<sup>2</sup> In setting forth the proper scope of the injunction the Circuit Court limits the application of the much discussed case of *Hitchman Coal Co. v. Mitchell*, 245 U. S. 229 (1917). See 31 HARV. L. REV. 648; 27 YALE L. J. 779. The court construes the "yellow dog" contract as requiring the employee merely to quit work if he joins the union, and therefore it refuses to enjoin propaganda seeking to have miners employed at will sever connection with their employer and openly join the union.

The question whether a labor union can violate the Sherman Act by peacefully expanding so as to secure nation-wide control of the labor supply in an industry largely devoted to interstate commerce has never been specifically answered.<sup>3</sup> If the complete unionization of such industries in itself constitutes a violation of the Sherman Act,<sup>4</sup> the injunction should have been upheld in its entirety, since the plaintiff can show damage through the destruction of the competitive advantage in non-union labor conditions. No doubt this powerful organization involves a restraint of trade, and would be illegal under a literal construction of the Sherman Act.<sup>5</sup> But it is the accepted view in dealing with combinations of capital that the words "restraint of trade" must be construed in view of the common-law background, and consequently that the Sherman Act strikes merely at an undue restriction of competition.<sup>6</sup> The question then becomes one of reasonableness. Its solution demands a consideration of all the facts of the particular restraint and a balance of the interests involved. A study of the coal industry reveals that the competitive advantage of the West Virginia fields rests in factors of geology and concentrated financial control in addition to labor conditions. Unionization would add to labor costs but would not drive the operators out of the interstate market. On the other hand, the use of this advantage in labor conditions means the exploitation of labor and threatens the disruption of the system of conciliation in the Central Competitive Field.<sup>7</sup> This system which brings relief from intermittent hostilities and presents an experiment in industrial co-operation, cannot function with West Virginia competing outside the field.<sup>8</sup> Stability

<sup>3</sup> The decisions which have enjoined certain union practices or held labor unions liable for damages under the Sherman Act were rendered in cases which included recognized illegal activities, such as the use of secondary boycott or violence. *Duplex Co. v. Deering*, 254 U. S. 443 (1921); *Loewe v. Lawlor*, 208 U. S. 274 (1908); *United Mine Workers v. Coronado Coal Co.*, 258 Fed. 829 (8th Circ., 1919); *Dowd v. United Mine Workers*, 235 Fed. 1 (8th Circ., 1916). However, there is an intimation in the case of *American Steel Foundries v. Tri-City Trades Council*, U. S. Sup. Ct., October Term, 1921, No. 2, that the benefit to the International Union is too remote and the control of interstate commerce sought too dangerous to make further extension of the *United Mine Workers* by any method legal; but the decision recognizes the right to unionize within a local competitive area.

<sup>4</sup> An initial problem under the Sherman Act is to find a restraint on commerce. If the distinction between commerce and manufacture set forth in the case of *United States v. E. C. Knight Co.*, 156 U. S. 1 (1895), were accepted at face value to-day it would be hard to find a restraint on commerce in the principal case. The *United Mine Workers* have no connection with the coal industry aside from the mining operations and the restraint on labor supply is a step back of actual manufacture in the productive process. It seems proper to disregard technical distinctions between manufacture and commerce and look at the ultimate result of complete unionization which indicates an effective restraint on interstate commerce since West Virginia production is almost entirely for interstate trade. *United Mine Workers v. Coronado Coal Co.*, 258 Fed. 829 (8th Circ., 1919).

<sup>5</sup> 26 STAT. AT L., c. 647.

<sup>6</sup> *Chicago Board of Trade v. United States*, 246 U. S. 231 (1918); *Standard Oil Co. v. United States*, 221 U. S. 1, 60 (1911); *United States v. American Tobacco Co.*, 221 U. S. 106, 179 (1911).

<sup>7</sup> See SUFFERN, CONCILIATION AND ARBITRATION IN THE COAL INDUSTRY, 107.

<sup>8</sup> West Virginia clearly belongs in the same competitive area as the states in the so-called Central Competitive Field (Western Pennsylvania, Ohio, Indiana, and Illinois).

of labor conditions in the coal industry demands that the operators and miners arrive at trade agreements on a large scale, and unless Congress desires to provide governmental arbitration, it should not be held an unreasonable restraint of trade for labor unions to perfect the extensive organization requisite for such settlements. Therefore legitimate methods of unionization should not be held to violate the Sherman Act though the union seeks and attains a preponderant position in the industry.

But the balance shifts when the methods used involve violence, intimidation, and inducing breach of contract, and such tactics were properly enjoined under the Sherman Act by the Circuit Court.<sup>9</sup> The vital question in the case is whether when a large union engages in unfair practices the whole combination may be smashed as in restraint of trade. In dealing with preponderant units of capital, the courts have tended to grant dissolution where unfair practices were employed and not merely to enjoin such practices.<sup>10</sup> The social interest in industrial development through large combinations has been outweighed by the interest in keeping prices free from the influence of monopoly. But the social interest in the existence of labor unions as a means of removing inequality of bargaining power in the competitive struggle introduces here a further and decisive consideration. Consequently, the legality of the existence of the union, in spite of unfair practices, was recognized at common law,<sup>11</sup> and the Sherman Act should not be held to change the situation. The Clayton Act<sup>12</sup> makes this doubly certain by providing that the Anti-Trust Laws shall not be construed to forbid the existence of labor organizations or to prevent them from lawfully carrying out their legitimate objects.<sup>13</sup> The right to exist must include the right to increase its membership. Certainly a legitimate object of a labor union is to win recruits, and there is nothing in the Act to deny this protection to a national union on account of size or unfair practices. It seems paradoxical that the existence of a union cannot be attacked, but that when it once approaches a national scope it may not peaceably

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<sup>9</sup> The cases holding labor unions for damages or granting an injunction under the Sherman Act have recognized the right to organize by legitimate methods, though the illegal means were punished. *Duplex Co. v. Deering*, 254 U. S. 443 (1921); *Loewe v. Lawlor*, 208 U. S. 274 (1908); *United Mine Workers v. Coronado Coal Co.*, 258 Fed. 829 (8th Circ., 1919). There is no authority for enjoining all methods of unionization or in effect smashing a union because of country-wide scope or illegal tactics.

<sup>10</sup> Nevertheless in a few cases where combinations of capital were involved the courts have enjoined the unfair practices but denied dissolution where the combination in other respects fostered the public interest. *United States v. Hamburg-American Line*, 216 Fed. 971 (S. D. N. Y.); *United States v. Keystone Watch Case Co.*, 218 Fed. 502 (E. D. Pa.).

<sup>11</sup> *Snow v. Wheeler*, 113 Mass. 179 (1873). See COMMONS, PRINCIPLES OF LABOR LEGISLATION, 102. "Upon the question of the legality of trade unions *per se*, there is general agreement among the courts. In only two cases were unions held to be unlawful organizations."

Where there are no unfair practices the courts have uniformly upheld the right to unionize. *Gompers v. Bucks Stove Co.*, 221 U. S. 418, 439 (1911); *Diamond Block Coal Co. v. United Mine Workers*, 188 Ky. 477, 222 S. W. 1079 (1920).

<sup>12</sup> See 38 U. S. STAT. AT L., c. 323, § 6.

<sup>13</sup> *American Steel Foundries v. Tri-City Trades Council*, U. S. Sup. Ct., October Term, 1921, No. 2.

urge others to join the organization. The Circuit Court recognizes this in an opinion vindicating the right of the United Mine Workers to unionize and to win recruits to the union cause by appeals to reason unaccompanied by violence or other illegal methods.

**PUBLIC TORTS.** — The division of criminal offenses into felonies and misdemeanors is not an adequate classification. Particularly in the application of the doctrine of *mens rea* have courts come to realize this fact. Several attempts have been made to establish new categories. Thus, actions for breach of police regulations have been termed *quasi-criminal*.<sup>1</sup> A further striking example is the division of offenses into crimes *mala per se* and *mala prohibita*.<sup>2</sup> Of late years a new classification of criminal offenses has been introduced, namely, public torts<sup>3</sup> and real crimes.

The term "public torts" refers to injuries to the state which are treated as analogous to civil injuries, actionable criminally either at common law or by statute. These include three classes of cases: injuries to public property, public nuisances, and police offenses.<sup>4</sup> The well-recognized right of the state to sue criminally for injuries to public property<sup>5</sup> rests on the historical disability of the state to sue for such wrongs in the civil courts.<sup>6</sup> Criminal action for public nuisances<sup>7</sup> falls within the same principle, since public nuisances in every case injure a property right of the state. In these cases it is necessary to look only at the nature of the act to determine whether it is a public tort. In statutory offenses, however, the legislative intent must govern. Violations of police regulations are ordinarily considered wrongs against the state not serious enough to constitute real crimes and are therefore treated as torts infringing the public interest in health and security.<sup>8</sup> But if the legislature considers the act sufficiently dangerous to the state to require punishment, it is a crime. Consequently the question whether a violation of a particular police regulation is a public tort or a real crime depends on whether the legisla-

<sup>1</sup> See *Wiggins v. Chicago*, 68 Ill. 372, 375 (1873).

<sup>2</sup> See 1 BISHOP, NEW CRIM. LAW, 8 ed., § 295.

<sup>3</sup> See BEALE, CAS. CRIM. LAW, 3 ed., 81.

<sup>4</sup> See *Sherras v. De Rutzen*, [1895], 1 Q. B. 918, 921.

<sup>5</sup> *Comm. v. Eckert*, 2 Browne (Pa.), 249 (1812); *Comm. v. King*, 13 Met. (Mass.) 115 (1847).

<sup>6</sup> The state, on account of its supposed legal ubiquity, cannot be disseised, and therefore cannot maintain the direct action of ejectment or trespass to try title. *State v. Stark*, 3 Brev. (S. C.) 101 (1812); *State v. Pacific Guano Co.*, 22 S. C. 50 (1884). See also *State v. Paxson*, 119 Ga. 730, 46 S. E. 872 (1904).

<sup>7</sup> *King v. People*, 83 N. Y. 587 (1881); *Comm. v. Sharpless*, 2 S. & R. (Pa.) 91 (1815). For other cases of public nuisances see 2 WOOD, NUISANCES, 3 ed., 1298.

<sup>8</sup> See *Helena v. Kent*, 32 Mont. 279, 290, 80 Pac. 258, 261 (1905); *Brookville v. Gagle*, 73 Ind. 117 (1880). At common law such action might be brought in debt or assumpsit. See 1 DILLON, MUNIC. CORP., 4 ed., § 409. See also *Steinert v. Sobey*, 14 App. Div. 505, 44 N. Y. Supp. 146 (1897); *C. Beck Co. v. Milwaukee*, 139 Wis. 340, 348, 120 N. W. 293, 295 (1909). But see *contra*, *Pearson v. Wimbish*, 124 Ga. 701, 52 S. E. 701 (1905); *Stone v. Paducah*, 120 Ky. 322, 323, 86 S. W. 531, 534 (1905).

tive body intends the penalty provided to be compensation<sup>9</sup> or punishment. Wherever imprisonment is prescribed or permitted it is clear that the latter is the case.<sup>10</sup> It thus seems that public torts include all wrongs against the state actionable criminally, the penalties for which are not intended as punishment.

This distinction between public torts and real crimes gives rise to important consequences: (1) *Mens rea* is not requisite for public torts;<sup>11</sup> the penalty to the individual is so slight that, bearing in mind the directness of the injury to the state, justice requires that the defendant be held for his anti-social act regardless of intent.<sup>12</sup> But *mens rea* is a necessary element for all real crimes. It is therefore necessary only to determine whether the offense be a public tort to settle this vexing problem of the necessity for *mens rea*.<sup>13</sup> This distinction is borne out by the cases, not only as regards injuries to public property and nuisances, but also as regards police offenses.<sup>14</sup> Consistent with this principle is a recent case<sup>15</sup> holding mistake of fact negating *mens rea* a defense in an action for violation of a liquor statute prescribing fine and imprisonment as punishment. The case is clearly right, since the act is made a crime, not a public tort. (2) Where the defendant while engaged in the commission of one crime commits another without intent to do the latter act, the criminal intent is carried over from the first act so as to constitute *mens rea* for the second.<sup>16</sup> But intent to commit a tort is not *mens rea*. Hence where the first offense is a public tort and the second

<sup>9</sup> So at common law public torts are penalized by fine only to provide redress to the state. See 2 WOOD, NUISANCES, 3 ed., 1305. The defendant may be imprisoned until he pays the fine, but this does not change the character of the offense. The imprisonment may be likened to equity's power of enforcement. It is meant, not as punishment, but to induce payment.

<sup>10</sup> See 15 HARV. L. REV. 660. It may be suggested that the same act can be a public tort in one state and a crime in another, because the one state inflicts only a fine, while the other commands imprisonment. There is in fact nothing inconsistent in this. One legislature deems the act serious enough to be a crime; the other does not. This testing by the penalty is no innovation. It is well settled that whether an offense is a felony or a misdemeanor is determined by the extent of the punishment. *People v. Sacramento Butchers' Prot. Ass'n*, 12 Cal. App. 471, 107 Pac. 712 (1910).

<sup>11</sup> *Comm. v. Boynton*, 2 Allen (Mass.) 160 (1861); *Comm. v. Farren*, 9 Allen (Mass.) 489 (1864); *Comm. v. Weiss*, 139 Pa. St. 247 (1891); *People v. Kibler*, 106 N. Y. 321, 12 N. E. 795 (1887). But see *contra*, *Teague v. State*, 25 Tex. App. 577 (1888); *Mulreed v. State*, 107 Ind. 62 (1886).

<sup>12</sup> "There is nothing that need shock any mind in the payment of a small pecuniary penalty by a person who has unwittingly done something detrimental to the public interest. To subject him to . . . the loss of civil rights, to imprisonment with hard labor, or even to penal servitude, is a very different matter." Wills, J., in *Reg. v. Tolson*, 23 Q. B. D. 168 (1889).

<sup>13</sup> See John Wilder May, "Mens Rea," 12 AM. L. REV. 469. The learned author deplores the fact that contrary decisions were handed down on what he took to be the same set of facts. See *Comm. v. Emmons*, 98 Mass. 6 (1867); *Stern v. State*, 53 Ga. App. 229 (1874). But while the act is almost identical in both cases (allowing a minor to enter a pool-room), the former case provided a penalty only; in the latter imprisonment was the punishment. The act was therefore a public tort in Massachusetts, a crime in Georgia. The cases are quite consistent.

<sup>14</sup> *Reg. v. Stephens*, L. R. 1 Q. B. 702 (1866). See also note 11, *supra*.

<sup>15</sup> *Coury v. State*, 200 Pac. 871 (Okla. 1921). For the facts of this case see RECENT CASES, *infra*, p. 471. *Accord*, *State v. Brown*, 188 Mo. App. 248, 175 S. W. 131 (1915); *State v. Cox*, 91 Ore. 518, 179 Pac. 575 (1919).

<sup>16</sup> *Comm. v. Mink*, 123 Mass. 422 (1877).

a crime, there being no *mens rea* originally, the defendant cannot be held criminally for the second act which he did not intend.<sup>17</sup> (3) It is constitutional to have no trial by jury in the case of a public tort.<sup>18</sup> (4) The plea of double jeopardy is not open to one convicted of a public tort, when accused of a crime on the same facts.<sup>19</sup> This case usually arises where an ordinance prescribes a penalty, and a statute inflicts imprisonment, for the same offense. Finally, it may be suggested that the ordinary requirement that the prosecution prove its case beyond a reasonable doubt does not extend to public torts.<sup>20</sup>

WHO PAYS FOR THE WIFE'S DEFENSE IN A DIVORCE ACTION?—Now that women sit in legislatures and upon juries, we may well wonder to find still blooming a doctrine which flowered when the married woman was at law the equal of the infant and the idiot. An English woman recently sued for divorce on the grounds of adultery, obtained the "usual interlocutory order" for costs.<sup>1</sup> This order required the husband to furnish suit-money<sup>2</sup> for her defense.<sup>3</sup> In England it has always been the established rule<sup>4</sup> that the solicitor who in good faith<sup>5</sup> and for prob-

<sup>17</sup> *State v. Horton*, 139 N. C. 588 (1905). Where the defendant violates a police ordinance regulating speed, and thereby injures another, he is not guilty of assault and battery. *Comm. v. Adams*, 114 Mass. 323 (1873). On the other hand, if the legislature makes the act a crime by prescribing imprisonment, the defendant may be held for manslaughter. *People v. Harris*, 182 N. W. 673 (Mich., 1921). This principle has been lost sight of in a few cases, where the defendant has been held guilty of manslaughter, although the statute in question provided merely a money penalty. See *State v. Gash*, 177 N. C. 595, 99 S. E. 337 (1919); *Bell v. State*, 7 Ohio App. 185 (1918); *State v. Rountree*, 106 S. E. 669 (N. C., 1921). See also *State v. Collingsworth*, 82 Ohio St. 154, 92 N. E. 22 (1910).

<sup>18</sup> *Williams v. Augusta*, 4 Ga. 509 (1848), approved *Floyd v. Commissioners*, 14 Ga. 394 (1853); *Sutton v. McConnell*, 46 Wis. 269, 280, 50 N. W. 414, 416 (1879). See also 1 DILLON, *MUNIC. CORP.*, 4 ed., § 433. But see *contra*, *Creston v. Nye*, 74 Iowa, 369 (1888). In *Byers v. Comm.*, 42 Pa. St. 89 (1862) the court held no jury trial necessary although imprisonment was the punishment. This is clearly wrong.

<sup>19</sup> *Leitchfield Merc. Co. v. Comm.*, 143 Ky. 162, 136 S. W. 639 (1911). But see *contra*, *State v. Cowan*, 29 Mo. 330 (1860), where the lightness of the imprisonment (five days) undoubtedly influenced the court. The court carried too far the principle here advocated in *State v. Clifford*, 45 La. Ann. 980 (1893), where imprisonment was provided. See also *Jenkins v. State*, 14 Ga. App. 276, 80 S. E. 688 (1914), commented on in 27 HARV. L. REV. 681.

<sup>20</sup> *Peterson v. State*, 79 Neb. 132, 112 N. W. 306 (1907).

<sup>1</sup> *Franklin v. Franklin*, [1921] P. 407. For the facts of this case, see RECENT CASES, *infra*, p. 470.

<sup>2</sup> In England "suit-money" is known as "costs." See 2 BISHOP, *MARRIAGE, DIVORCE, AND SEPARATION*, § 973. Such "costs" are allowed *pendente lite*, and must be distinguished from ordinary costs, which, though in the discretion of the court since THE MATRIMONIAL CAUSES ACT of 1857 (20 & 21 VICT., c. 85, § 51), usually follow the event, apparently by analogy to rule 1, order LXV, RULES SUPREME COURT OF JUDICATURE (1883). See RAYDEN, *DIVORCE*, 193.

<sup>3</sup> Such orders are made under the authority of Divorce Rules made in accordance with the provisions of the JUDICATURE ACT (38 & 39 VICT., c. 77, § 18). See *DIVORCE RULES* 158 and 159 (26 Dec., 1865), and 201 (14 July, 1875) collected in RAYDEN, *DIVORCE*, 301 *et seq.*

<sup>4</sup> See SHELFORD, *MARRIAGE AND DIVORCE*, 533; 2 BISHOP, *MARRIAGE, DIVORCE, AND SEPARATION*, § 973.

<sup>5</sup> The husband need not pay where the defense is fictitious. *Clark v. Clark*, 4 Sw. & Tr. 111 (1865). Or unreasonable. *Kershaw v. Kershaw*, 23 T. L. R. 296 (1907).

able cause<sup>6</sup> defends or prosecutes a divorce suit for the wife may recover at law from the husband a reasonable compensation, whether successful or not.<sup>7</sup> In some obvious cases — such as a frivolous defense — the husband is excused;<sup>8</sup> but normally, as long as the marital tie — however strained — still binds,<sup>9</sup> he must pay. To insure such payment, courts have been willing to enjoin husbands from receiving legacies till they complied with their orders.<sup>10</sup>

In America the authorities are in every form of conflict, resulting in nothing which can be called an American doctrine.<sup>11</sup> Some few states appear to follow England;<sup>12</sup> the others hesitate<sup>13</sup> or refuse.<sup>14</sup> It would serve no purpose to trace the tortuous ramifications of individual state doctrines; these involve statutes,<sup>15</sup> wholly or partially covering the question, and susceptible to changing interpretation. After all, when the historical background of the two countries is remembered, there is little wonder that the fixed English doctrine never became established in America. The frontier life of our seventeenth and eighteenth century infused an actual independence into our women quite alien to the immemorial inhibitions of the common law *feme covert*. It might have been expected, too, that the doctrine should survive in England. English law symbolizes slow, imperceptible change; our reactions are swifter.

It is generally said that the reason for the English doctrine is common fairness. Since the husband at marriage took all the wife's property, it was only justice that he put her upon an equal footing with himself

<sup>6</sup> *Brown v. Ackroyd*, 5 E. & B. 819 (1856); *Ottaway v. Hamilton*, 3 C. P. D. 393 (1878); *Rice v. Shepherd*, 12 C. B. (N. S.) 332 (1882).

<sup>7</sup> *Robertson v. Robertson*, 6 P. D. 119 (1881); *Chaldecott v. Chaldecott*, 29 L. T. R. (N. S.) 699 (1874). This ability to sue does not extend to the advocate, however. *Kennedy v. Brown*, 13 C. B. (N. S.) 677 (1863).

<sup>8</sup> *Milne v. Milne*, 2 P. & D. 202 (1871) (wife has separate estate); *Harding v. Harding*, 2 Sw. & Tr. 549 (1862) (wife exhibits laches). See *Flower v. Flower*, 3 P. & D. 132, 133 (1873) (wife's suit frivolous or vexatious). The determination of whether a defense is frivolous is not always easy. The interest of a third party, the wife's attorney, is involved. Often, while the wife is conscious of her guilt, her attorney proceeds in honest belief of her innocence. *Franklin v. Franklin*, note 1, *supra*. The test must be the *bona fides* of the attorney. He is cognizant of the law and the value of the evidence available, and he is requisite to the proper conduct of the wife's case. See *Flower v. Flower*, *supra*; *Franklin v. Franklin*, *supra*, at 415.

<sup>9</sup> Wife who has already obtained separation order. *Sheppard v. Sheppard*, [1905] P. 185. Wife found guilty on first trial. *Nicholson v. Nicholson*, 33 L. J. (P. M. & A.) 114 (1864).

<sup>10</sup> *Gillett v. Gillett*, 14 P. D. 158 (1889); *Bullus v. Bullus*, 26 T. L. R. 330 (1910).

<sup>11</sup> See 2 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, § 974.

<sup>12</sup> *McCurley v. Stockbridge*, 62 Md. 422 (1884); *Gossett v. Patten*, 23 Kan. 340 (1880); *Bord v. Stubbs*, 22 Tex. Civ. App. 242, 54 S. W. 633 (1899); *Hays v. Ledman*, 28 Misc. 575, 59 N. Y. Supp. 687 (1899).

<sup>13</sup> Compare *Clarke v. Burke*, 65 Wis. 359, 27 N. W. 22 (1886), with *Sumner v. Sumner*, 54 Wis. 642, 12 N. W. 21 (1882). See *Warner v. Heiden*, 28 Wis. 517 (1871). Compare *Gordon and Belsheim v. Brackey*, 143 Iowa, 102, 120 N. W. 83 (1909), with *Stockman v. Whitmore*, 140 Iowa, 378, 118 N. W. 403 (1908). See *Clyde v. Peavy*, 74 Iowa, 47, 36 N. W. 883 (1888).

<sup>14</sup> *Shelton v. Pendleton*, 18 Conn. 417 (1847); *Dow v. Eyster*, 79 Ill. 254 (1875); *Coffin v. Dunham*, 8 Cush. (Mass.) 404 (1851); *Wolcott v. Patterson*, 100 Mich. 227, 58 N. W. 1006 (1894); *Wing v. Hurlburt*, 15 Vt. 607 (1843).

<sup>15</sup> See 1920 N. Y. CIV. CODE, § 1769; 1919 WIS. STAT., § 2361; 1915 CAL. CIV. CODE, § 137; 1911 ANN. CODE MD., Art. XLV, § 21; 1916 ME. REV. STAT., c. 65, § 6, etc.



in court.<sup>16</sup> Legal suit-money was a practical equity. This fundamental idea courts have variously phrased.<sup>17</sup> The wife has been denominated an "agent of necessity" to bind her husband;<sup>18</sup> the suit-money has been called a "necessary."<sup>19</sup> Such phraseology has misled American courts;<sup>20</sup> and, blinded by words, they have failed really to conceive the problem. Yet the answer to it seems self-evident when stated. The husband owes the wife a duty of support, and this duty, which exists till death, mortal or legal, parts them, perforce involves furnishing the sinews for legal defense.

That this is the true basis of the doctrine is made abundantly clear in view of the effect of modern married women legislation.<sup>21</sup> This has made woman, generally speaking, man's legal equal. She can contract, hold and convey all classes of property, sue and be sued in her own name. But she is not man's actual equal, because there is no mutual duty of support.<sup>22</sup> As regards that duty, in the nature of things, the child-bearer can never be on an equality with the wage-earner. Unless we are to say that the state shall pay the expense of defending the penniless married woman<sup>23</sup> — and this step, because of practical difficulties,<sup>24</sup> few are ready to take — it must be that the English doctrine remains sound and just. The duty to support involves the duty to see the marriage relation through to the very end, however bitter.

## RECENT CASES

APPEAL AND ERROR — ACTIONS AGAINST DEFENDENTS IN THE ALTERNATIVE — DISMISSAL OF ACTION AGAINST ONE ALTERNATE DEFENDANT. — The plaintiff, injured in a collision of two cars, sued the proprietor of both cars jointly and in the alternative. He produced evidence of negligence of one defendant, but no evidence, except the fact of the collision, of the second defendant's negligence. At the close of the plaintiff's evidence the second defendant moved for judgment, and the motion was granted. The remaining

<sup>16</sup> See 2 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, § 976; *D'Aguilar v. D'Aguilar*, 1 Hag. Ec. 773, 787 (1794). For another practical reason see SCHOULER, DOMESTIC RELATIONS, 5 ed., § 61.

<sup>17</sup> See SCHOULER, DOMESTIC RELATIONS, 5 ed., § 70.

<sup>18</sup> See CENTURY OF LAW REFORM, 368-369.

<sup>19</sup> *Conant v. Burnham*, 133 Mass. 503 (1882); *McCurley v. Stockbridge*, 62 Md. 422. See SPEER, LAW OF MARITAL RIGHTS IN TEXAS, 2 ed., § 560; *Wilson v. Ford*, 3 Exch. 63, 67 (1868), *per* Channell, B.

<sup>20</sup> There can be no agency to terminate the agency relation. *Shelton v. Pendleton*, 18 Conn. 417 (1847). The suit-money is not a necessary. *Warner v. Heiden*, 28 Wis. 517 (1871); *Dow v. Eyster*, 79 Ill. 254 (1875); *Yeiser v. Lowe*, 50 Neb. 310, 69 N.W. 847 (1897).

<sup>21</sup> A typical example of this legislation is the MARRIED WOMEN'S PROPERTY ACT 1882 (45 & 46 VICT., c. 75). For a clear exposition of "the revolution" effected by such legislation in the law, see CENTURY OF LAW REFORM, 354-378.

<sup>22</sup> Except possibly in Iowa *Barnes v. Barnes*, 59 Iowa, 456 (1882).

<sup>23</sup> This is the procedure in Illinois. See 1917 ILL. STAT., c. 40, § 14.

<sup>24</sup> The free counsel assigned to the destitute in criminal cases has not proved in practice a success, because of the inferior class of attorneys available. Suggestions have been made that the proper solution is for the state to bear the expense of all litigation. See 10 HARV. L. REV. 242; "Lawyers' Bills — Who Should Pay Them?" 12 LAW. Q. REV. 368.

defendant then introduced evidence proving that the second defendant was, and that he was not, negligent. A rule of court allows defendants to be sued in the alternative. (COUNTY COURT RULES, Order III, rule 5.) *Held*, that a new trial be granted. *Hummerstone v. Leary*, [1921] 2 K. B. 664.

The common-law rule that only parties who have a unity of interest may be joined as defendants still exists in the majority of American jurisdictions. See *Casey Pure Milk Co. v. Booth Fisheries Co.*, 124 Minn. 117, 144 N. W. 450; *Brown v. Ill. Central R. R.*, 100 Ky. 525, 38 S. W. 862. In such jurisdictions, if the plaintiff, suing several defendants jointly, fails to make out a *prima facie* case against one, the action against such defendant may properly be dismissed at the conclusion of the plaintiff's evidence. *Potomac Elec. Power Co. v. Hemler*, 47 App. D. C. 34. A few states, however, have adopted the English practice of allowing defendants to be sued in the alternative. 1919 WISC. STAT., § 2603; 1912 N. J. PRACTICE ACT, § 6, N. J. COMP. STAT., FIRST SUPP., p. 1204, § 95; 1909 R. I. GEN. LAWS, c. 283, § 20; 1920 N. Y. CIVIL PRACTICE ACT, § 211; CONN. RULES OF PRACTICE, c. 1, § 3, 58 Conn. 561, 20 Atl. v. Where such practice prevails, the plaintiff makes out a *prima facie* case against all defendants joined in the alternative by evidence that one of them is liable, without specifying which one. See ODGERS, PLEADING AND PRACTICE, 8 ed., 30. It should make no difference that the plaintiff goes further, as in the principal case, and gives evidence tending to prove which one of the defendants is liable. In allowing the defendants to be sued in the alternative, it is recognized that their interests may be adverse. See *Bennets & Co. v. McIlwraith & Co.*, [1896] 2 Q. B. 464; *Crouse v. Perth Amboy Publ. Co.*, 85 N. J. L. 476, 89 Atl. 1003. It follows that the case against any one defendant is not completed until all the evidence, not only of the plaintiff but also of the other defendants, is produced. See 46 L. J. 746.

**CARRIERS — PERSONAL INJURIES TO PASSENGERS — LIABILITY FOR CRIMINAL ACTS OF THIRD PERSONS — PROXIMATE CAUSE.** — The plaintiff, a girl of eighteen, was carried seven-tenths of a mile past her station by the defendant railroad, shortly before twilight. She got off the train in the open country, and it was necessary, in walking to her station, to pass a notorious "hoboes' hollow." On her way she was twice raped. In an action for personal injuries, she recovered a verdict and judgment. *Held*, that the judgment be reversed and the cause remanded, to determine whether the plaintiff left the train voluntarily; if she did not, judgment to be entered for the plaintiff. *Hines v. Garrett*, 108 S. E. 600 (Va.).

The defendant carrier owed the plaintiff a duty to use reasonable care to prevent injury growing out of their relationship. *Pugh v. Washington Ry. & Electric Co.*, 113 Atl. 732 (Md.); *McKellar v. Yellow Cab Co.*, 181 N. W. 348 (Minn.). It may be argued that the defendant, having carried the plaintiff beyond her station, owed her a duty not to let her get off without warning her of the danger of the place, even if she got off voluntarily. If the defendant put her off, its action may well be held a violation of its duty to discharge passengers only at reasonably safe places. *Gott v. Kansas City Rys. Co.*, 222 S. W. 827 (Mo.); *Louisville & N. R. R. Co. v. Roney*, 127 S. W. 158 (Ky.); *Terre Haute & Ind. R. R. Co. v. Buck*, 96 Ind. 346. Assuming a violation of duty, the court considered proximate causation established. Such a criminal assault as occurred was risked by the situation created by the defendant. The conclusion on causation is sound in principle, though inconsistent with authority. See Joseph H. Beale, "The Proximate Consequences of an Act," 33 HARV. L. REV. 633, 657. See 32 HARV. L. REV. 293. Cf. *Carter v. Atlantic Coast Line R. R. Co.*, 109 S. E. 357; *Andrews v. Kinsel*, 114 Ga. 390, 40 S. E. 300; *Sira v. Wabash R. R. Co.*, 115 Mo. 127, 21 S. W. 905. In case the proposed view of causation be rejected, it may still be argued, as the

court suggests, that the plaintiff did not cease to be a passenger if she was put off the train improperly; and that she therefore still had a right to protection by the defendant against foreseeable assault. *Cf. Williams v. East St. Louis & S. Ry. Co.*, 232 S. W. 759 (Mo. App.); *Missouri K. & T. Ry. of Texas v. Silber*, 209 S. W. 188 (Tex. App.). This theory, however, is open to criticism in that its basis is an artificial conception of status.

**CONFLICT OF LAWS — DOCTRINE OF *RENOI* — APPLICATION TO SISTER STATE MARRIAGES.** — The defendant was domiciled with her husband in Texas. He left her and secured a divorce in Nevada upon constructive service. Meanwhile the defendant had become domiciled in Missouri. The plaintiff, a New York citizen, married the defendant in Washington, D. C., and now sues to annul the marriage. *Held*, that the case be remanded to ascertain what effect Missouri would give to the Nevada divorce. *Ball v. Cross*, 132 N. E. 106 (N. Y.).

For a discussion of the principles involved, see NOTES, *supra*, p. 454.

**CONFLICT OF LAWS — RECOGNITION OF FOREIGN JUDGMENTS — JUDGMENT RENDERED ON CAUSE OF ACTION NOT ENFORCEABLE IN THE FORUM.** — The claimant secured in Malta a judgment ordering the plaintiff's testator to pay for the support of their illegitimate child, according to the provisions of Maltese law. The claimant now appears in the English administration proceedings as a judgment creditor. *Held*, that the claim be disallowed. *In re Macartney*, [1921] 1 Ch. 522.

A right of action given by foreign law will generally not be enforced if it is not essentially compensatory. *Adams v. Fitchburg R. R. Co.*, 67 Vt. 76, 30 Atl. 687. See MINOR, CONFLICT OF LAWS, § 10; 26 HARV. L. REV. 172. *Cf. Huntington v. Atrill*, 146 U. S. 657, 666-668; *Huntington v. Atrill*, [1893] A. C. 150, 156-158; 32 HARV. L. REV. 172. This is true even when judgment has been obtained in the foreign country. *Arkansas v. Bowen*, 3 App. D. C. 537. See *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 289-291. *Contra* (under full faith and credit clause of the United States Constitution), *Healy v. Root*, 11 Pick. (Mass.) 389; *Schuler v. Schuler*, 209 Ill. 522, 71 N. E. 16; *State ex rel. Stone v. Helmer*, 21 Iowa, 370. An obligation to support an illegitimate child is within this rule. *Graham v. Monsergh*, 22 Vt. 543. See *State ex rel. Stone v. Helmer*, *supra*, at 371; 1 WHARTON, CONFLICT OF LAWS, 3 ed., § 4. See also *De Brimont v. Penniman*, 10 Blatchf. (U. S.) 436 (S. D. N. Y.). The principal case therefore seems clearly sound. Some hesitation was, however, occasioned by the doubts of an eminent textwriter: "An action (*semble*) cannot be maintained on a valid judgment if the cause of action in respect of which the judgment was obtained was of such a character that it would not have supported an action in England (?)." DICEY, CONFLICT OF LAWS, 2 ed., 414. This doubt is, it is submitted, due to the fact that the statement really covers two entirely dissimilar cases: (1) where the court where the judgment is sued upon considers that the court which rendered the judgment made an error of law or fact in holding that there was a cause of action; (2) where the judgment was rendered upon a cause of action admittedly valid, but one which the court where the judgment is sued upon would not enforce because of policy, *e. g.* one not essentially compensatory. As meaning the former, the statement plainly conflicts with the well-settled rule that a mistake does not impair the binding force of a judgment. *Fisher, Brown & Co. v. Fielding*, 67 Conn. 91, 34 Atl. 714; *Godard v. Gray*, L. R. 6 Q. B. 139. See DICEY, CONFLICT OF LAWS, 2 ed., 407. As meaning the latter, the statement is irrecusable; the same policy which refuses to enforce the original cause of action would refuse to enforce a judgment rendered upon it. The principal case falls within this second meaning. See, *accord*, *De Brimont v. Penniman*, *supra*.

**CONSTITUTIONAL LAW—CLASS LEGISLATION—STATE POLL TAX ON ALIENS.**—In 1920, California adopted a constitutional amendment, imposing an annual poll tax of ten dollars upon all adult male aliens. (CAL. CONST., art. 13, § 12.) A statute requires registration for this tax. (CAL. POL. CODE, §§ 3839-3856.) Upon failing to comply with the statute, a citizen of Mexico was arrested; and he now applies for a writ of *habeas corpus* on the ground that the amendment and the statute deny him the equal protection of the laws, in violation of the Fourteenth Amendment. *Held*, that the tax is unconstitutional. *Ex parte Kotta*, 200 Pac. 957 (Cal.).

It is settled that aliens may claim equal protection of the laws under the Fourteenth Amendment. *Yick Wo v. Hopkins*, 118 U. S. 356. This amendment applies to state taxation. *Southern Railway Co. v. Greene*, 216 U. S. 400. See 1 WILLOUGHBY, CONSTITUTION, § 270. A state, however, may classify its population for purposes of legislation provided no arbitrary or unreasonable distinction is adopted. *Giozza v. Tiernan*, 148 U. S. 657. See COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 15, note (a). Moreover, the courts should respect the legislative view of what is reasonable in classification, unless no fair basis could possibly exist. *Missouri, Kansas & Texas R. R. Co. v. May*, 194 U. S. 267. Grounds of public safety and welfare at once suggest themselves to justify the exclusion of aliens from certain occupations such as liquor selling, and from holding public office. *Trageser v. Gray*, 73 Md. 250, 20 Atl. 905; *State ex rel. Off v. Smith*, 14 Wis. 497. And citizens are properly given preference as regards the wealth and resources of the state. *People v. Crane*, 214 N. Y. 154, 108 N. E. 427. But statutes debarring aliens, as such, from ordinary pursuits or from equal opportunity for private employment have been held indefensibly discriminatory. *Templar v. State Board of Examiners*, 131 Mich. 254, 90 N. W. 1058; *Truax v. Raich*, 239 U. S. 33. *A fortiori* no peculiarity attaches to aliens as a class, which could justify a state in making them the sole objects of a poll tax. *Juniata Limestone Co. v. Fagley*, 187 Pa. St. 143, 40 Atl. 977. The court might also have held the tax invalid in the principal case because of its tendency to interfere with the control of immigration, vested in the Federal government. *Lin Sing v. Washburn*, 20 Cal. 534.

**CONSTITUTIONAL LAW—DUE PROCESS OF LAW—STATUTE EMPOWERING SOLICITOR TO CALL SPECIAL TERM OF COURT.**—A South Carolina statute requires the Governor, on application of any circuit solicitor stating that the public interest demands a special term of court, to appoint a judge to hold it. The judge is selected with the advice of the Chief Justice of the South Carolina Supreme Court. (1912, 1 S. C. CODE OF LAWS, § 3841.) The defendant was convicted of rape at a special term called under the provisions of the statute. No other causes were tried at the term. The defendant appeals, contending that the statute violates the Fourteenth Amendment. *Held*, that the statute is unconstitutional. *State v. Gossell*, 108 S. E. 290 (S. C.).

Statutes empowering judges, when necessity demands it, to call special terms of criminal court are constitutional. *State v. Alfred*, 87 Vt. 157, 88 Atl. 534. See *Graham v. Comm.*, 164 Ky. 317, 175 S. W. 981. The statute involved here gives this power to the prosecuting officer; it is an expression of the legislature's determination that an expedient and effective scheme of procedure requires that the discretion of initiating proceedings be placed in his hands. It cannot be said that the legislative judgment has no foundation in reason. That being so, the statute is not unconstitutional because the court thinks the discretion might better have been given to some other officer. The special term of court will administer the law as impartially as any. The only effect of the statute is to provide a speedy trial, for which there is much to be said as a means of reducing lawlessness. Due process of law does not require delay; the policy of the law is to the contrary. See *Graham v. Comm.*, 164 Ky. 317.

328, 175 S. W. 981, 986. Though sometimes public opinion will be against the accused, it seems that he is sufficiently safeguarded by his right to apply for a change of venue when a fair trial cannot be had.

**CONSTITUTIONAL LAW — EVIDENCE — OBJECTION AT TRIAL TO EVIDENCE OBTAINED BY UNLAWFUL SEARCH AND SEIZURE — DELAY IN OBJECTING.** — On trial under an indictment for illicit distilling, all the evidence offered by the government was the testimony of three prohibition agents who went to the defendant's residence in his absence, and seized without a warrant what they believed to be parts of a still. They destroyed all the paraphernalia before trial. The defendant made no objection to the testimony when it was given, defending on the merits. Finally, after the general charge to the jury, he requested that an acquittal be directed, on the ground that the only evidence against him was obtained by unlawful search and seizure. *Held*, that it was error to refuse the request. *Holmes v. United States*, 275 Fed. 49 (4th Circ.).

It is a general rule that competent evidence will be received in a criminal case without inquiring how it was procured. See *Comm. v. Dana*, 2 Met. (Mass.) 329, 337; *State v. Flynn*, 36 N. H. 64, 68. Formerly this principle was applied by the Federal courts to evidence obtained by unlawful search and seizure. *Adams v. New York*, 192 U. S. 585; *Youngblood v. United States*, 266 Fed. 795 (8th Circ.). But the rule was practically abrogated when the Supreme Court decided that an inquiry must be made when the constitutional question is raised, if it seems probable that there has been an unconstitutional seizure. *Gould v. United States*, 255 U. S. 298; *Amos v. United States*, 255 U. S. 313. In these cases, it is to be noted, objection to the testimony was promptly made. It has been held by some courts that failure to object at the time evidence is offered, or to move promptly that it be stricken out, waives the objection. *Comm. v. Valsalka*, 181 Pa. St. 17, 37 Atl. 405; *State v. Yourex*, 30 Wash. 611, 71 Pac. 203. But other courts have been more lenient, viewing the requisite of timely objection simply as a "rule of practice." *Morton v. State*, 43 Tex. Cr. Rep. 533, 67 S. W. 115. See also *Reg. v. Gibson*, 18 Q. B. D. 537. In the principal case, in view of the attitude of the Supreme Court, the leniency extended to the defendant was not unwarrantable. No unfairness resulted to the government by eliminating the testimony at the last minute, for it had no other evidence. That the evidence in this case was testimony and not the seized property itself, does not prevent the defendant from raising the constitutional objection. See *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 392.

**CONSTITUTIONAL LAW — SEPARATION OF POWERS — ADMINISTRATIVE DETERMINATION OF PRIVATE RIGHTS.** — A Texas statute confers upon the State Board of Water Engineers the duty, among others, of investigating and determining private water rights as a step in the process of creating effective regulation and control over the taking of water from streams and other sources for irrigation purposes. (1920 TEX. REV. CIV. STAT., title 73, c. 1, arts. 5011½ f. *et seq.*) Proceedings before the board may be instituted by an individual claimant or "in case suit is started in any court for the determination of rights to the use of water, the case may, in the discretion of the court, be transferred to the [board] for determination, as in this Act provided." Once set in motion, the board is required to ascertain all rights in the particular source to which its attention has been directed and, thereafter, to take proper means to supervise in detail the exercise of those rights. Determinations of the board are open to review *de novo* in appropriate proceedings before the local courts, provided an appeal is taken within sixty days, if the appellant appeared before the board, or three years, if he did not there appear. A proceeding before the board having been petitioned by one claimant, an injunction

was sought by another to prevent the board from acting, on the ground that the statute vested the board with judicial powers and was, therefore, unconstitutional. *Held*, that the injunction be granted. *Board of Water Engineers v. McKnight*, 229 S. W. 301 (Tex.).

For a discussion of the principles involved, see NOTES, *supra*, p. 450.

**CONTRACTS — CONSTRUCTION OF CONTRACTS — NATURE OF SHIPPING DOCUMENTS TO BE TENDERED UNDER C. I. F. CONTRACT.** — The plaintiff made a c. i. f. contract for the sale of goods to the defendant. The plaintiff duly tendered a document purporting to be a bill of lading, stating the goods to have been "received . . . to be transported by the SS. Anglia . . . or failing shipment by said steamer in and upon a following steamer." The defendant refused to accept this as a bill of lading. *Held*, that the plaintiff is not entitled to the price. *Diamond Alkali Export Corporation v. Bourgeois*, [1921] 3 K. B. 443.

Under a c. i. f. contract the purchaser agrees to pay cash against shipping documents, including a bill of lading. See *C. Groom, Ltd. v. Barber*, [1915] 1 K. B. 316, 324; *Ireland v. Livingston*, L. R. 5 H. L. 395, 406; *Smith Co. v. Moschides*, 193 App. Div. 126, 129, 183 N. Y. Supp. 500, 503. What is a bill of lading within the meaning of the contract is a question of construction, to be determined largely by the sense given the words by business custom. An instrument acknowledging receipt by the carrier of goods to be shipped on a named or any other vessel does not fulfill all the requirements sometimes laid down for bills of lading. See *Rowley v. Bigelow*, 12 Pick. (Mass.) 307, 314; *The Caroline Miller*, 53 Fed. 136, 138 (S. D. N. Y.). But in modern business large-scale shipping often necessitates the acceptance of goods without naming the forwarding ship. And the English Privy Council has recently held that a document such as that refused in the principal case is a bill of lading within the Admiralty Act, 1861. *The Ship "Marlborough Hill" v. Alex. Cowan & Sons, Ltd.*, [1921] 1 A. C. 444. It is difficult to reach a definite conclusion on such a question of construction without an examination of the evidence as to business custom; but it seems likely that the view of the court in the principal case will not be universally followed.

**COSTS — SUIT-MONEY FOR THE DEFENDANT WIFE IN A DIVORCE ACTION.** — The husband sued for divorce on the ground of adultery. *Pendente lite*, the wife applied for the usual order for costs for her defense, filing an affidavit as to the merits, but not specifically denying the adultery. From an order that the husband pay her costs already incurred and lodge further security in court, the husband appealed. *Held*, that the appeal be dismissed. *Franklin v. Franklin*, [1921] P. 407.

For a discussion of the principles involved, see NOTES, *supra*, p. 464.

**CRIMINAL LAW — PUBLIC TORTS — MISTAKE OF FACT.** — A statute made it an offense punishable by fine and imprisonment to sell cider that is intoxicating. The defendant sold such cider, but introduced evidence that he did not know it was intoxicating. The judge refused to allow that issue to go to the jury, on the ground that it was no defense. *Held*, that mistake of fact is a defense in an action under this statute. *Coury v. State*, 200 Pac. 871 (Okla.).

For a discussion of the principles involved, see NOTES, *supra*, p. 462.

**ESTOPPEL. — TRANSFER OF PLEDGE INTEREST IN CHATTELS BY ESTOPPEL.** — A delivered jewels to B, purporting to pledge them as his own for an advance made him by B. A had no interest in the jewels, but later he lent money to the true owner of them and obtained an agreement from the latter that they should stand pledged to A as security for this loan. The owner did not know

of A's prior dealings with B; and, although it does not so appear upon the record, it must be suspected that A's conduct in obtaining the pledge was fraudulent. *Held*, that the pledge interest so procured passed by estoppel to B so as to enable B to hold the jewels as against the general owner until the latter should pay the amount which A had loaned her. *Blundell-Leigh v. Attenborough*, [1921] 3 K. B. 235 (C. A.).

For a discussion of the principles involved in this aspect of the case, see NOTES, *supra*, p. 456. (The questions of the law of pledges raised by this decision were considered in 35 HARV. L. REV. 318.)

**EVIDENCE — CONFESSIONS — ADMISSIONS — NECESSITY OF PROVING THAT THEY ARE VOLUNTARY.** — In a prosecution for maintaining a bawdy-house, a witness testified that the defendant told him that she was the occupant of the house. The prosecution had not prefaced this introduction of evidence with anything to show that the accused's statement was voluntarily made. *Held*, that the admission of the testimony was error. *Rex v. Jones*, [1921] 3 W. W. R. 411 (Alta.).

A confession is an admission of guilt in a criminal case. Before it may be introduced in evidence the prosecution must show that it was voluntarily made. *Ibrahim v. Rex*, [1914] A. C. 599; *Reg. v. Thompson*, [1893] 2 Q. B. 12. Otherwise it is excluded as untrustworthy. *Comm. v. Myers*, 160 Mass. 530, 26 N. E. 481. See *Reg. v. Scott*, 1 D. & B. 47, 58. No such requirement exists as to other admissions, whether in civil or criminal cases. See *Newhall v. Jenkins*, 68 Mass. 562, 563; *Stockfleth v. De Tastet*, 4 Camp. 10, 11. See 1 WIGMORE, EVIDENCE, § 821 (3) and 2 *ibid.*, § 1050. The difference in practice is usually referred to the law's solicitude for the prisoner, and to the greater untrustworthiness of confessions, due to the likelihood of yielding to coercion or promise because of what is at stake. See 1 WIGMORE, *op. cit.*, § 815. There is, moreover, the factor, not noted in the cases, of the accused's privilege against testifying. If confessions which are *ex hypothesi* untrustworthy are received, the accused may be forced on the stand in self-protection and be exposed to a complete violation of the privilege the law has said should be his. See 3 WIGMORE, *op. cit.*, § 2276(2). These considerations, which lead to the requirement that the prosecution show lack of threat or promise before it introduces a confession, would seem to apply with about equal weight to other admissions in criminal cases. Hence, although the statement in the principal case is properly to be regarded as an admission short of a confession, the result seems desirable.

**FEDERAL COURTS — JURISDICTION — ENJOINING PROCEEDINGS UNDER STATE EXECUTIONS VIOLATING FEDERAL LAW.** — Judgments were recovered in a state court against the petitioner and the Director General of Railroads on causes of action arising while the railroad was under Federal control. Executions were caused to be issued commanding the sheriff to satisfy the judgments by sale of the petitioner's property. The latter seeks in a Federal court to enjoin the sheriff and the plaintiffs in the executions from further proceedings in violation of a Federal statute providing that no execution shall be levied on the property of any railroad under a judgment where the cause of action arose during Federal control. (41 STAT. AT L. 462.) *Held*, that the temporary injunction be made permanent. *Seaboard Air Line Co. v. Fowler*, 275 Fed. 239 (W. D. N. C.).

A statute provides that Federal courts may not enjoin proceedings in state courts except in bankruptcy cases. 36 STAT. AT L. 1162. See 1 JOYCE, INJUNCTIONS, §§ 88, 600. Executions and sales in satisfaction of valid judgments fall within this prohibition. *Mills v. Provident Life & Trust Co. of Phila.*, 100 Fed. 344 (9th Circ.); *American Ass'n v. Hurst*, 59 Fed. 1 (6th Circ.). But

see 2 FOSTER, FEDERAL PRACTICE, 6 ed., § 270. *Contra*, *Cropper v. Coburn*, 2 Curt. (U. S.) 465 (D. Mass.). But in spite of the statute an injunction will issue in a Federal court against the collection of a state judgment fraudulently obtained. *Schultz v. Highland Gold Mines Co.*, 158 Fed. 337 (D. Ore.). And Federal courts enjoin the enforcement of void state judgments. *Simon v. Southern Ry. Co.*, 236 U. S. 115. See 2 FOSTER, *op. cit.*, 1344. The court in the principal case rests its decision on the invalidity of the state judgments. But the state judgments are not void; the proceedings up to and including judgment were entirely regular. The judgments might properly have been satisfied out of the revolving fund provided by statute. See 41 STAT. AT L. 462, 468. To seek to satisfy them by execution was, however, a direct violation of the statute. See 41 STAT. AT L. 462. The executions may, therefore, be treated as void. *Cf. Planters' Loan & Sav. Bank v. Berry*, 91 Ga. 264, 18 S. E. 137; *Pacific Nat. Bank v. Mixter*, 124 U. S. 721. It is arguable that the proper remedy is in the state court. But if Federal courts may restrain proceedings under fraudulent and void state judgments, the same reasoning will support an injunction against proceedings under void executions. On this ground the decision may be supported.

**GARNISHMENT—EFFECT OF DEATH OF PRINCIPAL DEFENDANT.**—The plaintiff brought an action against A's testator, and garnished X, as permitted by statute. (1919 WASH. CODE., § 7999.) Before judgment in the main action, A's testator died, and A was substituted as defendant. X confessed the garnished debt and paid the money into court. The plaintiff, having recovered judgment against the new defendant, moves the court to pay him sufficient of the money paid in by X to satisfy it. *Held*, that the motion be granted. *Hawley v. Isaacson*, 200 Pac. 1109 (Wash.).

Garnishment proceedings in this country are purely statutory. See ROOD, GARNISHMENT, § 6; DRAKE, ATTACHMENT, 7 ed., § 451a. Where there is no express statutory provision, it would seem as a matter of construction that these proceedings, being meant to follow the main action, and being merely ancillary thereto, should survive or abate with it. *Dennison v. Taylor*, 142 Ill. 45, 31 N. E. 148; *Iron Cliffs Co. v. Lahais*, 52 Mich. 397, 18 N. W. 121; *Segar v. Muskegon Lbr. Co.*, 81 Mich. 345, 45 N. W. 982; *Kennedy v. Tiernay*, 14 R. I. 528. *Cf. Shafter, J.*, dissenting, in *Myers v. Mott*, 29 Cal. 359, 370. And see 2 SHINN, ATTACHMENT & GARNISHMENT, § 682; ROOD, *op. cit.*, § 2. If the particular statute under which the action is brought permits garnishment only for the purpose of compelling the appearance of the principal defendant, then it is sound to hold that the garnishment is dissolved by his death prior to judgment. *Reynolds v. Nesbitt*, 196 Pa. St. 636, 46 Atl. 841. *Cf. Sweringen v. Adm'r of Eberius*, 7 Mo. 421. But under most of the modern statutes the primary purpose of garnishment is to secure the creditor. *Oberleuffer v. Harwood*, 6 Fed. 828 (D. Minn.). See *Kennedy v. Tiernay*, *supra*, at 530. *Cf. Clark v. Patterson*, 58 Vt. 676, 5 Atl. 564. See ROOD, *op. cit.*, § 7. The effect of the garnishment is to give the plaintiff a lien on the assets of the principal defendant in the possession of the garnishee to secure whatever judgment he may recover in the main action. *Beamer v. Winter*, 41 Kan. 596, 21 Pac. 1078; *Burlingame v. Bell*, 16 Mass. 318; *Beiber v. Weiser*, 1 Woodw. Dec. (Pa.) 473; *Wilder v. Weatherhead*, 32 Vt. 765. *Cf. Killredge v. Warren*, 14 N. H. 509. It is clear that the death of the principal defendant after judgment would not defeat this lien. *Coit v. Sistare*, 85 Conn. 573, 84 Atl. 119. The principal case is manifestly sound in holding that his death even before judgment does not dissolve the garnishment, where the main action survives. *Cf. Logan v. Trust Co.*, 203 N. Y. 611, 96 N. E. 1120; *Mitchell v. Schoonover*, 16 Oreg. 211, 214, 17 Pac. 867, 869. But see *Myers v. Mott*, 29 Cal. 359.



**LABOR UNIONS — SHERMAN ACT — LAWFUL METHODS OF UNIONIZATION.** — At the suit of a West Virginia coal company, the District Court for Indiana enjoined the defendants, officers of the United Mine Workers resident in Indiana, from further unionization of the non-union coal fields of Mingo County, West Virginia, and Pike County, Kentucky, as in violation of the Sherman Act. The defendants appealed to the Circuit Court of Appeals for the Seventh Circuit. *Held*, that the preliminary injunction be modified so as to check merely the illegal interfering acts set forth in the affidavits. *Gasaway v. The Borderland Coal Corporation*, U. S. Circ. Ct. of Appeals, 7th Circ., Dec. 15, 1921.

For a discussion of the principles involved, see NOTES, *supra*, p. 459.

**LANDLORD AND TENANT — ASSIGNMENT AND SUBLETTING — RIGHT OF GRANTEE OF REVERSION TO ENTER FOR CONDITION BROKEN PRIOR TO GRANT.** — X leased certain land to the defendant, the lease containing a covenant by the lessee not to erect certain buildings, and a provision for re-entry on breach of covenant. The defendant broke the covenant. X, without having waived the breach, conveyed the premises to the plaintiff "subject to and with the benefit of the lease." The plaintiff knew of the breach. A statute allows rights of entry for covenants already broken to be assigned. (1 & 2 GEO. 5, c. 37, § 2.) The plaintiff seeks to re-enter. *Held*, that judgment be entered for the defendant. *Davenport v. Smith*, [1921] 2 Ch. 270.

This case is the latest manifestation of the apparently implacable hostility of the English courts to the assignment of rights of entry for condition broken. Originally they fell under the common-law principle which forbade the assignment of any chose in action, to prevent champerty. See 1 TIFFANY, LANDLORD AND TENANT, § 149 (b). A statute made rights of entry transferrable with the reversion after estates for life and years. 32 HEN. 8, c. 34. But the statute was held not to apply if the condition was already broken at the time of the assignment. *Lewes v. Ridge*, Cro. Eliz. 863. A later statute made future interests, including rights of entry, assignable. 8 & 9 VICT., c. 106, § 6. But this statute again was partially construed away. *Hunt v. Bishop*, 8 Ex. 675, 680. Now another statute expressly allows the transfer of rights of entry for conditions already broken. 1 & 2 GEO. 5, c. 37, § 2. The principal case weakens its effect by holding that the breach is waived by accepting an assignment of the premises "subject to and with the benefit of the lease." When a condition is broken, the reversioner may elect to enter or to treat the tenancy as continuing. See *Green's Case*, Cro. Eliz. 3; *Ward v. Day*, 4 B. & S. 337. See also 2 TIFFANY, LANDLORD AND TENANT, § 194 (i) c & f. The court holds that the plaintiff has manifested a choice of the latter alternative. Certainly mere acceptance of the assignment is not an election, and it is hard to see that the words used add anything to the acceptance.

**LEGACIES AND DEVISES — CLASSIFICATION — BEQUEST OF AMOUNT OF STOCK OWNED BY TESTATOR.** — The testatrix left a will bequeathing to her father "£948 3 s 11 d Queensland 3½ per cent. Inscribed Stock" and to her mother "£613 18 s 11 d Victoria 3½ per cent. Consolidated Stock and £300 Queensland 3 per cent. Stock." At the date of the will she was possessed of the exact three sums of stock and no more. Later she disposed of these and at her death owned no stock whatever. A summons was issued to determine whether the legacies are general or specific. *Held*, that the legacies are general. *In re Willcocks*, [1921] 2 Ch. 327.

It is said that, in determining whether a legacy is general or specific, the intent of the testator is controlling. See *Humphrey v. Robinson*, 52 Hun, 200, 204, 5 N. Y. Supp. 164, 166. But the accuracy of this statement is open to question. Because specific legacies are subject to ademption, courts have de-

veloped a tendency to construe legacies as general. See 2 ALEXANDER, WILLS, § 646. A clear intent to the contrary is required to overcome this leaning. *Matter of Security Trust Co.*, 221 N. Y. 213, 116 N. E. 1006. So if there is a legacy of a specified amount or number of shares of stock, and it appears that the testator never possessed stock to the amount of the legacy, it is held general. *Purse v. Snaplin*, 1 Atk. 414. The same is usually held of a bequest of an amount equal to that possessed by the testator at the date of the will. *Snyder's Estate*, 217 Pa. St. 71, 66 Atl. 157; *Dryden v. Owings*, 49 Md. 356; *Tift v. Porter*, 8 N. Y. 516; *Simmons v. Vallance*, 4 Bro. C. C. 345; *Robinson v. Addison*, 2 Beav. 515. See 1 ROPER, LEGACIES, 4 ed., 205 *et seq.* *Contra*, *Jewell v. Appolonio*, 75 N. H. 317, 74 Atl. 250. And see *New Albany Trust Co. v. Powell*, 29 Ind. App. 494, 64 N. E. 640. Where such amount is in round numbers, it may be that no sufficient intent that the legacy be specific is shown. But where the amount is odd, it seems that the inference of fact is sufficiently strong to turn the balance, and to convince the court that the testator is dealing with the actual stock he owns. See *Waters v. Hatch*, 181 Mo. 262, 79 S. W. 916; *Martin, Petitioner*, 25 R. I. 1, 54 Atl. 589; *Jeffreys v. Jeffreys*, 3 Atk. 120. See 14 COL. L. REV. 74. But see 1 ROPER, *op. cit.*, 212.

**LIENS — LOSS OF LIEN — ATTACHMENT AT SUIT OF LIENHOLDER — RETENTION OF POSSESSION AFTER DISSOLUTION OF ATTACHMENT.** — The defendant, who held a motor boat under a lien for repair charges, attached it in a suit against the owner. The sheriff left the motor boat on the defendant's premises, taking his receipt therefor. The plaintiff, upon being appointed receiver of the assets of the owner, procured the dissolution of the attachment. He now sues for possession of the boat, and the defendant sets up his lien. *Held*, that the plaintiff recover the boat. *Fidelity & Deposit Co. of Maryland v. Johnson*, 275 Fed. 112 (E. D. Mich.).

When property subject to a lien is attached at the suit of the lienholder and actually taken into possession by the officer, the lien, being dependent upon possession, is lost. *Cf. Swett v. Brown*, 5 Pick. (Mass.) 178. See STORY, AGENCY, 9 ed., § 367. See also 12 HARV. L. REV. 571. If, as in the principal case, the lienholder retains the goods, he holds them as bailee for the sheriff and must deliver to the latter upon demand. *Irey v. Gorman*, 118 Wis. 8, 94 N. W. 658; *Stannard v. Tillotson*, 88 Vt. 1, 90 Atl. 950. He thus ceases to claim simply under his lien and renders himself unable to respond immediately to a proper tender. Such possession may rightly be considered insufficient to continue the lien. *Citizens' Bank of Greenfield v. Dows*, 68 Iowa, 460, 27 N. W. 459; *Jacobs v. Latour*, 5 Bing. 130. *Contra*, *Lambert v. Nicklass*, 45 W. Va. 527, 31 S. E. 951. The lien being gone, it is the sheriff's duty, upon dissolution of the attachment, to deliver the goods to the receiver. Since such delivery has not yet been made, the sheriff may still hold the defendant liable upon his receipt. See *Fitch v. Chapman*, 28 Conn. 257, 261; *Berry v. Flanders*, 69 N. H. 626, 627, 45 Atl. 591, 592. The latter, therefore, is not restored to possession under a claim of lien. Even if he were, the lien, once lost, would be held, on common-law principles, not to revive. *Cf. Ford Motor Co. v. Freeman*, 168 S. W. 80 (Tex. App.); *Harley v. Hitchcock*, 1 Starkie, 408. The court reaches a technically correct and desirable result. The former lienholder would otherwise retain his advantage over other creditors merely because the sheriff had chosen to leave the attached property with him.

**MASTER AND SERVANT — WORKMEN'S COMPENSATION ACTS — RIGHT OF EMPLOYER TO REDUCE COMPENSATION BY AMOUNT RECEIVED BY EMPLOYEE FROM INJURING PARTY.** — The Iowa Workmen's Compensation Act provides that where an employee receives an injury which "was caused under circum-

stances creating a legal liability in some person other than the employer, to pay damages in respect thereof," the amount of compensation to which such employee is entitled shall be reduced by the amount of damages recovered from the third party; and the employer, from whom compensation was recovered, shall be entitled to indemnity from the third party and to subrogation to the employee's rights against that party. (1913 IOWA CODE SUPP., § 2477-m. 6.) The plaintiff's intestate, an employee of the defendant, was injured by and in the course of his employment through a collision with a street car operated by a third party. The employee, in consideration of his covenant not to sue the third party, received from the latter the sum of \$750. The employee then sued the defendant for compensation. It did not appear on the record who was at fault in causing the collision. The defendant sought to reduce compensation by the amount the employee had received from the third party. *Held*, that it cannot do so. *Renner v. Model Laundry, Cleaning & Dyeing Co.*, 184 N. W. 611 (Iowa).

The *ratio decidendi* is that as the defendant has not borne his burden of establishing that the third party was legally liable for the employee's injury, he has failed to lay the foundation necessary for the reduction sought. The decision is justified by the words of the statute. But the court would better have given effect to its manifest purpose, which is two-fold: (1) to entitle the employee to recover full indemnity for his injuries, but no more; and (2) as between the employer and a third party, to put the common-law damages, but no more, on the third party, if he would have been liable at common law. See *Mahomed v. Maunsell*, 124 L. T. 153, 1 B. W. C. C. (N. S.) 269. Cf. *Jacowicz v. Delaware, etc. R. R. Co.*, 87 N. J. L. 273, 92 Atl. 946. See 28 HARV. L. REV. 713. Where the employee is the recipient of a mere gratuity from the injuring party, it should not be deducted from his claim for compensation. See *Gilroy v. Mackie*, 46 Sc. L. Rep. 325, 2 B. W. C. C. (N. S.) 269; *Blackford v. Green*, 87 N. J. L. 359, 361, 94 Atl. 401, 402. Cf. *Burnand v. Rodocanachi*, 7 App. Cas. 333; *Castellain v. Preston*, 11 Q. B. D. 380, 389, 395. But where a substantial sum is received by the employee in consideration of his release of, or covenant not to sue, the injuring party, a presumption of the latter's liability would seem to be raised. Most of the few cases which have arisen under similar statutes agree that the employer is entitled to a *pro tanto* reduction. See *Page v. Burtwell*, [1908] 2 K. B. 758; *Mulligan v. Dick & Son*, 6 Sc. Sess. Cas., 5th Ser., 126, 41 Sc. L. Rep. 77; *Murray v. North British Ry. Co.*, 6 Sc. Sess. Cas., 5th Ser., 540, 41 Sc. L. Rep. 383; *Rosenbaum v. Hartford News Co.*, 92 Conn. 308, 103 Atl. 120; *Cripps's Case*, 216 Mass. 586, 588, 104 N. E. 565, 566. But see *Naert v. Western Union Telegraph Co.*, 206 Mich. 68, 172 N. W. 606. Cf. *Newark Paving Co. v. Klotz*, 85 N. J. L. 432, 91 Atl. 91, 86 N. J. L. 690, 92 Atl. 1086. See 26 HARV. L. REV. 377.

**RELEASE — CONSTRUCTION AND OPERATION — RELEASE OBTAINED BY FRAUD: SUIT ON ORIGINAL CLAIM WITHOUT TENDER.** — The plaintiff's intestate was injured by the defendant. He accepted a small sum and gave a release. The intestate having died as a result of the injury, the plaintiff brought this action on the original claim, and contended that the release was obtained by fraud. The plaintiff tendered at the trial repayment of the consideration for the settlement, but had made no tender before. *Held*, that the trial judge properly directed a verdict for the defendant. *Randall v. Port Huron, St. C. & M. C. Ry. Co.*, 184 N. W. 435 (Mich.).

The defendant agreed to pay the plaintiff a percentage of all profits accruing from the acquisition of copper properties brought to his attention by the plaintiff. The defendant obtained a release of his obligations by money settlement, and this money has not been tendered back by the plaintiff. The plaintiff brought this action on the original contract, and the defendant set up the

release. The plaintiff replied by alleging fraud in obtaining the release, and the defendant demurred. *Held*, that the demurrer be overruled. *Plews v. Burrage*, 274 Fed. 881 (1st Circ.).

The rule is usually stated to be that an equitable replication that a release of the plaintiff's claim was obtained by fraudulent misrepresentations is good only if tender is made before trial. *Gould v. Cayuga County Nat. Bank*, 86 N. Y. 75. This view is supported by the weight of authority, and is followed by the Michigan court for the purely technical reason that a release, though voidable, is not avoided until tender is made. *Riggs v. Home Mutual Fire Prot. Ass'n*, 61 S. C. 448, 39 S. E. 614; *Heck v. Missouri Pac. Ry. Co.*, 147 Fed. 775 (Circ. Ct., D. Col.); *Harley v. Riverside Mills*, 129 Ga. 214, 58 S. E. 711. But where the consideration is money, as distinguished from chattels, this technical rule is not properly applicable. The plaintiff should be able to maintain an action on his original claim without tender, since the court may deduct the amount of the consideration from the damages. *St. Louis & S. F. R. Co. v. Richards*, 23 Okla. 256, 263, 102 Pac. 92, 95; *O'Brien v. Chicago, etc. Ry. Co.*, 89 Iowa, 644, 57 N. W. 425. The Federal case is right in result, but is based too broadly on the ground that this is an equitable replication, and no tender is necessary in equity. That rule is true only because equity protects the defendant by a conditional decree. *Thomas v. Beals*, 154 Mass. 51, 27 N. E. 1004. The Federal case being at law, tender would be necessary to protect the defendant if the consideration were other than money.

**SALES — IMPLIED WARRANTY OF MERCHANTABILITY — INFRINGEMENT OF TRADE-MARK RIGHTS AS A BREACH.** — The plaintiffs contracted to purchase from the defendants three thousand cans of condensed milk. When the milk arrived, one thousand of the cans had labels with the word "Nissly" upon them. This was an infringement of the trade-mark rights of the Nestlé Co. To avoid conflict with the latter, the plaintiffs were forced to strip off the labels and sell the milk unlabeled. They suffered loss, and now bring this action, alleging a breach of an implied warranty of merchantability. *Held*, that the plaintiffs recover. *Niblett v. Confectioners Materials Co.*, 125 L. T. R. 552 (C. A.).

It seems sometimes to be tacitly assumed in discussing the section of the Sale of Goods Act (§ 14-2) involved here, or the similar section in the American Act (§ 15-2), that a breach of the implied warranty of merchantable quality is occasioned only by a defect in the physical quality of the goods. See *WILLISTON, SALES*, § 243. But the Acts elsewhere define quality as including "state or condition." *SALE OF GOODS ACT*, 56 & 57 VICT., c. 71, § 62. *UNIFORM SALES ACT*, § 76. The emphatic word in the section under discussion is merchantable; and whatever renders the goods unmerchantable, whether it be strictly a defect of physical quality or not, is a breach of the warranty. The principal case, upon a unique set of facts, makes this point clear.

**TRUSTS FOR CHARITABLE USES — CY-PRÈS — LACK OF GENERAL CHARITABLE INTENT SHOWN IN WILL.** — Land was devised in trust for a school for poor children; but if the trust should not take effect or should be defeated or "the precise object . . . become prevented," then in trust for the settlor, his heirs and assigns. The funds available became so meager that the school was practically derelict. The court decided that the object of the trust had "become prevented." *Held*, that the property be applied *cy-près*. *In re Peel's Release*, [1921] 2 Ch. 218.

It is firmly settled, in theory, that the *cy-près* doctrine is founded on the intention of the testator; and when it appears that he had no general charitable intent, as is evident in the principal case, the court should not apply the property *cy-près*. *In re Rymer*, [1895] 1 Ch. 19; *In re White's Trusts*, 33 Ch. Div.

449; *Bowden v. Brown*, 200 Mass. 269, 86 N. E. 351. See 2 PERRY, TRUSTS, 6 ed., §§ 723, 726, 727, 728, note a; 1 JARMAN, WILLS, 6 Am. ed., star pp. 206-210; 33 HARV. L. REV. 598; 4 VA. L. REV. 224. The heirs should take, not under the express gift over (which after the perpetual gift to charity is void for remoteness), but under a resulting trust (which is not affected by the rule against remoteness). *Bowden v. Brown*, *supra*. See 2 PERRY, *op. cit.*, §§ 724, 726. See GRAY, RULE AGAINST PERPETUITIES, 2 ed., §§ 592, 593, 603 e, 603 i. The court seems to have lost sight of this possibility, and to have acted on a misapprehension of *In re Bowen*, [1893] 2 Ch. 491. The language of *In re Bowen* leaves us in doubt as to the ultimate disposition of the property in that case; but the decision, that an express gift over to third parties in a similar settlement is void, is entirely sound, and warrants no such result as the court reached here.

**WAREHOUSEMEN—CONTRACT EXEMPTING FROM LIABILITY FOR NEGLIGENCE.**—A lumber company, to whose rights the plaintiff stands subrogated, was notified by the defendant company that during an anticipated strike it would store no lumber except on condition that it be free from liability for loss from any cause. Lumber stored during the strike was burned during a fire caused by the negligence of one of the defendant's employees in operating a machine attached to an improperly constructed oil tank. *Held*, that the plaintiff cannot recover. *Northwestern Mutual Fire Ass'n v. Pacific Wharf and Storage Co.*, 200 Pac. 934 (Cal.).

By the weight of American authority, bailees engaged in businesses "affected with a public interest" may not contract for exemption from liability for negligence. *Railroad Co. v. Lockwood*, 17 Wall. (U. S.) 357. See *Gulf Compress Co. v. Harrington*, 90 Ark. 256, 119 S. W. 249; *Patterson v. Wenatchee Canning Co.*, 59 Wash. 556, 558, 110 Pac. 379, 380. *Contra*, *Cragin v. N. Y. C. Ry. Co.*, 51 N. Y. 61. On principle this seems sound. It is contrary to public policy that bailees whose services are almost indispensable to the public and who enjoy unusual advantages should be permitted to use the strength of their position to coerce the public into oppressive contracts. See *Railroad Co. v. Lockwood*, *supra*, at 379. See Hugh E. Willis, "The Right of Bailees to Contract against Liability for Negligence," 20 HARV. L. REV. 297. If the prevailing doctrine is accepted, the principal case cannot be upheld because of its exceptional circumstances. The existence of the strike might justify the defendant in discontinuing its business; but the defendant has not done so. While the business is continued, it is doubtful if the defendant can limit its liability even for the results of the strike, such as the negligence of inexperienced employees. The interests against such limitation still outweigh the interests of the defendant. *A fortiori* there is no ground for allowing a general limitation, covering a case where the negligence is, as here, entirely disconnected from the strike.

**WILLS—CONSTRUCTION—"DIE WITHOUT ISSUE WHO SHALL REACH TWENTY-ONE."**—A farm was devised to A for life, then to B absolutely, but if B should "die without issue who shall reach twenty-one," then to C. The Wills Act provides that words "which may import either a want or failure of issue of any person in his lifetime or at his death or an indefinite failure of his issue," shall be construed to mean a definite failure of issue unless a contrary intention shall appear by the will. (7 WILL. 4 & 1 VICT., c. 26, § 29.) *Held*, that the gift to C is void for remoteness. *In re Thomas*, [1921] 1 Ch. 306.

Where in a gift on failure of issue either a definite or an indefinite failure might be meant, the common law presumed that the testator intended an indefinite failure. *Candy v. Campbell*, 2 Cl. & F. 421. See HAWKINS, WILLS, 1 ed., 206. The Wills Act presumes a definite failure. See LEWIS, LAW OF

PERPETUITY, 396-404; 2 JARMAN, WILLS, 6 Am. ed., star pp. 1321, 1323. The words must be capable of the alternate construction before they are subject to the common-law presumption, or fall within the language of the Wills Act. In the principal case the words can hardly import a failure of issue only in B's lifetime or at his death, for obviously they cover the case where B dies leaving issue alive who afterward reach twenty-one. Neither can they reasonably import an indefinite failure of issue, for in such case the qualifying "who shall reach twenty-one" would be without intelligent meaning. A sensible testator could not mean, for example, that if the last of the line of issue died childless at forty, his heirs would keep forever; but that if the same individual died at forty leaving an infant child who died before majority, the gift over should take effect. The words are thus capable of neither construction mentioned in the Wills Act. The testator's intention is not ambiguous. He intended a gift over if no issue of B, living at or before B's death, should reach twenty-one. Cf. *In re Chinnery's Estate*, 1 L. R. Ir. 296. The gift over could take place no later than twenty-one years after the death of B, a living person. It is not too remote.

## BOOK REVIEWS

THE NATURE OF THE JUDICIAL PROCESS. By Benjamin N. Cardozo. New Haven: Yale University Press. 1921. pp. 180.

Judge Cardozo has in this book tried his hand at one of those problems which have fascinated the mind of mankind since it began to ponder upon the meaning of law. The position of an English speaking judge, especially, presents an apparent contradiction that has always exercised those who are speculatively inclined. The pretension of such a judge is, or at least it has been, that he declares pre-existing law, of which he is only the mouthpiece; his judgment is the conclusion of a syllogism in which the major is to be found among fixed and ascertainable rules. Conceivably a machine of intricate enough complexity might deliver such a judgment automatically were it only to be fed with the proper findings of fact. Yet the whole structure of the common law is an obvious denial of this theory; it stands as a monument slowly raised, like a coral reef, from the minute accretions of past individuals, of whom each built upon the relics which his predecessors left, and in his turn left a foundation upon which his successors might work.

We have grown more self-conscious of late and can no longer content ourselves with fictions; and candid men like Judge Cardozo will not stomach those equivocations which keep the promise to the ear and break it to the hope. So, while he is aware enough of the limitations upon a judge's freedom, he is more acutely aware than many of his contemporaries of the extent to which he must choose responsibly. His essay tells us of the different factors which may properly enter into a judge's consideration. He must be faithful to the past, of which he is the inheritor, but not too faithful; he must remember that he lays down a rule of general application, — consistency for him is a jewel; but beyond all he must remember that he is a priest of his time, the interpreter of an inarticulate will, which accepts the past only in part, — no more of it than the present has not yet awakened to repudiate.

No quantitative valuation of these elements is possible; the good judge is an artist, perhaps most like a *chef*. Into the composition of his dishes he adds so much of this or that element as will blend the whole into a compound, delectable or at any rate tolerable to the palates of his guests. The test of his success is the measure in which his craftsman's skill meets with general acceptance. There are no *vade mecum*s to this or any other art. It

is in the end a question of more or less, and the judicial function lies in the interstices of the social tissues.

That a judge of Judge Cardozo's standing should so frankly own the way in which he works is itself a portent, though in fact he probably disposes of his cases by no saliently different methods from the judges who have preceded him. Indeed he is analyzing, not his own mind alone, but the ways in which all judges decide their cases. But the self-scrutiny which can learn how it works and the candor which will avow it, are rare in such high places. The masters assure us that ours is a time of change in the law, when it is to be recast; one of those periods when the bud is bursting its sheath and the flower unfolding. If they are right—and who are we to question them?—the development will be self-conscious as never before. How *Demos* will accept it is another matter. Hitherto he has been lulled to rest by unctuous protests of docility from his judges. Will he awaken in a rage when they admit that they are not all "mind," but entertain a "will" as well? Perhaps not; most judges are more pious than Judge Cardozo—and less sincere.

We, who are born in the faith, learned to lisp in our cradles that this is a government of laws, not men. Only yesterday the thunder broke from Olympus and reassured such of us as may have been shaken. From this postulate indeed it followed that the writ of injunction is one of those fundamental rights, any experimentation with which the Constitution forbids. I must confess that this book does not seem orthodox measured by that standard. There is a scandal in so much subjectivity. Mr. Justice Holmes has somewhere said that the lawyer's problem is one in psychology; he must find the personal equation of his judge, a complex (it was before the days of Freud) of all those elements which may influence him, his dialectic propensity, his learning, his deference to the past, his docility to the present, his traditions, his individual habit. It is as if a man were to study the disposition of a pet tiger, another pursuit interesting though perilous, like life. He must reckon with the fundamental biologic tropisms of all sentient creatures; he must know the limitations and capacities of the *Felidae*; he must acquaint himself with the acquired instinctive responses of *Felis tigris*; but chief of all he had better understand the partialities of that particular tiger.

I fancy that if all this be true, the law, which is the greatest common divisor of the sum total of concrete judgments, must in some measure retain a strain of warm humanity about it, which sits a little oddly upon the heights where the Constitution of Massachusetts has placed it. The law is indeed not the creation of this generation, and those who should feel so have no proper place in it. But then this generation was itself scarcely parthenogenetic; and to be human is necessarily to be more than individual. However, after making all allowances, there will be excellent people who cannot help feeling that the voice of this book is in a way the voice of heresy. It will disquiet them even more to know that it emanates from a judge who by the common consent of the bench and bar of his state has no equal within its borders; from one who by the gentleness and purity of his character, the acuteness and suppleness of his mind, by his learning, his moderation, and his sympathetic understanding of his time, has won an unrivaled esteem wherever else he is known. They will be troubled at learning all this; and they will be right to be troubled. When Brutus strikes, we had best fold our togas over our heads and resign our spirits to the darkness. Of course, there is always an escape by concession, by ceasing to climb towards the snowy heights of eternal principles; but they may be unwilling to surrender the truths which have descended to them from the Fathers, tested in the furnaces of experience, burnished by the great hands of the dead, for an opportunism which seeks to cover its usurpation under an affectation of candor. Nor will it much reassure such loyal souls to point to the casual origin of all other institutions, or to let them peep

into the unlovely undercurrents which run below the noble surfaces of even the great and good. But conversion is open to us all, and perhaps this book will prove to be a primer in introspection which may find a way even into the tents of righteousness.

LEARNED HAND.

THE SPIRIT OF THE COMMON LAW. By Roscoe Pound. Boston: Marshall Jones Co. 1921. pp. xiv, 224.

This volume contains the brilliant lectures delivered by Dean Pound in the summer of 1921 as one of the lecturers of the Dartmouth Alumni Lectureships on the Guernsey Center Moore Foundation. Starting with the premise that "if not actually upon trial in the United States, the common law is certainly under indictment," Dean Pound says that it behooves the lawyer "to examine the body of legal tradition on which he relies, to ascertain the elements of which it is made up, to learn its spirit, and to perceive how it has come to be what it is, to the end that we may know how far we may make use of it in the stage of legal development upon which the world has now entered." For such a survey certainly no one could be found better qualified by scholarship, training and experience than Dean Pound.

An examination of our legal tradition discloses two outstanding characteristics,—on the one hand, an extreme individualism; on the other, a tendency to impose duties and liabilities upon men as members of groups or classes, independently of their individual will. Seven factors, the lecturer says, have primarily contributed to these characteristics. They are the Germanic origin of our legal institutions, the feudal law, Puritanism, the contests between the courts and the crown in the seventeenth century, the political ideas of the eighteenth century, the frontier conditions under which American law was developed between the Revolution and the Civil War, and the philosophical ideas with respect to justice, law, and the state that prevailed during this formative period. Six of these have made for individualism. One of them, the feudal law, has given to our legal system a fundamental mode of thought which has always tempered individualism and has supplied the other characteristic of our legal tradition. These seven factors are discussed in the first six lectures. The two remaining lectures are entitled "Judicial Empiricism" and "Legal Reason." They deal respectively with the technique of legal growth and the theory of the end of law which obtains in the new stage of legal development upon which we seem now to be entering.

The method of the lecturer is that of brilliant generalization and of stimulating suggestions of parallelism drawn from legal history. Illustration can better show the method than attempted definition. "Judicial activity must be directed consciously or unconsciously to some end," he says (p. 194). "In the beginnings of law this end was simply a peaceable ordering. In Roman law and in the Middle Ages it was the maintenance of the social *status quo*. From the seventeenth century until our own day it has been the promotion of a maximum of individual self-assertion. Assuming some one of these as the end of the legal ordering of society, the jurist works out an elaborate critique on the basis thereof, the legislator provides new premises for judicial decision more or less expressing the principles of this critique, and the judge applies it in his choice of analogies when called upon to deal with questions of first impression and uses it to measure existing rules or doctrines in passing upon variant states of fact and thus to shape these rules and doctrines by extending or limiting them in different directions. The basis of all these operations is some theory as to what law is for." Or again (p. 69): "In these contests between courts and crown prior to the Stuarts, the courts had been guarding social interests by preventing perversion to quite different uses of powers which



could be used rightfully only to further public or social interests. In the nineteenth century we find common-law courts going much beyond this and thinking themselves bound to put limits in the interest of the individual to social control for the social interest. This change in the spirit of the common law resulted from the political phase of the contests between courts and crown under the Tudors and Stuarts and from the political and juristic theories of the eighteenth century."

The end of law as seen by those who believe that we have entered upon a new stage of legal development is socialization. An infusion of social ideas into the traditional element of law is needed and is taking place before our eyes. Consideration of the public weal as well as of the interests of the individuals before the court has always played some part in our judicial decisions, but undoubtedly a change of emphasis, or at least a more conscious recognition of the importance of this consideration, has occurred within the last few years. That law must change to keep abreast of changing social and economic conditions is admitted by all. Sometimes the change has been subconscious, sometimes cloaked in fictions. The greatest merit of Dean Pound's volume is to prove that "it may grow consciously, deliberately and avowedly through juristic science and legislation tested by judicial empiricism."

Dean Pound has himself been one of the foremost prophets of social utilitarianism in the field of law. In these lectures he has tested each of the factors which has entered into our legal tradition, with reference to its utility to promote socialization of the law. It is with a sense of satisfaction and of optimism that one reads his conclusion that the spirit of the common law is not hostile to the spirit of twentieth-century jurisprudence.

The only criticism of the volume that the present reviewer is disposed to express is the regret that the published edition of the lectures has not been annotated by footnotes. It betrays a wealth of learning which makes the ordinary reader covetous of possessing a bibliography of the materials from which the author has drawn his information.

THOMAS W. SWAN.

#### INSANITY AND MENTAL DEFICIENCY IN RELATION TO LEGAL RESPONSIBILITY.

By William G. H. Cook. New York: E. P. Dutton & Co. 1921. pp. xxiv, 192.

This is a very clear and concise statement of the problem presented by the divergent views of the law and of medicine upon insanity and mental deficiency. In spite of the very great interest that is being manifested in the relation of mental science to the problems of human behavior in general and especially to criminal acts, there is still a great deal of confusion in regard to the interpretation of such acts and of the laws relating to them. In writing books that touch upon this subject the temptation is to attempt rather more than our present knowledge justifies. It is particularly satisfactory to note that the author of this book has throughout maintained a very sound restraint and has presented a very complex subject with a directness and a simplicity which have in no way diminished the thoroughness of this study.

Sir John Macdonell in the foreword says "It is still true, as Brett, L. J., remarked in 1879, that the law relating to civil responsibility of lunatics stands upon a very unsatisfactory footing." Nothing is so likely to disclose the differences in method between the law and medicine as a discussion of responsibility. It is perhaps unfortunate that this discussion has been raised most frequently and most prominently in connection with criminals. Dr. Cook points out some of the reasons for this difference of opinion and supports his statement with a discussion of over two hundred cases.

The object of the book is "to fill the gap caused by the absence of modern works dealing with the *civil* responsibility of lunatics and of the mentally defective." There were three main reasons for undertaking the book: first, the unsatisfactory state of the law relating to civil responsibility of lunatics and of the mentally defective; second, the absence of any modern work in which the subject is adequately treated; and third, the steady increase in the number of the insane population of England since 1914. Chapter I is devoted to a study of definitions and classifications. In addition to various medical definitions quoted mostly from English authors, the excellent definitions from the Mental Deficiency Act of 1913 are stated. The definitions of insanity and classifications of insanity are taken largely from Dr. Henry Maudsley and Dr. Charles Mercier. Old English definitions have been quoted from the literature, and finally legal definitions and concepts are most concisely stated. Chapter II deals with mental deficiency in relation to tort. Chapter III deals with mental deficiency and the law of contract. It is divided into seven parts and covers not only mental deficiency in its narrow sense, but also insanity in relation to contracts. Chapter IV is devoted to discussion of mental deficiency and marriage, Chapter V to insanity and divorce, Chapter VI to testamentary capacity and mental deficiency, and Chapter VII briefly discusses the evidence of insanity. An appendix is added containing a summary of chief powers and duties of lunacy and mental deficiency authorities in England, and a second appendix contains suggestions for the reform of lunacy and mental deficiency administration. The typography is good, and the book contains a very useful index and a table of cases cited.

The good judgment and restraint of the author is nowhere more evident than in the suggestions for reform. These are four in number and might well be considered by students of this subject in this country, especially the fourth recommendation, which suggests making the Board of Control a sub-department of the new Ministry of Health and "that the Board be given statutory powers to deal with all cases of unsoundness of mind (*i. e.*, lunatics and mental defectives) in such manner as may be prescribed by Parliament; that is to say, the Board shall be enabled to certify, to segregate, to treat in or outside of institutions, all persons who by reason of defect of mind are a danger or a potential danger to themselves or to the community and to discharge them in proper circumstances. In other words, it is proposed to confer on the Central Authority wide powers for dealing not only with certified lunatics, idiots, imbeciles and feeble-minded persons, but also with all persons who may be suffering from mental disorder in an incipient stage."

It is interesting to note that a serious consideration of civil responsibility in connection with mental abnormality leads to the above conclusion, one which students of criminology have reached sometime since. Emphasis upon this more general aspect may help secure a more intelligent attitude on this latter than has been possible on the basis of experience in criminal cases alone.

HERMAN M. ADLER.

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A DIGEST OF ENGLISH CIVIL LAW. By Edward Jenks (Editor), W. M. Geldart, W. S. Holdsworth, R. W. Lee, and J. C. Miles. Second Edition. London: Butterworth & Co. 1921. Vol. I, pp. ccxlii, 668. Vol. II, pp. 669-1424.

The distinguished array of authors leads one to expect high things from this ambitious work. Book I, a catch-all called "General," and Book III, Things, were written by Professor Jenks; part of Book II, Contracts, by Professor Lee; The remainder of Book II, Torts, by Mr. Miles; Book IV,

Family Law, by Professor Geldart; and Book V, Succession, by Mr. Holdsworth.

A Digest is, in our law, a collection of decisions with more or less expository statement. It might be asked why, in view of Lord Halsbury's complete and helpful collection of decisions, "The Laws of England," this partial collection should be made. It might be asked why so novel a division of the law should be adopted. It might be loudly demanded what possible use there can be in reducing a complex and delicately shaded body of doctrine like the law into a collection of disjointed dogmas, elementary, so simple as to be misleading, so placid as to be deadly dull. Is this that "general view of the law as a complete whole" which some old-fashioned legal educators urge as desirable?

Given the plan, the execution is on the whole, of course, excellent. One can get a fairly good notion of the principal heads of a portion of the law by a study of the table of contents, supplemented by reading the text. But in some cases brevity becomes misleading. Under the section "Self-Help" it is said: "A person . . . whose possession is wrongfully interfered with, is justified in employing, against the wrong-doer, force apparently necessary to prevent the accomplishment or continuance of that . . . interference," thus leading one to suppose that one may kill, if necessary, to prevent a trespass on land; and "A person entitled to the possession of a chattel may seize it, by force if necessary," thus allowing an invasion by force of the peaceful possession of an innocent purchaser from a thief. The first of these errors is corrected later (p. 436), but the second remains uncorrected, except for a caution in a note (*ibid.*). As an example of brevity that dodges difficulties, the whole law of agency, so far as liability to third persons is concerned, is contained in seven and one half lines (p. 55). The words "cause," "consequence," "proximate," "remote" are not found in the index. There is no general treatment of the Conflict of Laws, nor does the work contain any discussion of such questions as what law governs the obligation of a contract, what power a foreign executor or administrator may have, or what recognition will be given to a foreign marriage where one or both parties were aliens. The law of legitimacy is stated as if no question of the legitimacy of an alien could arise in an English court.

An examination of this book confirms the idea that any attempt briefly to make the law simple, easy, or complete is foredoomed to failure.

J. H. BEALE.

#### SPECULATION AND GAMBLING IN OPTIONS, FUTURES, AND STOCKS IN ILLINOIS.

By James C. McMath. Chicago: George I. Jones. 1921. pp. xxxvi. 70.

This little book does not purport to be anything more than an outline of the law of gambling contracts with special reference to Illinois law, more especially as affecting transactions in grain futures and stocks. As such it will doubtless be of service to lawyers in the handling of cases involving such transactions. To this end it contains in the front an alphabetical index, or rather digest, with frequent references to the leading cases, text-books, and legal periodicals, and less frequent references to the text of the book itself. As the author takes care to point out, many references are to be found in this index-digest which are not to be found elsewhere in the book. In addition there is in the back of the book an appendix containing the Illinois statutes on the subject, together with an alphabetical list of Illinois cases and occasional reference to notes and articles in legal periodicals. The text itself is inclined to the platitudinous and adds little or nothing to the subject from the point of view of the student. On the whole one must regret that the author could not take the time to work his material into the concise and learned essay which the subject needs and deserves.

C. A. M.

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## MARGIN STOCKS<sup>1</sup>

THERE is a tendency even in the courts to treat the operations of stockbrokers as a mystery which outsiders cannot hope fully to comprehend. It is true that that part of the business which consists in buying and selling in the market and in borrowing and making deliveries and settlements is often highly technical and may require the exercise of considerable professional skill by the broker. Stock exchanges are established to facilitate and govern by appropriate rules transactions between brokers, who practice their profession in behalf of their customers or clients in much the same sense that an attorney practices in the courts.

"Doubtless, when one employs another to trade for him in a particular market, he impliedly authorizes the dealings to be conducted according to the established usages of that particular market, whether he knows of them or not. . . . Yet, he becomes bound only by such usages as are not illegal or contrary to sound public policy and 'are such as regulate the *mode* of performing the contracts, and do not change their intrinsic character.'"<sup>2</sup>

The general nature of margin transactions in stocks is now, however, well understood in the exchanges of this country both by customers and brokers. The main features consist in the employment

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<sup>1</sup> "Margin stocks" are intended in this article to include all negotiable and fungible securities adapted to margin transactions.

<sup>2</sup> Rugg, C. J., in *Hall v. Paine*, 224 Mass. 62, 73, 112 N. E. 153 (1916). The italics are the writer's. See also *Cronan v. Hornblower*, 211 Mass. 538, 98 N. E. 504 (1912); *Furber v. Dane*, 203 Mass. 108, 116, 89 N. E. 227 (1909); *Bibb v. Allen*, 149 U. S. 481, 489 (1893); 21 AM. L. REG. (N. S.) 171, 176, note on *Van Horn v. Gilbough*, 10 W. N. C. 347 (Pa., 1881).

of a broker by the customer to purchase stock to be delivered to the customer on demand and payment of the broker's charges and advances toward the purchase price, or to be sold on his account if so ordered, with authority to the broker to pledge the stock in common with his own stock and that of other customers for his own loans. The contract of employment, if analyzed, conforms substantially with the contract as stated in *Markham v. Jaudon*,<sup>3</sup> and in *Richardson v. Shaw*.<sup>4</sup>

A word is necessary about "margins." A customer opening a margin account is generally required by the broker to deposit stock or to pay money to an amount equal to a certain percentage of the cost of the stock to be dealt in. The broker advances the remainder of the necessary money and charges interest upon it, for which, together with the broker's commission as agent, the customer is indebted. If stock is so deposited as "margin," it is, by the custom of brokers everywhere and generally by express agreement, merged with the stock of that kind purchased and carried for customers.<sup>5</sup> The "margin" at any particular moment is the difference between the current price of the shares purchased or deposited and the cash indebtedness of the customer, who agrees to keep this difference above a certain minimum percentage of the value of the stock. It

<sup>3</sup> 41 N. Y. 235, 239 (1869).

<sup>4</sup> 209 U. S. 365, 374 (1908). The typical contract between broker and margin customer is thus described in this case and the case cited *supra*, n. 3: "The broker under takes and agrees — 1. At once to buy for the customer the stocks indicated. 2. To advance all the money required for the purchase beyond the ten per cent furnished by the customer. 3. To carry or hold such stocks for the benefit of the customer so long as the margin of ten per cent is kept good, or until notice is given by either party that the transaction must be closed. An appreciation in the value of the stocks is the gain of the customer, and not of the broker. 4. At all times to have, in his name and under his control, ready for delivery, the shares purchased, or an equal amount of other shares of the same stock. 5. To deliver such shares to the customer when required by him, upon the receipt of the advances and commissions accruing to the broker; or, 6. To sell such shares, upon the order of the customer, upon payment of the like sums to him, and account to the customer for the proceeds of such sale. Under this contract the customer undertakes — 1. To pay the margin of ten per cent on the current market value of the shares. 2. To keep good such margin according to the fluctuations of the market. 3. To take the shares so purchased on his order whenever required by the broker, and to pay the difference between the percentage advanced by him and the amount paid therefor by the broker."

<sup>5</sup> *Furber v. Danc*, 203 Mass. 108, 115, 89 N. E. 227 (1909); *Crehan v. Megargel*, 235 Mass. 279, 282, 126 N. E. 477 (1920).

seems, for reasons that later appear, that the present Massachusetts view is that the broker holds the legal title for the benefit of his customers, who are, therefore, the equitable owners. The doctrine in New York and other important jurisdictions is that the customers are legal owners as tenants in common of each kind of stock.<sup>6</sup> Corollaries of these doctrines respectively are that under the first the broker is secured for his advances and charges in the same way that a trustee is secured for his charges and expenses about the trust property, and that under the second the broker is in a position analogous to that of a pledgee of the undivided interest of the customer. He is, of course, not strictly a pledgee, as the undivided interest of a tenant in common is not capable of manual delivery.

The question of the property rights of customers has been more or less obscured by the existence of contractual relations with the broker. On the one hand a customer is indebted for the charges and advances of the broker, and on the other hand a broker has agreed to purchase and to carry or to sell stocks as ordered, and there are subsidiary obligations resting on both broker and customer; but none of these contractual relations necessarily affects the ownership of the stock acquired under the contract.

If a broker kept his transactions with each customer distinct from similar transactions with other customers, courts would never

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<sup>6</sup> 30 HARV. L. REV. 80, n.; *Duel v. Hollins*, 241 U. S. 523 (1916); *Gorman v. Littlefield*, 229 U. S. 19 (1913); *Sexton v. Kessler*, 225 U. S. 90 (1912); *Richardson v. Shaw*, 209 U. S. 365 (1908); *Caswell v. Putnam*, 120 N. Y. 153, 24 N. E. 287 (1890); *Markham v. Jaudon*, 41 N. Y. 235 (1869); *Skiff v. Stoddard*, 63 Conn. 198, 26 Atl. 874 (1893); *Brewster v. Van Liew*, 119 Ill. 554, 8 N. E. 842 (1886); *Price v. Gover*, 40 Md. 102 (1874); *In re James Carothers & Co.*, 182 Fed. 501 (1910); s. c., 192 Fed. 693 (1910); *In re A. O. Brown & Co.*, 171 Fed. 254 (1909); s. c., 183 Fed. 861 (1910); 8 COLUMBIA L. REV. 488, n.

Justice Holmes, who somewhat reluctantly concurred with his brethren in *Richardson v. Shaw*, *supra*, at p. 385, doubtless having in mind the opinion written by him in *Chase v. Boston*, 180 Mass. 458, 62 N. E. 397 (1902), while Chief Justice of the Massachusetts Supreme Judicial Court, describes a margin customer as "an equitable tenant in common." This description is wholly consistent with the actual decision in *Chase v. Boston*, where the broker was held to have the legal title, and accords with what seems to be the present Massachusetts view. Later in *Sexton v. Kessler*, *supra*, Justice Holmes, who wrote the opinion, seems to have overcome whatever lingering doubts he may have had. But an equitable tenancy in common, while consistent with the Massachusetts cases which deny the relation of pledgor and pledgee between customer and broker, is hardly compatible with the conception of the courts in other jurisdictions that the broker is a pledgee or in a position analogous to that of a pledgee.

have found serious difficulties in applying the ordinary principles of agency. The broker as agent would be under a contractual obligation to purchase or to sell the stock as ordered in behalf of his principal and the stock when purchased would be held by the broker as the property of his principal, either in law or in equity, depending on the manner in which the legal title was taken. Nor would the authority of the broker to pledge the stock for his own debts deprive a customer of his legal or equitable ownership. Of course the customer would take the risk that the broker might fail to redeem the pledge when called upon to make delivery; but in the mean time the general property rights in the stock itself would remain unchanged notwithstanding the pledge.

It is because brokers undertake margin transactions for many customers under substantially identical contracts with each that confusion has arisen as to the property rights of the customers, and in some jurisdictions, as in Massachusetts, it was once apparently denied that customers acquired any property rights at all. A broker never undertakes to distinguish between stocks of the same kind held for different customers, but this fact does not necessarily exclude them from all property interest even if the broker, as in Massachusetts, takes the legal title, for in that case there is no legal obstacle to his holding it for the benefit of all the customers who have purchased or deposited stock of that kind. On the other hand, if, as in other jurisdictions, the customers have the legal title, they are tenants in common of the stock.

So long as the broker is solvent and continues business, it matters little in practical results whether the broker or the customer owns the stocks purchased or deposited, because in the end the transaction is settled by the delivery of the stock to the customer on payment of his debt to the broker or, if he orders it sold, by an accounting between the two. It is, however, when the broker becomes bankrupt or meets with other financial disaster that the rights of ownership in the stock then in the broker's possession or control become paramount.

When a stockbroker goes into bankruptcy, two distinct fights are on: one between the margin customers and the general creditors, and the other among the margin customers themselves. The general creditors claim that the margin customers, like themselves, are merely creditors with no property rights, legal or equitable, in

the assets of the estate and that the indebtedness for which such customers may prove is the amount of their credit balances on the date of the bankruptcy. On the other hand, the margin customers say that they employed the broker as their common agent to buy and sell stocks and that in executing their commissions he acquired stocks which he holds in their behalf, so that these stocks cannot be reckoned among the general assets.

Again, when the margin customers turn from their common enemy, the general creditors, to the settlement of their internal differences, they seek all sorts of priorities and superior equities as against one another and to that end grasp at every device and circumstance to identify and to follow particular securities as belonging to themselves. In this attempt they are often successful before referees in bankruptcy, and occasionally in the district courts, because of the temptation to adopt principles of equity in following rights in property applicable to individuals who have no common interest with others. An avalanche of reclamation proceedings by individual customers is generally in order, and the results arrived at are too often unjust in the light of the true relations of margin customers between themselves and with the broker, their common agent. They were really all in the same boat, but by dint of superior diligence and ingenuity some swim while others sink. Like the two women grinding at the mill, one is taken and the other left, and for reasons so incomprehensible to lay minds that the unfortunate among the customers naturally regard the affair as a game of chance.

The whole controversy turns on the nature of margin transactions; and it is impossible to apply any legal principles or reasoning to the situation until the true relation between the broker and his margin customers has been determined in accordance with the facts and the intention of the parties.

Although the broker is allowed to mingle the stock purchased for his various margin customers, nevertheless, he is now in every jurisdiction in this country, including Massachusetts, required to have at all times in his possession or control, ready for instant delivery, sufficient stock to satisfy the just demands of all his margin customers.<sup>7</sup>

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<sup>7</sup> *Crehan v. Megargel*, 235 Mass. 279, 283, 126 N. E. 477 (1920); *Adams v. Dick*, 226 Mass. 46, 53, 115 N. E. 227 (1917); *Greene v. Corey*, 210 Mass. 536, 548, 97 N. E. 70 (1912); *Fiske v. Doucette*, 206 Mass. 275, 284, 92 N. E. 455 (1910); *Price v. Gover*,



Nevertheless, in Massachusetts the general creditors have continued to insist on the contractual aspects of the claims of margin customers to the exclusion of all property rights except possibly in the case of securities deposited as margin, and to contend that such customers are merely creditors like themselves with provable claims. In the other important jurisdictions of this country, however, the customers are held to have property rights in the stock acquired by the broker on their account, in addition to the purely contractual rights created by the contract of agency.

The existence of property rights in the stock purchased under a contract of agency is not only compatible with the existence of contractual rights but is the direct result of the performance of the broker's obligation under the contract. It is a familiar principle that, when an agent acquires the title to property in pursuance of his employment, such property, either in law or in equity, belongs to his principal, and he cannot set up or claim an independent title in himself. Indeed, the prime object of the employment of a broker to buy stock is to acquire for the principal a property in stock.

Of course, the contract would not even be a contract of sale if it is made to cover a wager. But, if the contract is really one of agency made in good faith, nothing can defeat the legal or equitable title of the principal to any stock purchased on his order unless the broker has so dealt with the stock after its purchase that the principal's property rights therein are extinguished as a matter of law. In the absence of such legal difficulty, however, the legal or equitable title is in the customer if the contract is recognized as one of agency; and the Massachusetts courts, whatever may have been said in early cases, now hold that such is the nature of the contract.<sup>8</sup> It is true that Justice Loring, in *Rice v. Winslow*,<sup>9</sup> intimates that although the broker acts as agent in buying the stock, nevertheless the customer's property right therein is extinguished of necessity when the broker mingles the purchased stock with

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40 Md. 102 (1874); *Douglas v. Carpenter*, 17 App. Div. 329, 335, 45 N. Y. Supp. 219 (1897); *Nourse v. Prime*, 4 Johns. Ch. (N. Y.) 490 (1820); NEW YORK PENAL LAW, § 956; *Skiff v. Stoddard*, 63 Conn. 198, 26 Atl. 874 (1893); 1 DOS PASSOS, STOCK-BROKERS, 2 ed., 257; 16 COLUMBIA L. REV. 48. See also 19 HARV. L. REV. 529 note.

<sup>8</sup> *Rice v. Winslow*, 180 Mass. 500, 62 N. E. 1057 (1902); *Hall v. Paine*, 224 Mass. 62, 112 N. E. 153 (1916).

<sup>9</sup> 180 Mass. 500, 502, 503, 62 N. E. 1057 (1902).

stock of his own and of other margin customers; but such necessity depends entirely upon the nature of the property right acquired by the broker for his customer; and when the nature of this property right is defined and understood it will be seen that there is no necessity for the extinction of the customer's legal or equitable title.

To deny that margin customers have any rights of property in the stocks which they intend to purchase is not only a shock to them but is contrary to all principles of fair dealing. "At the inception of the contract it is the customer who wishes to purchase stocks," not the broker.<sup>10</sup> It is his judgment and not the broker's which is exercised in the selection of the stocks for purchase. He buys frequently for investment and speaks of the stocks as "my" stocks. He takes all the risks of the transaction and receives all the profits as well as suffers all the loss. To say that he has bought nothing and is a mere creditor is to defeat the very object for which he employs the broker as agent. Moreover, the broker who honestly performs his obligations is amply protected against loss by reason of the purchases so made and his private property and general estate are not imperilled. His ability to pay his private debts can be in no way impaired by the honest performance of his duties as agent for margin customers,<sup>11</sup> and it is the rankest sort of injustice to those customers to throw the property that they employed the broker to buy into the general pot in bankruptcy for distribution to all claimants, including the private creditors of the bankrupt. This, however, is the result unless the rights of margin customers are held to be something more than mere contractual claims; and the courts should, unless absolutely compelled on legal considerations, decline to perpetrate such an injustice.

The difficulties which seem to lie in the way of determining the legal relations of both customer and broker to the stock purchased may be traced almost wholly to the right of the broker to mingle the stock of his several customers and to pledge it for his own loans; and the claim has been made that this authority is so inconsistent with the retention of any property rights in the customer that in case of bankruptcy he must have recourse solely to his contractual rights, limiting his claim substantially to the amount of damage

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<sup>10</sup> *Richardson v. Shaw*, 209 U. S. 365, 377 (1908).

<sup>11</sup> *Gorman v. Littlefield*, 229 U. S. 19 (1913); *Duell v. Hollins*, 241 U. S. 523 (1916).

occasioned by the breach of the broker's contract to deliver the stock. Of course the customer may elect to treat the bankruptcy as equivalent to such a breach on the broker's part;<sup>12</sup> but he may with equal propriety elect not to abandon his property rights.

### THE "MASSACHUSETTS DOCTRINE"

Is there a Massachusetts doctrine? It may be asserted that there is, but the doctrine certainly is not the one commonly ascribed to the courts of that state. The supposed doctrine is that margin customers have no property interest in stock purchased on their account, that the broker does not act as an agent or in any fiduciary capacity, and that the contract is an executory contract of sale between the broker as vendor and the customer as vendee. This supposition would be partially justified if one should begin with *Wood v. Hayes*<sup>13</sup> in 1860 and read the decisions down to *Chase v. Boston*<sup>14</sup> in 1902. But if he begins with *Crehan v. Megargel*<sup>15</sup> in 1920 and examines the cases back to *Greene v. Corey*<sup>16</sup> in 1912, he finds that the court has ceased even to cite the old cases for the *dicta* supposed to support the "doctrine" attributed to them and holds the broker to the strictest performance of his obligation as a fiduciary, first to purchase all stock when ordered by his margin customers,

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<sup>12</sup> *In re Swift*, 112 Fed. 315 (1901). When a customer proves his claim as a creditor under the contract with the broker, he thereby waives his other remedies, unless he expressly reserves them. *Thomas v. Taggart*, 209 U. S. 385 (1908). But the extraordinary contention has occasionally been made before referees in bankruptcy that, inasmuch as bankruptcy excuses a demand before proof of claim by a customer as a creditor and because he may so prove his claim without demand, therefore, whatever his previous rights of ownership may have been, the intervention of bankruptcy converts him at once into a mere creditor stripped of all rights of ownership, legal or equitable, in the stock carried for him by the bankrupt. This proposition, it is contended, is supported not only by *In re Swift*, 105 Fed. 493 (1900), but by *Weston v. Jordan*, 168 Mass. 401, 47 N. E. 133 (1897), and further by certain remarks in the opinion in *Richardson v. Shaw*, 209 U. S. 365, 383, 384 (1908). There is nothing whatever in any of these cases to support such a proposition, and in fact Mr. Justice Day in the latter case says (at p. 380), "We cannot consent to the contention of the learned counsel for the petitioner, that the insolvency of the broker at once converts every customer, having the right to demand pledged stocks, into a creditor who becomes a preferred creditor when the contract with him is kept and the stocks are redeemed and turned over to him."

<sup>13</sup> 15 Gray (Mass.) 375 (1860).

<sup>14</sup> 180 Mass. 458, 62 N. E. 397 (1902).

<sup>15</sup> 235 Mass. 279, 126 N. E. 477 (1920).

<sup>16</sup> 210 Mass. 536, 97 N. E. 70 (1912).

and afterwards to keep in his possession or control sufficient stock of each kind to satisfy the demands of them all. While he takes the legal title<sup>17</sup> he must keep the *res*, that is the body of the margin securities, intact; and the reader finds that the only perceptible difference at all fundamental between the true Massachusetts doctrine and the doctrine held elsewhere is that the Massachusetts court has put the broker in the position of a trustee holding the legal title and has strictly defined not only the *res* of the trust but his obligations with reference to it, while other jurisdictions regard the customers as legal tenants in common of property in the possession or control of their common agent. Further, the student will find that this view of the broker's relation to margin stocks does not conflict with the actual decision in any Massachusetts case, and squares more closely with the intention of the parties and the methods and customs of business than the view in other jurisdictions which involves at least two somewhat strained conceptions: (1) that shares of stock are essentially abstract units independent of the certificates,<sup>18</sup> and (2) that an anomalous relation of pledgor and pledgee exists between customer and broker.

It must be admitted that during the early period the Massachusetts court was apparently headed toward holding that margin transactions were as matter of law not at all what they purported to be but something different, yet the tendency is more apparent than real. So-called margin transactions so often cloaked a bet on the market without intention of actual purchase and sale, and so many brokers acted on the theory that notwithstanding the form of the contract and the entries on their books they were under

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<sup>17</sup> *Chase v. Boston*, 180 Mass. 458, 62 N. E. 397 (1902); *Hall v. Paine*, 224 Mass. 62, 112 N. E. 153 (1916); *Crehan v. Megargel*, 235 Mass. 279, 126 N. E. 477 (1920).

<sup>18</sup> It is not quite true that the holder of a certificate representing shares in a corporation owns nothing but a certain number of abstract units independent of the certificate. He also owns the certificate; and such ownership will distinguish his shares from those of others so that he can identify them and perhaps be enabled to follow the proceeds if the shares or their proceeds are wrongfully in another's hands. To say that shares of stock of any particular kind are absolutely fungible in all circumstances is not true; but to say that margin stocks of any particular kind in the hands of a broker are absolutely fungible is true. The fungibility springs from the way the stocks are held and not from the nature of the property itself. Identification of their stocks is impossible between margin customers; but identification of his stock by one claiming that it has passed wrongfully into the hands of another is essential to any steps taken to recover it or its proceeds.

no legal obligation actually to buy and carry the stocks as ordered provided they could deliver the stocks when a customer paid up and demanded delivery, that the court may well have thought that there was in fact a mere wager involving neither agency nor property<sup>19</sup> or substantially an executory sale conditioned on payment.<sup>20</sup> At any rate the court was slow to accept a margin contract in stocks at its face value, and indeed could not do so while brokers recognized no legal obligation actually to purchase and to carry the stocks as ordered. Judge Lowell pointed this out in 1900.<sup>21</sup>

A review of the Massachusetts decisions shows the constant progress of the law in Massachusetts. Starting in 1860 with the idea that a stockbroker was virtually a dealer in stocks on his own account, he was treated in *Wood v. Hayes*<sup>22</sup> strictly as a seller of stock for future delivery on condition that the price was paid. The exact statement of Chief Justice Shaw was: "The contract was strictly conditional, to deliver so many shares upon the payment of so much money." This opinion that the relation was that of vendor and vendee was not at all required by the facts of the case, which was an action of tort for conversion, as Judge Lowell pointed out,<sup>23</sup> but it may be assumed fairly to reflect the current, if somewhat vague, conception at that time of the intended meaning of an order for stock from a broker to be delivered in the future, whatever the particular form of the contract. One must remember that *Wood v. Hayes*<sup>24</sup> "was decided in 1860, before the stockbroker was as familiar a figure as he is today, and before the law governing his calling was as well established."<sup>25</sup>

*Covell v. Loud*,<sup>26</sup> in 1883 restated the proposition in these words: "The contract was conditional to deliver the shares upon the payment of the money." In this case also the expression of opinion as to the nature of the contract was wholly unnecessary to the decision.

In 1897, in the case of *Weston v. Jordan*,<sup>27</sup> the court declined to reconsider the view supposed to be held in Massachusetts in conse-

<sup>19</sup> *Chase v. Boston*, 180 Mass. 458, 62 N. E. 397 (1902).

<sup>20</sup> *Wood v. Hayes*, 15 Gray (Mass.) 375 (1860).

<sup>21</sup> *In re Swift*, 105 Fed. 493 (1900).

<sup>22</sup> 15 Gray (Mass.) 375 (1860).

<sup>23</sup> *In re Swift*, 105 Fed. 493 (1900).

<sup>24</sup> 15 Gray (Mass.) 375 (1860).

<sup>25</sup> *Skiff v. Stoddard*, 63 Conn. 198, 214, 26 Atl. 874 (1893).

<sup>26</sup> 135 Mass. 41, 44 (1883).

<sup>27</sup> 168 Mass. 401, 47 N. E. 133 (1897).

quence of the two previous decisions because the facts of the case did "not call for such reconsideration of the general doctrine." The opinion was expressed, however, that the relation between customer and broker is not that of pledgor and pledgee, which, of course, implied that the title to the stocks remains in the broker until the time comes for delivery, and that the broker and customer are vendor and vendee merely, not agent and principal. If, as a matter of fact, the relationship of vendor and vendee was the true one, the broker, as the court remarks, was not "bound always to have on hand enough shares to meet the purchase," although such was the doctrine in New York and elsewhere. The subsequent recognition of that very obligation has proved to be the turning point in the later development of the law in Massachusetts. As long as the court clung, however, to the idea that a customer who bought stock from a broker for future delivery was dealing with the broker as a vendor of the stock so that the purchaser had only the contractual rights of a vendee, whatever the form of the contract, it necessarily followed that no intervening obligation rested on the broker to purchase the stock and to carry it for the customer's benefit until the time came for delivery. Judge Lowell in 1900, when he decided *In re Swift* in the United States District Court, drew attention to this lack of legal liability on the part of the broker actually to buy and carry the stock in the interim before delivery, although he acknowledged that brokers had a vague impression that they ought to do so.

Judge Lowell, of course, was attempting to follow the Massachusetts conception of the contract which controlled the case before him, but confessed himself considerably puzzled about the real opinion of the state court in view of the circumstance that such opinions as had been uttered were really *obiter dicta*, and also because both *Covell v. Loud* and *Weston v. Jordan* expressly worked out the same result both under the theory of vendor and vendee and the theory of agent and principal. He finally thought that the Massachusetts view, which was more or less justified by the practices of brokers at that time, inclined to the theory of vendor and vendee under a conditional contract of sale. That is why it was necessary in the case before him to determine when the broker was in default and the right of action by the customer accrued; and he finally held, and his decision was afterwards affirmed by the Circuit Court

of Appeals, that the broker would not be in default for failure to perform his conditional contract of sale until tender and demand by the purchaser or until the equivalent of such tender and demand; and, invoking the doctrine that a tender is unnecessary when it is impossible for the other party to perform, that bankruptcy practically created such impossibility so that an actual demand was excused. In holding that a demand and tender were necessary he expressly followed the case of *Weston v. Jordan*, where the court had stated that after the repeated demands and refusals shown in that case the purchaser had a valid ground of action against the broker "either for a breach of contract or for a conversion; it matters not which."

The idea that the form of the contract between broker and customer, which of course is plainly that of agency and not of purchase and sale, readily lent itself to an attractive method of betting on the rise and fall in price of stocks, strongly colors several of the Massachusetts decisions. Thus in *Chase v. Boston*,<sup>28</sup> decided in 1902, Chief Justice Holmes says that none of the features of the contract is decisive as to its character and that "a transaction in similar form might be a simple wager." Of course if the contract is a wager, stocks bought by the broker or which happen to be in his possession at any time are his property, not even subject to valid contractual demands; but, at the time of the decision, there had been in existence since 1890 a statute intended to curb in some degree the practice of making wagering contracts with reference to the rise and fall of stocks by giving the so-called customer a right of action to recover money or property paid to or deposited with the so-called broker, and actions had already been brought to enforce the remedy provided.<sup>29</sup> "Bucketing" had not at that time been made a crime, as it was later in 1907,<sup>30</sup> and the court was excusably slow to see that the remedy of the statute and the language in which that remedy was couched really implied an obligation on the part of the broker to carry out in good faith the orders of his customers for the purchase of stock and to hold or carry the stock when purchased; in other words, that the statute implied the true relation was that of agency. It cannot be reiterated too often

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<sup>28</sup> 180 Mass. 458, 62 N. E. 397 (1902).

<sup>29</sup> *Lyons v. Coe*, 177 Mass. 382, 59 N. E. 59 (1901).

<sup>30</sup> STAT. 1907, c. 414.

that when the obligation of the broker under contracts made in good faith is recognized to be that he must actually purchase and hold or carry the stock until the time comes for delivery, the whole foundation falls from under the supposed doctrine of such cases as *In re Swift*, *Weston v. Jordan*, *Covell v. Loud*, and *Wood v. Hayes*.

The pressure of the statute was felt in *Chase v. Boston*, but the court explained that its language was used in a popular sense "and that the broker is not treated there as a party to a contract to buy or sell but as one employed to buy or sell." Some such explanation was necessary to make the opinion verbally consistent with *Rice v. Winslow*, reported in the same volume.<sup>21</sup>

The point at issue, however, in *Chase v. Boston* was simply whether the broker who is carrying stocks for margin customers holds the legal title for purposes of taxation; and the court said that he does. In view of the later cases, *Chase v. Boston* stands only for the proposition that the broker in margin transactions acquires the legal title of the stock purchased by him on the orders of customers. Nothing is said in that case as to the obligation of the broker actually to purchase the stock and to hold it in his possession or control until delivery is demanded. Of course, the decision implies that the court recognized no such obligation, yet in *Rice v. Winslow*, which was an action by a customer to recover from a broker under the wagering statute of 1890, Justice Loring found himself bound to say that in making the initial purchase of stock to be carried on a margin the broker's "relation to the customer in buying the stock is that of an agent," because otherwise he would not come within the language of the statute which provides for recovery when one "employs another to buy or sell for his account."

*Rice v. Winslow* marks important progress in the Massachusetts law. (1) In the ordinary margin transaction the customer is held not to purchase of the broker. The case did not come "within the first clause [of the statute of 1890] because it is a case where the plaintiff did not buy of the defendant, but where he employed the defendant to buy." (2) It is distinctly recognized that the initial relationship in margin transactions is that of agency.

These two propositions are an absolute departure from the doctrine of *Wood v. Hayes*, which is that there is no agency and that

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<sup>21</sup> 180 Mass. 500, 62 N. E. 1057 (1902).



the relationship is that of buyer and seller. The court does not undertake in *Rice v. Winslow* to pass upon the obligations of the broker after the initial purchase to hold or carry the stock. The only suggestion made in regard to that subject is that the broker, having the right in some respects to treat the shares so bought as his own and to mingle them with other stocks, is authorized, like a factor in the case of money received from the sale of goods for several principals, to substitute his credit for the stock itself; so that the case is cited for the proposition that the initial purchase is made by the broker as agent of his customer but that, owing to "the necessities of the business of the agent," he becomes a debtor to the customer for the stocks.

The way in which a broker conducts his business prevents him from keeping the margin stocks acquired for each customer apart from other stocks of the same kind, and requires the use of the margin stocks *en bloc* or otherwise at the discretion of the broker as pledges for his own loans. These are the "necessities of the business" which the learned justice undoubtedly had in mind. But neither the right to mingle the stocks nor the right to pledge them is incompatible with the retention of property therein by the customers.

In jurisdictions outside Massachusetts a margin customer has a legal property like that of a depositor in a grain elevator who "may have a property in grain in a certain elevator although the keeper is at liberty to mix his own or other grain with the deposit and empty and refill the receptacle twenty times before making good his receipt to the depositor concerned";<sup>82</sup> and in such jurisdictions the margin customers are, therefore, legal tenants in common of the margin stocks of each particular kind. In Massachusetts the situation now appears to be the same except that the interest of the customers is equitable instead of legal, because the legal title is in the broker. So that in all jurisdictions the stocks in the hands of the broker may be absolutely fungible and at the same time belong, either in law or in equity, to the margin customers. And it is equally true that the broker's right to pledge the margin stocks furnishes no cause for the conversion of the relation between broker and customer into that of debtor and creditor.

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<sup>82</sup> Holmes, J., in *Sexton v. Kessler*, 225 U. S. 90, 98 (1912).

In *Chase v. Boston*<sup>32</sup> (a suit between the same parties as in the earlier case of the same name), the right to pledge stocks kept in separate envelopes as the property of each customer was held not to affect the customer's title.<sup>34</sup> In view of these considerations, therefore, none of the "necessities of the business" of the broker has the effect suggested by Justice Loring.

In 1902, then, it had been settled that the broker at the start is an agent. It had been suggested that after the initial purchase of the stock he substituted his credit for the stock and the relationship thereafter was that of debtor and creditor. It had also been declared, perhaps decided, that the broker is the holder of the legal title, and therefore is not a pledgee. And the question of the broker's obligations with respect to carrying stock and having sufficient on hand to meet all demands had been left open with no intimations except those made by Justice Allen in *Weston v. Jordan* and by Judge Lowell in the case of *In re Swift*.

We now pass to the later Massachusetts cases. Justice Rugg in *Fiske v. Doucette*,<sup>35</sup> in 1910, speaking of the title to stocks carried on margin and the question whether the broker is a pledgee according to the New York law, puts the case no more strongly than this: "In this regard the law of New York *probably* differs from our own"; but in *Hall v. Paine*,<sup>36</sup> decided in 1916, the same judge, then chief justice, said: "... the rule in this Commonwealth is that, in the ordinary relation between customer and broker where the latter carries stocks on margin, the legal title is in the broker, *Chase v. Boston*, 180 Mass. 458, differing in this respect from that of some other jurisdictions, *Gorman v. Littlefield*, 229 U. S. 19." In the later case of *Crehan v. Megargel*,<sup>37</sup> decided in 1920, Justice De Courcy says:

"In accordance with the long established rule of law in this Commonwealth, the legal title to the stocks carried on margin was in the brokers, as between them and their customer; and this is true alike of the stocks bought on margin by the defendants, and those deposited with them under the circumstances here disclosed . . ."

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<sup>32</sup> 193 Mass. 522, 79 N. E. 736 (1907).

<sup>34</sup> See also JONES, COLLATERAL SECURITIES, 3 ed., § 153.

<sup>35</sup> 206 Mass. 275, 281, 92 N. E. 455 (1910).

<sup>36</sup> 224 Mass. 62, 72, 112 N. E. 153 (1916).

<sup>37</sup> 235 Mass. 279, 282, 126 N. E. 477 (1920).

It appears to be settled in Massachusetts, therefore, that the legal title to stock deposited or carried is in the broker and not in the customer. This proposition carries with it the further proposition that in Massachusetts the customer and broker do not and cannot stand in the relation of pledgor and pledgee. In this respect, as Chief Justice Rugg says, the Massachusetts law differs from that in other jurisdictions, and it may be added that it wisely differs, because to hold that the broker has the full legal title to all stocks which he purchases on margin for his various customers conforms better with the facts and permits a clearer conception of his true relationship to his customers than the somewhat strained conception entertained in other jurisdictions that each customer has some legal right of property which follows the stocks in the broker's hands through all the transactions short of actual sale.

But to say that the legal title to all stocks carried on margin is in the broker is far from saying that the customer has no rights in the nature of property in the stocks. *Furber v. Dane*<sup>38</sup> furnishes, perhaps unintentionally, a powerful argument in support of a property right of some kind. One of the plaintiffs was allowed in equity to recover stock he had deposited as margin. It was conceded that brokers treat stock so deposited exactly like stock purchased and carried on margin. This means that brokers have and exercise the same rights to mingle and to pledge stocks deposited as margin that they have and exercise in the case of stocks purchased and carried on margin. If these rights are inconsistent with the existence of any property rights of the customer in the one case they must be in the other. In both, the customer's proprietary interest is extinguished, if at all, at the moment the stocks pass into the broker's possession with full power to mingle and to pledge them; and once extinguished, it is forever gone unless newly created by act of the parties. The fact that the identical certificates deposited as margin may turn up somewhere is of no consequence in the determination of the customer's present interest. If several persons contributed money to a trust fund which was to be held and subsequently divided among them, the final division would not be affected by the presence of marked bills paid in by one of them. If, therefore, *Furber v. Dane* establishes that a property

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<sup>38</sup> 203 Mass. 108, 89 N. E. 237 (1909).

right which may be enforced in equity by the customer persists in the case of stocks deposited as margin, in spite of the broker's authority to mingle and to pledge them, then the same principle applies to stocks purchased and carried on margin. The conception of an undivided equitable right of property is identical to both.

The law in Massachusetts, therefore, comes down to this: that the broker must be a trustee of the stocks which he is carrying for his margin customers and that each of his customers has an equitable interest or title in his undivided proportionate part of all the stock of any particular kind in the possession or control of the broker. The Massachusetts court has stopped short of saying in so many words that each customer has such an equitable property or interest; but it has in recent years defined with great particularity the duties and obligations of the broker with reference to the stock, and these duties and obligations so defined are precisely those which would be required of the broker as trustee. The definition of his duties and obligations fixes his character; it comes to the same thing if you first define the rights and obligations of a person with reference to a particular matter and then find that you have described a trustee; or first describe him as a trustee and then say that because he is a trustee he has precisely these same rights and obligations. The character of legal relationships is determined by the rights and obligations incident to them; and when we find a man subject to all the rights and obligations of a trustee we may as well call him so. What, then, are the rights and obligations now recognized as resting on a broker who has purchased and is carrying stock on a margin?

It is of interest that the formula expressing the obligation of a broker to keep intact the body of stocks required to meet the demands of margin customers was developed in cases arising under statutes passed in 1890 and 1901<sup>39</sup> providing a remedy against brokers for losses suffered under wagering contracts. By the later statute brokers were allowed to show in defense that they actually purchased or sold the stock as ordered and in 1910 it was held, in *Fiske v. Doucette*,<sup>40</sup> that the defense permissible under the statute was not made out on the evidence submitted "unless by reason of

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<sup>39</sup> STAT. 1890, c. 437; STAT. 1901, c. 459.

<sup>40</sup> 206 MASS. 275, 284, 92 N. E. 455 (1910).

the purchase on the stock exchange the broker or his agent has within his immediate control certificates of stock at all times ready to deliver to the plaintiff upon demand, or in the case of sales, like certificates for delivery to a purchaser." This the learned justice said was the implied doctrine of the previous case of *Rice v. Winslow*.<sup>41</sup> "The dispute there arose between the purchaser and the stockbroker, and it was assumed as the basis of the opinion that the broker had in his manual possession or immediate and instant control certificates of stock to meet upon demand every share purchased or sold for the account of his customer."

Justice Sheldon, in *Greene v. Corey*,<sup>42</sup> an action brought on the same ground that recovery was sought in *Fiske v. Doucette*, said:

"The broker, to put himself right in such a case as the one now before us, must show that he has under his control, free from the just demands of other customers and available for delivery to the customer whose case is in question, the stocks of which that customer upon payment will be entitled to demand delivery."

Obviously compliance with the rule as stated by Justices Sheldon and Rugg requires the broker not only to purchase but to keep a body of stock of each particular kind in his possession or control to meet the demands of all the customers.

Admittedly the broker has the legal title, but he is subject to the obligation above stated. In other words, all the stocks of any particular kind in his possession or control are a trust property or *res* held for the benefit of the customers interested in that particular kind. The broker, according to the rule laid down, has no right to deplete the trust property. True, he has a power of substitution, but he must keep the property intact as far as the number of shares is concerned. And each customer interested is on the same footing as each other customer. Each is entitled to the immediate delivery of his share of the trust property when he complies with the conditions which, of course, are that he shall pay the amount of the advances and charges of the trustee. The only known term that will describe the relation of the broker to the customers in these circumstances is that of trustee. It is true that he started out as an agent to acquire the property which is the subject matter

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<sup>41</sup> 180 Mass. 500, 62 N. E. 1057 (1902).

<sup>42</sup> 210 Mass. 536, 548, 97 N. E. 70 (1912).

of the trust; but after he has acquired it he must become a trustee of it, if he is subject to the obligations which the law, in the opinion of the court, has laid upon him. There is nothing peculiar to this situation distinguishing it from any other where an agent has acquired the legal title to property in behalf of his principal. He is necessarily trustee of the property, and his principal is the equitable owner.

If the broker is trustee for each group of customers for whom he is carrying a particular stock on margin, he is naturally required to exercise the care and fidelity of a trustee in respect to the trust property, taking into account the purposes for which it is held and the powers which the customers have conferred upon him. There are no particular degrees of fidelity and good faith in such a case as this. The fidelity and good faith required of the broker as an agent differ in no wise from those required of him as a trustee. We should expect the court to impose upon the broker in such circumstances all the obligations which are appropriate to his fiduciary position. Accordingly he is bound to deal with the trust property without self-interest. In *Rice v. Winslow*,<sup>33</sup> Justice Loring says that "in the purchase of the stock he owes to his customer the same duty, that he owes to him, where he is employed to buy stocks, which are to be taken and paid for by the customer in place of being taken and paid for by the broker for the customer." This language is quoted with approval by Chief Justice Rugg in *Hall v. Paine*,<sup>34</sup> and he adds, "For breach of that duty by the broker a cause of action arises and, so far as the measure of damages goes, it is not of consequence whether the action is in tort for conversion or for breach of contract. *Richardson v. Shaw*, 209 U. S. 365, 382. Moreover, in this respect it matters not whether the stock were bought on margin or deposited with the broker. *Furber v. Dane*, 203 Mass. 108, 115." When the broker is ordered to sell stocks that are carried on margin the learned Chief Justice says that "while he may transfer a good title to a third person, [he] cannot purchase for himself, at least not without the full knowledge and assent of his principal. A broker's obligation to his principal requires him to secure the highest price obtainable, while his self-interest prompts him

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<sup>33</sup> 180 Mass. 500, 502, 62 N. E. 1057 (1902).

<sup>34</sup> 224 Mass. 62, 72, 73, 112 N. E. 153 (1916).

to buy at the lowest practicable price. The law does not trust human nature to be exposed to the temptations likely to arise out of such antagonistic duty and influence. . . . The converse of the rule is equally binding, that an agent to buy cannot sell his own goods to his principal without the latter's knowledge and assent. . . . This rule is so deeply grounded in fundamental reason that no custom or private rule can override it."

The foregoing language is equally applicable to agent or trustee. It matters not by what name he may be called, the fiduciary character of either requires the exercise of precisely the same fidelity to the interests of the beneficiary or principal. The only difference, which has nothing to do with the character of the obligation, is that in the particular case of a broker as agent dealing with margin stocks he is the holder of the legal title and is, therefore, strictly speaking, a trustee with respect to the stocks. Decisions by the Massachusetts court such as those above quoted remove entirely from the field of discussion the question whether or not a broker purchasing or selling or carrying stocks on a margin is acting in a fiduciary capacity.

The Massachusetts court has also discussed the subject matter of the trust held by the broker for each group of his margin customers interested in a particular stock. Chief Justice Rugg in *Adams v. Dick*,<sup>46</sup> speaking of the defense set up by the broker in an action under the statute to recover money paid as margins, said:

"The judge found that the defendants had only five sources from which to comply with possible demands upon them for the delivery of stocks sold on the plaintiff's orders or for delivery to the plaintiff of stocks bought on his orders, viz.: stocks actually in the hands of the defendants, stocks pledged by the defendants as collateral for loans made to them from banks, stocks pledged by the defendants to other brokers, stocks lent by the defendants to other brokers, and the obligations of persons who had sold stock short through the defendants without furnishing them with the certificates; and that, unless all these sources complied with the law, the defendants were not ready to respond to such demands. Manifestly stock in actual possession was available to the defendants. The plaintiff concedes that stocks pledged to the banks also were available. See *Chase v. Boston*, 180 Mass. 458. Without discussing whether stocks pledged or lent to other brokers were available

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<sup>46</sup> 226 Mass. 46, 53, 54, 115 N. E. 227 (1917).

to the defendants, it is plain that the obligations of persons who had sold stock short, to deliver certificates of such stock on demand, utterly fails to constitute stock in possession. As shown by the transactions with the plaintiff, short sales at most result in contracts which neither party expects to carry out by actual delivery. But even if there is a purpose to carry them out by an actual delivery of the certificates of stock, a contract for the delivery of stock is not equivalent, in any just sense, to possession of stock. The defendant failed to show actual purchases and sales as defined in *Fiske v. Doucette*, 206 Mass. 275."

Evidently at the outset the court did not perceive that the wagering statute of 1890 inferentially defined or affected the relation between brokers and their customers, but felt that it imposed an arbitrary *duty* to execute the customer's orders.<sup>46</sup> The later language of Chief Justice Rugg in *Hall v. Paine*,<sup>47</sup> however, quoting *Rice v. Winslow*,<sup>48</sup> when he speaks of the "duty" owed the customer instead of making use of the word *obligation* has no special significance. The broker purports to be and to act as an agent, and it makes no difference how his obligations are defined or what remedies are provided for breaches of them. If the broker is in duty bound, whether because of statute or of decisions or of both, to do those things which an agent should do under his contract, his relationship to the other party is thereby fixed. A statute requirement that a broker should deposit funds collected for customers in a separate account in a bank standing in his name as trustee, when complied with, fixes the relation between the broker and the beneficiaries of the funds deposited. The customer would be held to have rights in the funds deposited in such manner from the moment the deposit was made.

While it is true that the recognition of the obligation of brokers to keep intact the body of margin stocks developed from statements of the kind of evidence that would sustain the defense of actual purchases or sales provided by the statute of 1901<sup>49</sup> in actions brought under the statute of 1890<sup>50</sup> to recover money or

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<sup>46</sup> See the concluding statements in *Chase v. Boston*, 180 Mass. 458, 460, 461, 62 N. E. 397 (1902).

<sup>47</sup> 224 Mass. 62, 72, 73, 112 N. E. 153 (1916).

<sup>48</sup> 180 Mass. 500, 502, 62 N. E. 1057 (1902).

<sup>49</sup> STAT. 1901, c. 459.

<sup>50</sup> STAT. 1890, c. 437.



securities paid or deposited by customers in bucketing transactions,<sup>51</sup> the Massachusetts court in the recent case of *Crehan v. Megargel*<sup>52</sup> did not hesitate in transactions not bucketing in character to hold the brokers liable for a breach of contract unless they proved "that they had in their possession or control at all times, available for delivery to the plaintiff, the stocks which they purported to be carrying for him." This decision is, of course, directly contrary to the *dictum* in *Weston v. Jordan*<sup>53</sup> that a broker was not "bound always to have on hand enough shares to meet the purchase," although such was the doctrine in New York and elsewhere, and on that subject the decision ranges Massachusetts squarely with other jurisdictions.

The real "Massachusetts doctrine," therefore, so far as there is a doctrine peculiar to that state, seems clearly to be that the broker takes the legal title of stock deposited or purchased and holds it as trustee for his margin customers under all the obligations growing out of that relation.

### MARGIN STOCKS IN BANKRUPTCY

At least one thing is clear about margin stocks in the bankruptcy of the broker. If the stocks belong to the customer, whether in law or in equity, it matters not which, the general creditors have no claim upon them. In bankruptcies outside Massachusetts they have been kept apart from the general assets in a multitude of cases which are beyond the scope of this article to examine.<sup>54</sup> But the federal courts in bankruptcy cases controlled by Massachusetts law have hitherto acted in conformity with the supposed doctrine of that state, holding margin customers to be creditors merely who

<sup>51</sup> *Barrell v. Paine*, 236 Mass. 157, 128 N. E. 17 (1920); *Adams v. Hayden*, 236 Mass. 454, 128 N. E. 798 (1920); *Zemler v. Fitzgerald*, 234 Mass. 236, 125 N. E. 299 (1919); *Houghton v. Keveney*, 230 Mass. 49, 119 N. E. 447 (1918); *Chandler v. Prince*, 214 Mass. 180, 100 N. E. 1029 (1913); S. C., 217 Mass. 451, 105 N. E. 1076 (1914); S. C., 221 Mass. 495, 109 N. E. 374 (1915).

<sup>52</sup> 235 Mass. 279, 126 N. E. 477 (1920).

<sup>53</sup> 168 Mass. 401, 47 N. E. 133 (1897).

<sup>54</sup> *In re Solomon & Co.*, 268 Fed. 108 (1920); *In re Wilson*, 252 Fed. 631 (1917); *In re James Carothers & Co.*, 182 Fed. 501 (1910); S. C., 192 Fed. 693 (1911); *In re A. O. Brown & Co.*, 171 Fed. 254 (1909); S. C., 183 Fed. 861 (1910); *In re T. A. McIntyre & Co.*, 181 Fed. 955 (1910); M. S. Hagar, "The Bankruptcy Law as Applied to Stockbrokerage Transactions," 30 YALE L. J. 488.

may prove their claims for a breach of the contract to deliver stocks upon demand.<sup>55</sup> The time seems to have come to declare that this doctrine, if it ever existed, is obsolete.

Margin customers may, of course, elect to prove their claims as creditors, treating the bankruptcy as a breach of contract to deliver stocks;<sup>56</sup> but such an election should not work to the advantage of the general creditors at the expense of the other margin customers who do not so elect. It is one of the purposes of this article to draw attention to certain important consequences of the community of interest of margin customers derived from their employment of a common agent which have not received the study they deserve. The familiar and well-settled principles of law involved are those governing the mutual relations of parties in such a situation, and bankruptcy simply furnishes occasion for their application. Bankruptcy by itself alters the nature of neither contract nor property.

The origin and reason of margin transactions may be found in the apparent need of some method of buying stocks largely on credit. Stockbrokers have undertaken to perform that service, supplying a part, often a large percentage, of the necessary funds and protecting themselves from loss by the retention of the securities purchased and requiring a certain proportionate payment or the deposit of other securities by their customers. The business is necessarily done on a considerable scale and the success of the broker depends upon the extent of his clientage. The larger the clientage the more money must be advanced by the broker for the purchase of stocks, but being a broker and not a banker he soon finds that the capital necessary far outruns his resources without loans from financial institutions.<sup>57</sup> Of course it is natural that the securities purchased for customers and those deposited by them should be used as pledges for the money he borrows in the business; and it is obvious that, having a large number of customers, many of whom are ordering him to purchase stocks of the same kind, it is impracticable for him to undertake, either in the original purchase or in the subsequent

<sup>55</sup> *In re Swift*, 105 Fed. 493 (1900); S. C., 112 Fed. 315 (1901); *In re Gay & Sturgis*, 251 Fed. 420 (1918).

<sup>56</sup> *In re Swift*, 105 Fed. 493 (1900); S. C., 112 Fed. 315 (1901).

<sup>57</sup> *Skiff v. Stoddard*, 63 Conn. 198, 230, 26 Atl. 874 (1893).

hypothecation of the stock, to keep any particular certificates or securities of any kind apart from the general mass as the property of particular customers.

Now this situation is well understood and, even without the express stipulations generally insisted on by the broker, customers may well be deemed to authorize purchases and pledges to be made in the manner indicated.<sup>58</sup> This brings us to the important and significant fact, frequently overlooked, that the whole body of margin customers, employing the broker as their common agent under identical contracts, necessarily constitutes a class or group in which the rights of the individual members are dependent to a large extent upon the rights of all other members and, at any rate, ought not to be enforced by any one of them without due regard to the rights of the others.

The property, therefore, held by the broker for the class of persons comprising all his margin customers consists in the first place of all the securities bought for the members of that class. To this body of securities should be added, whenever custom or contract requires, the securities deposited by the margin customers. For instance, in Boston it is the custom of brokers to treat stocks deposited as margin in precisely the same way as stocks bought and carried on margin.<sup>59</sup>

A most important consequence follows. Since the broker has been given, either by custom or by express contract, the right to hypothecate, at his discretion, any or all of the securities so held by him for the purpose of providing himself with the necessary funds to carry on the business in behalf of all his margin customers, a loan procured by him for which he has pledged any of these securities is a charge upon the whole body of securities, and in case of loss occasioned by an excessive pledging by the broker, that loss, on the familiar principle of contribution or general average, must be borne *pro rata* by all the customers in proportion to the value

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<sup>58</sup> *Skiff v. Stoddard*, 63 Conn. 198, 219, 26 Atl. 874 (1893); 1 *Dos Passos, Stock-Brokers*, 2 ed., 254; 19 *HARV. L. REV.* 529, n. See also *Nourse v. Prime*, 4 Johns. Ch. (N. Y.) 490 (1820); *Lawrence v. Maxwell*, 53 N. Y. 19 (1873); *Oregon Co. v. Hillmers*, 20 Fed. 717 (1884).

<sup>59</sup> *Hall v. Paine*, 224 Mass. 62, 73, 112 N. E. 153 (1916); *Crehan v. Megargel*, 235 Mass. 279, 282, 126 N. E. 477 (1920); *Furber v. Dane*, 203 Mass. 108, 115, 89 N. E. 227 (1909).

of their respective holdings.<sup>60</sup> The mind should be permitted to dwell upon this proposition because it is founded upon those equitable principles always sought to be applied where there is a community of interest, and prevents unjust results which are sure to follow in greater or less degree an attempt to work out the rights of individual customers in total or partial disregard of their essential community of interest arising from the fact that each one of them has voluntarily become a member of the class of persons for whom their common agent is doing business on margin.

There are but two causes for loss to margin customers occasioned by the acts of their common broker that need be considered. The first is an excessive use of the margin securities by the broker for the purpose of procuring loans to himself; and an excessive use may be defined in general to consist in loans aggregating more than the amount owed by customers for the purchase of securities. The second cause of loss is due to the failure of the broker to keep intact the body of securities held for the margin customers. How loss from the first cause should be distributed has just been stated. Loss from the second cause must be distributed according to the same principle applied to different facts.

Owing to the fact that different customers are interested in different securities it cannot be said that securities of all kinds are so mingled in the hands of the broker that the failure of the broker to keep intact the amount of securities of any particular kind should affect the entire body of margin customers. If, for instance, the broker should have in his possession or control 1000 shares of United States Steel stock to meet the demands of all the customers interested in that particular stock and in fact has but 500 shares when overtaken by bankruptcy or other financial catastrophe, the loss is necessarily limited to the group of customers entitled to shares of that kind, and they must bear it *pro rata*. In other words, while the entire body of customers have a common interest and have given identical authority with respect to the loans procured by the broker on such stocks as he may select at his discretion, they have not a common interest in the particular kinds of stock held by the broker. Each customer exercises his own judgment

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<sup>60</sup> *Skiff v. Stoddard*, 63 Conn. 198, 231, 26 Atl. 874 (1839); *In re T. A. McIntyre & Co.*, 181 Fed. 955 (1910).

successfully or unsuccessfully with regard to the advantages of the particular securities in which he authorizes the broker to deal for him, but inasmuch as the broker is at liberty to hold the securities of any particular kind in such form as he pleases with no attempt to divide them between the customers entitled to them, there must be an equitable adjustment of the loss in the event of a shortage in the amount of the securities so held. Therefore, applying the same principle of contribution, each customer entitled to a particular stock must, in the event of insufficiency of stock of that kind to meet the demands of all the customers entitled to it, contribute to or bear his share of that loss in common with those in like case.<sup>61</sup> The application of the principle stated works exact justice under familiar doctrines of equity and eliminates the tendency toward the unjust and often absurd results, not comprehensible to laymen, arrived at by technical legal reasoning which ignores the essential community of interest between those who are in precisely like circumstances.

The courts in this country are now in agreement that the broker is under an obligation to keep intact the body of securities which he holds for margin customers whether purchased for them or deposited by them. It has already been stated that by common practice securities deposited as margin are merged with and treated in precisely the same manner as securities purchased. But keeping the securities intact does not mean that the original certificates need in any case be retained. The absolute right of the broker to substitute other certificates of like kind and of the same aggregate amount is unquestioned.<sup>62</sup> This right or power of substitution makes it clear that neither the broker nor his customers have any intention of preserving the identity of securities in margin transactions for the purpose of distinguishing between customers as to

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<sup>61</sup> *In re Wilson*, 252 Fed. 631 (1917); *Duel v. Hollins*, 241 U. S. 523 (1916); *Skiff v. Stoddard*, 63 Conn. 198, 26 Atl. 874 (1893).

<sup>62</sup> *Duel v. Hollins*, 241 U. S. 523 (1916); *Gorman v. Littlefield*, 229 U. S. 19 (1913); *Sexton v. Kessler*, 225 U. S. 90 (1912); *Richardson v. Shaw*, 209 U. S. 365 (1908); *Chase v. Boston*, 180 Mass. 458, 460, 62 N. E. 397 (1902); 1 *DOS PASSOS, STOCK-BROKERS*, 2 ed., 187, 251. The intention of the broker to replenish the body of margin stocks by purchase of new stocks to take the place of those which he ought to have is inferred from the kind of stocks purchased, and is distinguished from the replenishment of a trust account in a bank in which the trustee has mingled his own funds. *In re Leavitt & Grant*, 215 Fed. 901 (1914).

their property rights. Such identity as may exist in any particular case is either accidental or for some incidental purpose, such as to enable the broker to keep check on the amount of loans procured by him as compared with the amounts owed him by customers. Where attempts are made to follow such pseudo identity for the purpose of determining the rights of individual customers absurd and generally unjust results are bound to follow. Attempts in bankruptcy cases to act on the supposed doctrine of *Furber v. Dane*,<sup>63</sup> which was not a case of bankruptcy, have led to extraordinary inequalities and injustices for the reason that emphasis has been placed upon the identity of securities held by the broker in margin transactions to the utter exclusion of the fundamental conception of such transactions which has been above stated and which is, in short, that persons selecting a common agent for the purpose of dealing in stocks on margin thereby become members of a group who have authorized their agent first to mingle indistinguishably all the margin securities of the same kind and secondly to hypothecate any he selects from all kinds.<sup>64</sup>

The general propositions are, therefore, that losses occasioned by excessive pledging, as defined above, should be apportioned *pro rata* among all the margin customers; while losses caused by failure to maintain the amount of any particular kind of stock should be apportioned among the margin customers entitled to that kind of stock.

Stock pledged by the broker to banks for his own loans is held by them under the ordinary conditions of a common-law pledge, and the identity of the stock so pledged is not lost.<sup>65</sup> In Massachusetts the broker has the legal title to the stock which either stands in his own name or, as is generally the case, has been endorsed to him in blank. When he pledges it to the bank, the bank probably acquires the legal title, but this is not incompatible with a pledge of stock. "In such case, although the pledgee receives

<sup>63</sup> 203 Mass. 108, 89 N. E. 227 (1909).

<sup>64</sup> There are, of course, many cases in which brokers have wrongfully used securities entrusted to them, and in those cases the ordinary equitable remedies require some identification of the property by those seeking to recover it. 22 HARV. L. REV. 133 n.; *Thomas v. Taggart*, 209 U. S. 385 (1908).

<sup>65</sup> But if the pledgee surrenders other certificates of stock of the same amount and kind as the certificates originally pledged, the pledgor could recover at most only nominal damages, except in unusual circumstances. *Atkins v. Gamble*, 42 Cal. 86 (1871).

the apparent legal title, the general property in the security remains in the pledgor"; and "it is immaterial in this respect whether such transfer appears to be absolute or is expressed to be made as security."<sup>66</sup> In other jurisdictions the bank as pledgee is in the same position as in Massachusetts, but the general property of the pledged stock is really in the customers and not in the broker, although as between the bank and the broker the latter is deemed to be the pledgor.

What has been said up to this point shows the principles upon which the broker's entire interest in stocks which are carried on or deposited as margin should, in case of loss, be apportioned among the margin customers. Of course, if there has been no overpledging of stocks, that is to say if the loans made to the broker secured by pledges of the stock are not in excess of the amounts due from margin customers, the latter amounts when collected will redeem the pledges or, if the stocks are sold, the sums so received will be sufficient not only to satisfy the banks but also to pay over to the customers the full value of their interest in the stocks. In such case money is substituted for the stocks themselves, but the principle is the same.<sup>67</sup> And so in like manner, if there comes into the possession or control of the trustee in bankruptcy a sufficient number of shares of the stocks of each kind to satisfy the demands of margin customers, there will be no controversy with the general creditors and division of the stocks or their proceeds may be made without difficulty.

We now come to the question how the conflicting interests of margin customers and general creditors shall be adjusted in case of loss.

1. When there is a deficiency in the number of shares of stock of any particular kind as they come into the possession or control of the trustee in bankruptcy, the margin customers have no rights against the general assets of the estate such that the trustee is obliged to purchase by use of the general assets sufficient shares to make good the deficiency. Although the bankrupt was at all times bound to do so,<sup>68</sup> that obligation does not pass to the trustee,

<sup>66</sup> JONES, *COLLATERAL SECURITIES*, 3 ed., § 153.

<sup>67</sup> *In re James Carothers & Co.*, 182 Fed. 501 (1910); *s. c.*, 192 Fed. 693 (1911).

<sup>68</sup> *Richardson v. Shaw*, 209 U. S. 365 (1908); *Gorman v. Littlefield*, 229 U. S. 19 (1913).

because to discharge it requires to some extent that personal discretion, judgment, and skill which the bankrupt himself was employed to exercise. The trustee cannot perform the functions of a broker when they involve services requiring to any degree the personal judgment of the broker. Fiduciary obligations of that sort are necessarily suspended by bankruptcy; at least, the trustee is not subject to them because he cannot perform them.

Here, however, we come to the important question as to when a deficiency for the purpose of proceedings in bankruptcy exists, and if so, to what extent. If all the margin customers having an interest in any particular kind of stock make their claims in the bankruptcy proceedings relying upon their property rights in the stock, then there is a deficiency if there are not sufficient shares of that kind of stock to satisfy the demands of all in that group of customers. It is frequently the case, however, that many of the customers, either by inadvertence or preference, do not insist on their property rights but prove their claims as general creditors. In such case they are said to waive their property rights in the stock and to rely wholly upon their claims arising out of contract, as they have a perfect right to do. The trustee in bankruptcy has precisely the same choice as to the course to pursue. If he deems it to be for the advantage of the estate he may tender the stock and demand payment of the amount due from the customer, but he must do so within a reasonable time.<sup>69</sup> When, however, it is definitely settled that the customer has elected, and the trustee has not exercised his election to the contrary, that he will rely upon his contractual rights as a creditor, he then drops out of the group of margin customers to which he belongs, and the *pro rata* shares of the remaining members in the case of a deficiency become so much the larger.

In *Gorman v. Littlefield*<sup>70</sup> the petitioner claimed 250 shares of a copper stock; 350 shares of that kind of stock came into the possession of the trustee. As to this stock no other claim had been filed with the receiver or with the trustee and the time for filing such claims had expired. Gorman was allowed to recover to the extent of his 250 shares, as there was more than sufficient stock to satisfy him as the only claimant.

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<sup>69</sup> *In re Swift*, 112 Fed. 315 (1901).

<sup>70</sup> 229 U. S. 19 (1913).



In *Duel v. Hollins*<sup>71</sup> two claimants appeared, who together had bought 150 shares of a certain kind of stock. The trustee in bankruptcy, however, had only 100 shares. It was held that the two margin customers who had filed proper claims should divide the 100 shares in proportion to their respective claims.

Therefore, the extent of the deficiency in any kind of stock must be determined upon the face of the claims as presented to the trustee and, if it then appears that there is a deficiency, those margin customers making proper claims are entitled to their *pro rata* shares.<sup>72</sup>

It will in most cases, however, appear that the election of certain of the margin customers to prove their claims as creditors relying on their contractual rights will deplete the general assets of the estate to the extent of their dividends. Ought their election while enhancing the *pro rata* shares of the remaining margin customers to work any loss to the general estate? It seems just and equitable that the amount of such dividends be deducted in some appropriate way from the stock or its proceeds claimed by the remaining customers. In other words, the election of certain of the margin customers to press their contractual rights as ordinary creditors ought not to work to the advantage of the other customers claiming their stock at the expense of the general assets.

2. A much more difficult question arises when there has been an excessive pledging by the broker of stocks carried on or deposited as margin in the manner which has been above defined. The issue is whether the trustee in bankruptcy ought to pay the excess out of the general assets of the estate.

There is strong argument that he should do so to the extent that it is necessary to redeem stocks in which margin customers have sought to enforce their property rights. If he does so, he is to that extent only paying a debt of the bankrupt. This is far different from using the general funds to purchase stocks when there is a deficiency. The payment from the general assets of any part of the debt due to the banks is in no way a preference, either to the banks or to the margin customers whose stocks would thereby be

<sup>71</sup> 241 U. S. 523 (1916).

<sup>72</sup> The apportionment is determined by the number of those making proper claims to the stock, not by the number of those who might have made such claims but did not. *In re Solomon & Co.*, 268 Fed. 108 (1920).

released. It is not a preference of the banks, because the banks are secured creditors anyway. It is not a preference in the obnoxious sense of the margin customers, because they are not creditors.<sup>73</sup> It is rather the performance of a fiduciary obligation resting upon the bankrupt irrespective of his financial condition up to the moment of bankruptcy. Of course the trustee, no more than the bankrupt, is bound to procure the release of pledged stocks to satisfy the demands of any customer who does not pay or tender the amount of his debt to the broker.

There is no good reason why this obligation should be suspended or extinguished by reason of bankruptcy. In *Richardson v. Shaw*<sup>74</sup> it was held that an insolvent broker may redeem pledged stocks for delivery to a margin customer up to the moment of bankruptcy. The discharge of this obligation by the trustee, who steps into his shoes, consists only in the payment of a debt of the bankrupt himself. It is not new business, but it is a legitimate part of the administration of the estate. It involves the exercise of no discretion. It is not the performance of the function of a broker like the purchase of stock to supply a deficiency.

This distinction is in accord with the general principle that a trustee in bankruptcy takes the property of the bankrupt subject to all valid claims, liens, and equities.<sup>74</sup> The bankrupt, as has been pointed out, is under two obligations: (1) one to maintain the necessary holdings of stock and (2) the other to procure the release from pledges of sufficient stock to meet the demands of customers. The first obligation relates to no stock that comes into the possession or control of the trustee. There is, therefore, no property to which any equitable obligation can attach, and it is of such a nature that the trustee cannot perform it. But the second obligation, on the contrary, exists with reference to the very stock which does come into the control of the trustee; and just as the bankrupt was bound to relieve that stock from the burden of pledges for the bankrupt's own debts, so the trustee's title to it is subject to the same obligation.

The obligation to substitute new for missing stock cannot survive, because there has been a breach of that obligation before the bank-

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<sup>73</sup> *Richardson v. Shaw*, 209 U. S. 365 (1908).

<sup>74</sup> COLLIER, *BANKRUPTCY*, 12 ed., 1117.

ruptcy. The trustee in bankruptcy cannot repair the delinquencies of the bankrupt, but must take the situation as he finds it. The case is no different from that of a trustee who is short in his trust funds.

But the obligation to redeem stock to meet demands of customers does not arise until demand has been made in any particular case. Until then the stocks are rightfully pledged, and the broker is guilty of no lapse. The trustee in bankruptcy, therefore, must perform that obligation, provided that such performance is within the scope of his functions in the administration of the bankrupt's estate.<sup>75</sup> He has no right to allow the pledged stocks to be taken to pay the debts of the bankrupt, because there is an outstanding obligation which the bankrupt has not broken that they shall not be so taken. It is this negative phase of the broker's obligation which survives, and attaches to the stocks which, although pledged, come under his control as a part of the bankrupt estate.

After all, the obligation to redeem pledged stock is merely incidental to the obligation to deliver stock on tender and demand by the customer, and has no independent existence by itself. If the obligation to deliver survives, the incident survives with it. The only way to prevent a breach of the broker's negative obligation not to permit the stock to be used for the payment of his own debts is for the trustee to redeem the stock that is demanded. Moreover, loans to the broker by the banks in excess of the broker's advances to customers represent sums not necessary to the margin business borrowed by the broker for his personal use in other matters. It is not just that the property of the broker's principals should be taken to pay such debts.<sup>76</sup>

It follows, therefore, that the trustee should pay from the general assets of the estate a sufficient sum to release the pledged stock for which proper demands have been made by customers.

It may be, however, that in any given case where a considerable number of the margin customers have elected to prove their claims as ordinary creditors, it will not be necessary to apply this doc-

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<sup>75</sup> "It would seem to follow that the customer would have a right to demand his stock of the trustee himself, as well as to receive it from the bankrupt, on paying whatever remained to be paid." Justice Holmes in *Richardson v. Shaw*, 209 U. S. 365, 385 (1908).

<sup>76</sup> *Gorman v. Littlefield*, 229 U. S. 19, 25 (1913).

trine. The excess, as has been defined, of loans made by the banks to the broker is primarily a charge or encumbrance upon all of the margin stock in the broker's possession or control, whether pledged or not; that is, it constitutes such a charge as between the members of the entire group of margin customers. As has been pointed out, they have all entered into the same relation under substantially the same contract with the broker as their common agent, and it is wholly a matter of accident what particular stock at any moment stands pledged by him under the authority given by all. But it follows from the principles that have been above set forth that if margin customers forego their rights in the stock their interest or equity therein passes to the benefit of those who remain. In such case the equity of those who elect to prove as creditors may be applied toward the release of a sufficient number of shares of stock of the various kinds to satisfy the demands of those who have properly pressed their claims to stock. If these unclaimed equities are not sufficient for the purpose, the remaining deficiency must be borne *pro rata* by all the margin customers who elect to claim their property rights, unless the trustee is bound to pay it from the general assets.

Another way of stating the same result is to say that the equitable interests of all the margin customers in the whole body of margin stocks constitute a fund applicable to the release of such stocks as are duly demanded. Any surplus belongs to the general assets of the bankrupt; any deficiency, if not paid by the trustee from the general assets, must be borne *pro rata* by the margin customers who demand their stocks. If the trustee is under no obligation to supply the deficiency, the same reason that denies the obligation to do so requires that the general fund provided by the margin stocks be diminished by the dividends payable to those margin customers who have elected to prove their claims as general creditors.

#### THE FIELD FOR LEGISLATION<sup>77</sup>

Suspensions or bankruptcies of brokers having a large business in margin stocks are generally scandalous because the brokers, before they admit insolvency, not only have disposed of stocks they should be carrying but have hypothecated stocks left in their hands

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<sup>77</sup> This subject does not invade the field of "Blue Sky" laws, designed to prevent fraudulent sales of worthless securities.

to the limit of availability. Experience always has shown the danger of permitting men to invite business from the public which places in their hands large quantities of securities and money that they are free to use subject to no restraints save those of personal honor. The foregoing discussion makes it possible to predicate the main objectives to be aimed at for the protection of the public in the matter of margin stocks, although space forbids anything like an adequate treatment of the subject.

Plainly, legislation must have an eye to the broker's fiduciary relation to his margin customers collectively, not as individuals. Just as a banker receiving deposits should have approved resources equal to the sum of all the deposits, so a broker should have in his possession or control sufficient stocks to satisfy the demands of all his margin customers. The same collective view should be taken regarding the use of margin stocks as pledges for bank loans to the broker. Is the sum total borrowed excessive, that is, more than the broker legitimately requires for the purchase of margin stocks? It matters not at all for how much any particular stock is pledged. The broker's margin business is at least on an honest basis when the sum borrowed does not exceed the aggregate amount owed by margin customers; on the other hand, the broker as a fiduciary has not made an honest use of the power intrusted to him to make pledges of the stock if he borrows in excess of this amount.

Punitive legislation by itself is inadequate, for punishment comes too late, although its deterrent effect counts for something.<sup>78</sup> The evils to be corrected are at bottom due to the broker's methods of business.

The writer is strongly impressed by the need of some sort of supervision of the whole margin business to the end that brokers (1) shall keep in their possession or control sufficient stocks to meet the demands of all their customers; and (2) shall not abuse their fiduciary powers by use of margin stocks as pledges for loans not legitimately required for margin transactions. Incidentally such supervision faithfully administered would do more toward the abolition of "bucketing" than all the penal statutes hitherto invented.

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<sup>78</sup> See New York Penal Law, sec. 956.

## THE EARLY ENGLISH STATUTES

THE English statutes printed before 1600 fall into three general classes: first, collections of statutes; second, abridgments; third, session-laws. These will be separately considered.

## I. COLLECTIONS

## NOVA STATUTA

The English statutes, beginning with Magna Carta, were widely circulated in manuscript before the time of printing; numerous manuscripts are found to-day in the large libraries.<sup>1</sup> It is the more surprising that the earliest printed statutes do not begin with Magna Carta, but with the statutes of Edward III. The first to be printed (except the great Abridgment, which will be mentioned later) was the volume entitled "Nova Statuta," printed probably by Machlinia in 1485. It is made up of an alphabetical table of 40 leaves; The Statutes of Edward III, 66 leaves; of Richard II, 50 leaves; of Henry V, 20 leaves; Henry VI, 83 leaves; and Edward IV, 51 leaves; the last session printed is 22 Edward IV. It consists, therefore, of a book of 310 leaves, without title or colophon.

This was reprinted with the same title, twenty years later, by Pynson. This book also has no title-page; it has, however, a short colophon stating the printer's name, and his device. It consists of 297 leaves.

## MAGNA CARTA

A demand evidently existed, however, for all the statutes; and as early as 1508 Pynson began the publication of the earliest statutes, under the title "Magna Carta."<sup>2</sup> The form which became typical in the earlier editions was a title-page, followed by a calendar in red and black, and then the statutes, Magna Carta being

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<sup>1</sup> The Harvard Law School, for example, has many such manuscripts.

<sup>2</sup> It is not quite accurate to say that this title was given in 1508. The only known copy of this edition lacks the title-page and calendar; and in the colophon the book is called *Antiqua Statuta*. The name *Magna Carta* is first found in the colophon to the edition of 1519. It was a common title in the MSS.

given as it had been reënacted by Edward I. It is a narrow 12°. Of this early edition (the colophon speaks as if there had been a still earlier one) only a single copy is known, at the British Museum. Pynson issued editions also in 1514 and 1519; Berthelet in 1531; Redman in 1534 and 1539, and his widow an undated copy; Petit in 1542; Marsh in 1556 (and what is apparently the identical edition, omitting the date); and Tottel in 1556 (two editions),<sup>3</sup> in 1576 (two editions), and in 1587.

In connection with the Magna Carta, the later printers often separated the work into two parts, beginning the "Secunda Pars Veterum Statutorum" with a new title-page and register. This seems commonly to have been done after 1530.

#### THE GREAT BOOK OF STATUTES

In succession to the Nova Statuta, but brought down to date, and printed in a very thick, ponderous folio, is the "Great Book of Statutes," first published without date by Robert Redman, between 1535 and 1540, and reissued about ten years later by William Middleton. This was a dignified and noteworthy book. It is ornamented by the well-known cut of the king on his throne, surrounded by his counsellors.

#### THE STATUTES

In 1543 Berthelet issued in two volumes all the statutes, from 1225 (the Magna Carta of Henry III) to date; the first volume, consisting of the statutes through Henry VII, having as title: "In this Volume are contained the statutes made and established from the time of King Henry the Thirde unto the first yere of the reigne of our most gracious and victorious soveraigne lorde Kyng Henry the VIII." The second volume, with a separate title-page and table, contained the years of Henry VIII to the date of issue, as they had been separately printed. The same volume was reissued by Henry Wykes in 1551, and again in 1564; and anonymously, but doubtless by Tottel, in 1577.<sup>4</sup>

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<sup>3</sup> When one speaks of two editions in the same year, one must remember that the title-page may have been copied *literatim*, date and all, in a later edition; so that the two editions purporting to have been issued in 1556 may well have been published in different years.

<sup>4</sup> This seems to be certain, as Tottel's name occurs in the corresponding second volume in the same year.

## THE STATUTES AT LARGE

A similar work, entitled "The Whole Volume of Statutes at Large," was printed by Barker in 1587, and has often been reprinted since 1600.

## THE COLLECTED SESSION-LAWS

In several instances, as has been said, the session-laws during a certain period were collected into a volume, with a title-page and table. This new matter (title-page and table) should therefore be assigned to this class. Berthelet (twice), Powell, and Marsh printed such titles for the Session-laws of Henry VIII; Berthelet for those of Edward VI; and Tottel for the sessions from the first of Edward VI to the fourteenth of Elizabeth.

## II. ABRIDGMENTS

## THE GREAT ABRIDGMENT

Meanwhile lawyers generally were using one or the other of two handy alphabetical digests of the statutes. The earlier of these was called the "Abridgment," and soon, to distinguish it probably from the abridgments of the annual session-laws, the "Great Abridgment." The first edition was printed by Lettou and Machlinia about 1480, without title-page or colophon, in the same type as the *editio princeps* of Littleton's Tenures, after a four-leaf table come the statutes, alphabetically arranged, in 103 leaves.

In 1499 Pynson reprinted this work in two distinct impressions; a table of eight leaves, without title-page, was followed by the text in 188 pages. The two impressions differ minutely in the colophon and in other particulars.

Later editions were published by Pynson in 1521 and 1528; by J. Rastell in 1527 and 1528; by Redman in 1528 and three times without date; by W. Rastell in 1533; by Middleton in 1542; by Petit in 1542; by Kele, Powell, and Seres in 1551.

## RASTELL'S STATUTES

Another collection of all the statutes, digested alphabetically, finally superseded the Great Abridgment. It was introduced by a preface by William Rastell, and from the preface was known as Rastell's Statutes. The title-page read: "A Colleccion of all the statutes, from the beginning of Magna Carta unto the yere" of



publication. The first known edition, by Tottel in 1557, is in the British Museum. Tottel also printed two or three editions in 1559, and others in 1565, 1568, 1572, and 1574; Barker or his deputies in 1579, 1583, 1588, 1594; and Wight and Norton in 1594 and 1598.

#### PULTON'S PENAL STATUTES

"An abstract of all the penall Statutes," alphabetically arranged, was published by Tottel in 1577, by Barker in 1579, 1581, 1586, and without date, and by Jane Yetsweirt in 1596.

#### ABRIDGMENT OF SESSION-LAWS

While "The Great Abridgment" was at the height of its popularity, between 21 and 33 Henry VIII,<sup>5</sup> printers who had published the larger work also issued as supplements abridgments of the session-laws. William Rastell, Petit, and Middleton printed each a few years; Redman printed most if not all of them during the time. Copies of this work are naturally very rare.

### III. SESSION-LAWS

#### RICHARD III AND HENRY VII

Many collections of statutes were preserved in manuscript; but so far as is known there is not found a manuscript containing the laws of only a single session of parliament. With the very beginning of printing, however, the laws of a contemporary session were published in print; and from that time the series of session-laws of the parliament of England is unbroken.

The first session so printed was the first year of Richard III. It was issued by Machlinia, and survives apparently in a unique copy in the British Museum.

The years of Henry VII were printed by various printers. 1 Henry VII (which in fact includes laws of the first four years) was first printed anonymously; it has generally been ascribed to Caxton.<sup>6</sup> The later years were printed by his successor Wynkyn de Worde.<sup>7</sup>

Other editions of the statutes of this reign were printed by Julian

<sup>5</sup> The "Handlist of Books printed by London Printers" mentions an abridgment of 18 HENRY VIII in the Bibliothèque Nationale in Paris.

<sup>6</sup> Rae, Caxton's Statutes of Henry the Seventh.

<sup>7</sup> All the years are in King's College, Cambridge; separate printings of the 11th year are in the British Museum and Harvard.

Notary (the successor of Machlinia), by William Faques, and by Richard Pynson, who was the king's printer.

Notary's edition was uniform, in octavo form, illustrated copiously with woodcuts. Each year has a separate register and colophon, but all are dated 1507.

De Worde printed an edition of all the years which in form was a palpable imitation of Notary's, dated 1508, with a continuous register for all the years.

William Faques, king's printer for a year, printed the eleventh year in a beautiful type, each page being surrounded by a chain border. This is the only statute he seems to have printed; indeed, he died before the next session.

The same year this statute was printed separately by Richard Pynson, who describes himself as "squire and printer unto the king's most noble grace," a position to which he succeeded on the death of Faques. He also printed all the years of the reign with a single register; Harvard has the nineteenth year of this edition, comprising signatures *l* to *n*.

#### HENRY VIII

During the reign of Henry VIII sessions of parliament were held in the following regnal years: 1, 3, 4, 6, 7, 14-15, 21, 22, 23, 24, 25, 26, 27, 28, 31, 32, 33, 34-35, 35, and 37. Each year was printed in a single issue until the 34-35th, when a subsidy act of three signatures with colophon, and the Ordinance of Wales of two signatures with colophon, were separately printed. In the 35th year, a general pardon, in a single signature of four leaves with colophon, was separately printed; and in the 37th, a subsidy act in three signatures with colophon.

At the beginning of this reign Pynson was the undisputed printer of the king; and as such he issued the statutes of the first year (in the British Museum), the third year (in the British Museum and the Harvard Law School), the fourth year (in the same and in the Bodleian Library at Oxford), the sixth year (surviving only in a fragment in the Cambridge University Library), and the twenty-first year (in the British Museum and the Harvard Law School), and conjecturally also the fifth and the fifteenth years, of which no surviving copy has been found. The distinctive feature of these issues is the large capital S (in Statuta), in the shape of a bird's neck and head, which dominates the title-page.

With the publication of the twenty-first year Pynson's printing of the statutes ceased; he died in 1530, soon after printing that year. Several printers at once reprinted the twenty-first year, hoping, no doubt, to succeed Pynson as king's printer. An edition almost exactly identical with Pynson's, containing the same capital S, but lacking the device at the end, has been ascribed to Redman, who secured much of Pynson's type at his death and was constantly imitating his books. John Rastell also printed an edition, imitating the distinctive capital S with a letter formed by a dragon holding a human head in its jaws. Neither of these, however, secured the coveted appointment as king's printer, which went to Thomas Berthelet, and Berthelet printed the statutes during the rest of the reign of Henry VIII.

From the time of his appointment in 1530 Berthelet printed one<sup>8</sup> and sometimes two<sup>9</sup> or three<sup>10</sup> editions of the statutes immediately after the end of the session. In 1536 he reprinted three sessions,<sup>11</sup> and in 1538-39 four sessions.<sup>12</sup> In 1542-43, in connection with his title-page and tables of the latter year, he made a general reprint of the statutes from the beginning of the reign; a reprint of this period has been found for every year up to that time except two,<sup>13</sup>—in both these years there had been a very recent reprint, so that another was perhaps not needed; or a copy may sometime turn up. In 1546-47 several years were reprinted.<sup>14</sup> In 1552, in connection with the 1551 title-page and table, another general reprint from the beginning of the reign was undertaken; copies of all the years survive except four,<sup>15</sup> in each of which there had been a special reprint five or six years earlier.

This was Berthelet's last printing. On the accession of Edward VI he had been succeeded as king's printer by Grafton, but had retained what might be called the copyright of the statutes he had printed. On his death this seems to have passed to his nephew, Thomas Powell, who printed a few years in 1556-57,<sup>16</sup> and then in 1562 a complete edition, with his title-page and table.

<sup>8</sup> The regnal years 22, 23, 24, 26, 27, 28, 34-35, 35, 37.

<sup>9</sup> The regnal years 25, 31, 32.

<sup>10</sup> The regnal year 33.

<sup>11</sup> The regnal years 22, 23, and 26.

<sup>12</sup> The regnal years 23, 24, 26, 28.

<sup>13</sup> The regnal years 24 and 31.

<sup>14</sup> The regnal years 24, 27, 31, and 34-35.

<sup>15</sup> The regnal years 24, 27, 34-35, 37.

<sup>16</sup> The regnal years 27, 34-35, and 37; note that these were three of the four years of which no existing copy can be identified as of the edition of 1552.

In 1573 Marsh published a complete edition, with a title-page and table, thus completing the editions of these separate years.

It must not be supposed that the dates ascribed to these various editions, or even the names of the printers, are taken from the statutes themselves. Even when a date or a printer's name appears it cannot be trusted for the typographer who set up the new edition often followed an older copy with slavish exactness, reprinting its name and date. Intrinsic evidence has in most cases to be examined to determine the printer and the date: tricks of expression in title-page and colophon, watermark, format, but especially the condition of the border and woodcuts. Berthelet and Powell used in most of their years a border made of Greek fretwork,<sup>17</sup> and two woodcuts often occurred, one a dark block-ornament,<sup>18</sup> the other the so-called "Arma Regis" ornament.<sup>19</sup> These were used so long and so hard as to have become much worn; and their various states have been studied with a view to determine the dates of the issue in which one is used. The change in condition of these cuts appears to have occurred during their heavy use in the years of much reprinting. A and X lasted in the first state to about 1533; the second state of A came to an end in 1536, and of X in 1538, years of considerable printing; the next change of state of both occurred while the great edition of 1543 was in progress, and again during the edition of 1552. While investigators might differ as to an example printed during the transition period, the result of the inquiry in every case will fix the date with hardly a doubt.<sup>20</sup>

#### EDWARD VI

Five sessions of parliament were held during this reign, in the regnal years 1, 2-3, 3-4, 5-6, and 7. All were printed in a single issue except the session in the first year, in which a general pardon was printed separately, with colophon.

The session-laws of this reign were all originally printed by Richard Grafton, who was made king's printer at the beginning of the reign. A rather complete reprint seems to have been made

<sup>17</sup> Designated in the Table as "A."

<sup>18</sup> Designated "Y."

<sup>19</sup> Designated "X."

<sup>20</sup> This method for ascertaining the date of these statutes is to be credited to R. Proctor, of the British Museum staff; see 5 *TRANSACTIONS BIBLIOGRAPHICAL SOCIETY*, 255.

about 1552; but with the immediate ending of the reign and the accession of Mary, Grafton was not only removed from his office but thrown into prison. He therefore could not carry out the plan, if he had one, of issuing a complete collection of the laws of the reign; Berthelet did so, however, the title-page and table being dated 1553. No reprint could have been needed during the reign of Mary; but with Elizabeth's accession a demand was created which seems to have been satisfied by a partial reprint early in the reign, and a complete reprint about 1571. These reprints could not have been made by Grafton himself; but his business seems to have passed to his son-in-law, Tottel, who issued, about 1571, a title-page and index of the statutes from the beginning of Edward's reign to the twelfth of Elizabeth's. He must have used for the later statutes issues printed by Cawood and Jugge; but it is a reasonable conjecture that he may have printed the last issues of Edward's statutes.

#### MARY; PHILIP AND MARY

Sessions of parliament during Mary's reign were held in the first year of Mary (two parliaments), and in the years 1-2, 2-3, and 3-4 of Philip and Mary. Each session was printed in a single issue. John Cawood became "printer of the royal majesty" at the beginning of the reign. Each session was printed several times, apparently during the same year. The reign was too short for a new edition to be called for. About 1570, however, perhaps to supply the demand of Tottel for his publication, there was an edition of all the years.

#### ELIZABETH

Sessions were held during this reign in the following regnal years: 1, 5, 8, 13, 14, 18, 23, 27, 29, 31, 35, 39, 43. In most of these years one or more acts was printed separately: in the first year a subsidy in three signatures; in the fifth, eighth, and eighteenth, a subsidy in three signatures and a pardon in one; in the thirteenth, a subsidy in two signatures, a special subsidy in three, and a pardon in one; in the twenty-third, twenty-seventh, and twenty-ninth, a subsidy and a pardon in six signatures; in the thirty-fifth, a subsidy of the clergy in two signatures, a subsidy in three, and a pardon in one; and in the forty-third, a subsidy in two signatures, a special subsidy in four, and a pardon in two.

At the beginning of the reign Cawood continued as queen's printer, but Richard Jugge was associated with him in the office. Cawood died in 1570, and Jugge held the office alone until his death a few years later. Christopher Barker was then made queen's printer, and as such printed himself or by his deputies until the end of the century. He was then succeeded by his son Robert Barker, who printed the last of Elizabeth's sessions in 1601.

Of the years printed by Jugge and Cawood several reissues were printed, but there is no sign of a general reprint until about 1571, when the previous years seem to have been reprinted for Tottel's collection. When Barker began to print he seems to have adopted the policy of printing at the first a large enough edition to last. In only two cases does he seem to have made a second printing.

*Joseph H. Beale.*

HARVARD LAW SCHOOL.

#### LIST OF LIBRARIES

- B. British Museum.
- C. University Library, Cambridge.
- CH. Library of Trinity Hall, Cambridge.
- CJ. Library of St. John's College, Cambridge.
- CK. Library of King's College, Cambridge.
- CM. Pepysian Library, Magdalen College, Cambridge.
- CP. Library of Pembroke College, Cambridge.
- CT. Library of Trinity College, Cambridge.
- H. Library of the Harvard Law School.
- I. Library of the Inner Temple.
- J. Private library of J. P. Morgan.
- L. Library of Lincoln's Inn.
- M. Library of the Middle Temple.
- N. Private library of H. E. Huntington.
- O. Bodleian Library of Oxford University.
- OA. Library of All Soul's College, Oxford.
- OB. Library of Brasenose College, Oxford.
- OC. Library of Corpus Christi College, Oxford.
- OE. Library of Exeter College, Oxford.
- OQ. Library of Queen's College, Oxford.
- P. Lambeth Palace Library.
- R. John Rylands Library, Manchester.
- W. Library of Congress.

## TABLE OF THE STATUTES

## I. COLLECTIONS

Name	Printer	Date	Libraries	Distinguishing Marks
NOVA STATUTA	Machlinia	c. 1485	B : C : H : I : J : N : O : OA : OB : OC : R	
MAGNA CHARTA	Pynson	c. 1500	C : H : O	
	Pynson	1508	B : N : O	
	Pynson	1514	B : H	
	Pynson	1519	B : C : H : N : R	
	Pynson	1527	Handlist	
	Redman	1529	B : H : N : O	
	Berthelet	1531 <sup>1</sup>	H	¶ Impressus Londini
	Berthelet	1531 <sup>2</sup>	B : H : O	¶ Impressus Londini
	Berthelet	1541	H : O	
	Redman	1525	O	
	Redman	1534	B : H	
	Ellz. Redman	[1540]	B : C : H : O	
	Petit	1542	B : C : CP : H : N : O	
	Marsh	1556	B : CP : H : OQ	
	Tottel	1556 <sup>1</sup>	B : H : N	
	Tottel	1556 <sup>2</sup>	B : CT : N	12 Jun. 1556
	Tottel	1576 <sup>1</sup>	B : C : H : N	12 Inn. 1556
	Tottel	1576 <sup>2</sup>	H	¶ Magna Charta
SECUNDA PARS	Tottel	1587	H : N : O	¶ Magna Charta
	Berthelet	1532	B : H : O	
	Redman	1539	H	
	Berthelet	1540	CP : H	
	Marsh	1556	B : CT : H	
GREAT BOOK	Tottel	1556	H	
	Redman	n. d.	B : H	
	Middleton	n. d.		

TABLE OF THE STATUTES—Continued

Name	Printer	Date	Libraries	Distinguishing Marks
STATUTES TO HENRY VIII	Berthelet	1543	B : CJ : H : O	in officina Thomae Berthelet
	Wykes	1551	H	
	Wykes	1564	CJ : N	
STATUTES AT LARGE COLLECTED STATUTES HENRY VIII	[Tottel]	1577	B : H : N	
	Barker	1587	B : CJ : CP : H	
	Berthelet	1543	B : C : CJ : H	
	Berthelet	1551	B : H	
	Powell	1563	C : H	
	Marsh	1575	B : N	
EDWARD VI	Berthelet	1553	B : C	
	Tottel	[1571]	B : C : CH : H : N	

## II. ABRIDGMENTS

The Great Abridgment	[Lettou & Machl.]	n. d.	B : CJ : O : OA : R	(Colo.) Explicit abbreviamtum (Colo.) Explicit abbreviamtū
The Great Abridgment	Pynson	1499 <sup>1</sup>	B : H : J	Le bregemēt ¶ : The greate abbridyement Colo. ¶ Imprynted by R. R.
	Pynson	1499 <sup>2</sup>	C : H : R	
	Pynson	1521	B : C : H	
	Pynson	1528	B : C : R	
	J. Rastell	1527	B : H : O : R	
	J. Rastell	1528	C : H : P	
	W. Rastell	1533	B : H	
	Redman	1528	B :	
	Redman	n. d. [1534]	C : H	
	Redman	n. d. [1538]	B : CJ : H	
	Redman	n. d. <sup>3</sup>	H	
	Middleton	1542	B : C : H : O	
	Petit	1542	B : C : H : O	
	[Gaultier] Powell	1551	H : N	
	Gaultier-Kele	1551	H	
	Gaultier-Seres	1551	C	



TABLE OF THE STATUTES—Continued

Name	Printer	Date	Libraries	Distinguishing Marks
RASTELL'S STATUTES	Tottel	1557	B	1557.)..... In aedibus R. T.
	Tottel	1557/9 <sup>1</sup>	H	1557)..... In aedibus R. T.
	Tottel	1557/9 <sup>2</sup>	B : CJ : CP : H : W	
	Tottel	1565	B : H : N	
	Tottel	1566	H	
	Tottel	1568	B	
	Tottel	1572	H : N	
	Tottel	1574	B : H	
	Barker	1579	B : H	
	Barker	1583	B : H	
	Barker	n. d. [1583]	H	
	Barker (dep.)	1588	B : H	
	Barker (dep.)	1594	B : CP : H	
	Yetsweirt	1595	N	
PULTON'S PENAL STATUTES	Wight & Norton	1598	B : H : N	
	Tottel	1577	CJ : H	
	Barker	1579	B	
	Barker	1581	B : H : W	
	Barker	1586	B : H	
	Barker	n. d.	H : W	
	Yetsweirt	1596	H	

TABLE OF THE STATUTES—Continued

Name	Printer	Date	Libraries	Distinguishing Marks
SESSION-LAWS				
21 HENRY VIII	[Redman]	n. d.	C	¶ Imprinted at London in Fletestrete
22	Redman	n. d.	C	¶ Imprinted by me
22	[W. Rastell]	n. d.	B: H	¶ Imprinted at London in Fletestrete
23	E. Redman	n. d.	C: P	¶ Imprinted by me
23-24	W. Rastell	1534	H	¶ The Abregement
24-25	Middleton	n. d.	C	¶ The abregement
24-25	Redman	n. d.	H	
26	Redman	n. d. <sup>1</sup>	C	
26	Redman	n. d. <sup>2</sup>	H	
27-28	Redman	n. d. <sup>1</sup>	C	
27-28	Redman	n. d. <sup>2</sup>	H	
30	Redman	n. d.	B: C	
31	Redman	n. d. <sup>1</sup>	B	
31	[Redman]	n. d. <sup>2</sup>	C	
32	E. Redman	n. d.	B: C	
33	Petit	1542	B: H	
33	Middleton	n. d.	B: H	

## III.—SESSION—LAWS

Regnal Year	List No.	Printer	Date	Border	Cuts	Colla.	Libraries	Distinguishing Marks
Rich. III 1	1	[Machlinia]	[1485]	.....	.....	A-B	B:N:R	
Henry VII 1-4	1	[Carton]	[1490]	.....	.....	A-E	B:I:R	
	2	de Worde	[1492]	.....	.....	A-I	CK	
	3	Notary	1507	.....	.....	A-F	H	
7	1	de Worde	[1492]	.....	.....	A	CK	
	2	Notary	1507	.....	.....	A	B:H	
11	1	de Worde	[150-]	.....	.....	A-E	B:H	
	2	Notary	1507	.....	.....	Aa-Gg	B:CK:H	
19	1	de Worde	[1492]	.....	.....	A-D	H	
	2	Faques	[150-]	Chain	.....	A-C	B	
	3	Notary	1507	.....	.....	A-E	H	
	4	Pynson	[150-]	.....	.....	.....	B	
1-19	1	de Worde	1508	.....	.....	A-S	B:H	
	2	Pynson	[150-]	.....	.....	a-n	H	
Henry VIII 1	1	Pynson	[1510]	.....	.....	A-D	B	Title in 18 lines: Colo. T. B. r. i. excud.
	2	Berthelet	[1543]	.....	Y <sup>s</sup>	A-B	B:C:CJ:H	Title in 16 lines: Colo. T. B. excud.
	3	Berthelet	1552	.....	.....	A-B	B:H:O	
	4	Powell	1562	A <sup>s</sup>	.....	A-B	H	
	5	[Marsh]	1573	C	.....	A-B	B	
3-4 6	1	Pynson	[1513]	.....	.....	A-E	B:H:N:O	
	2	Pynson	[1515]	.....	.....	.....	C	
3-7	3	Berthelet	[1543]	.....	X <sup>s</sup> {Y <sup>s</sup>	A-I	B:C:CJ:H	Soverynyn: Colo. T. B. r. i. excud.
	4	Berthelet	1552	.....	X <sup>s</sup>	A-I	B:H	Soverynyne: Colo. T. B.
	5	Powell	[1562]	A <sup>s</sup>	.....	A-I	CH:H	
7	6	[Marsh]	1573	C	.....	A-I	B	
14-15	1	Berthelet	1543	.....	Y <sup>s</sup>	A-C	B:C:CJ:H	Soverynyne: Colo. T. B. r. i. excud.
	2	Berthelet	1543	.....	.....	A-C	B:H	Soveraine: Colo. T. B. excud.
	3	[Powell]	1562	A <sup>s</sup>	.....	A-B	CH:H	
	4	[Marsh]	1573	C	.....	A-B	B	

## SESSION—LAWS—Continued

Regnal Year	List No.	Printer	Date	Border	Cuts	Colla.	Libraries	Distinguishing Marks
21	1	Pynson	[1529]	.....	.....	A-E	B : H	Device at end.
	2	[Redman]	[1529]	.....	.....	A-E	B	No device.
	3	Rastell	[1529]	.....	.....	A-E	B	
	4	Berthelet	[1543]	A <sup>5</sup>	.....	A-E	B : C : CJ : H	Colo. Berthelet
	5	Berthelet	[1552]	A <sup>4</sup>	.....	A-E	H	Colo. Berthelet
	6	[Powell]	[1562]	A <sup>5</sup>	.....	A-E	B : H	
22	7	[Marsh]	[1573]	C	.....	A-E	B : H	
	1	Berthelet	[1530]	.....	.....	A-D	B	Anno XXII. Colo. T. B.
	2	Berthelet	[153-]	.....	.....	A-D	B	Anno XXII. Colo. ¶ T. B.
	3	Berthelet	[1543]	.....	.....	A-D	B : C : CJ : H	Anno vicesimo secundo. Title I. 20, primus
	4	Berthelet	[1543]	.....	.....	A-D	H	Fourth line of title, Statuta bonum
	5	Berthelet	[1552]	.....	.....	A-D	B : H	Anno vicesimo secundo. Title I. 20, primum
23	6	Powell	[1562]	.....	.....	A-D	B : C : H	
	7	[Marsh]	[1573]	C	.....	A-D	B : H	
	1	Berthelet	[1531]	A <sup>1</sup>	X <sup>1</sup>	A-D	B	Colo. ¶ Imprinted.
	2	Berthelet	[153-]	A <sup>2</sup>	Y <sup>1</sup>	A-E	B : CJ	Colo. ¶ Imprinted
	3	Berthelet	[153-]	A <sup>3</sup>	X <sup>2</sup>	A-E	B	God saue the kynge.
	4	Berthelet	[1543]	.....	.....	A-E	B : C : CJ : H	
24	5	Berthelet	[1552]	A <sup>4</sup>	X <sup>5</sup>	A-E	B : H	[L to R] God save the Kynge.
	6	[Powell]	[1562]	A <sup>5</sup>	.....	A-E	B : C : H	
	7	[Marsh]	[1573]	C	.....	A-E	B	[L to R] God save the Kynge. [L to L]
	1	Berthelet	[1532]	.....	X <sup>1</sup>	A-C	B	Parlyamente. [L to L] Londini.
	2	Berthelet	[1538]	.....	X <sup>2</sup>	A-C	B : CJ : H	Parlyamente. [L Up.] Londini.
	3	Berthelet	[1546]	.....	X <sup>3</sup>	A-C	B : C : CJ : H	Parliament
25	4	[Powell]	[1562]	A <sup>5</sup>	X <sup>6</sup>	A-C	B : C : H	
	5	[Marsh]	[1573]	C	.....	A-C	B	
	1	Berthelet	[1533]	.....	X <sup>1</sup>	A-G	B : H	[L to L] Londini
	2	Berthelet	[153-]	.....	X <sup>2</sup>	A-G	B : C : CJ : H	Londini
	3	Berthelet	[1543]	.....	X <sup>3</sup>	A-G	B : C : CJ : H	[L to R] Londini. Typis
	4	Berthelet	[1552]	.....	X <sup>4</sup>	A-G	B : H : O	[L to R] Londini. Typis
26	5	[Powell]	[1562]	A <sup>5</sup>	.....	A-G	B : CH : H	
	6	[Marsh]	[1573]	C	.....	A-G	B	
	1	Berthelet	[1534]	A <sup>1</sup>	X <sup>5</sup>	A-E	B	Parlyament. Device of Lucrece

## SESSION—LAWS—Continued

Regnal Year	List No.	Printer	Date	Border	Cuts	Colla.	Libraries	Distinguishing Marks
27	2	Berthelet	[153-]	A <sup>3</sup>	X <sup>3</sup>	A-E	B : C	Parliament. Table (reverse of title) ends Finis tabule
	3	Berthelet	153-	A <sup>3</sup>	.....	A-D	B : H	Parliament. Table ends Finis Tabule
	4	Berthelet	1543	.....	.....	A-D	B : C : CJ : H	Parliament
	5	Berthelet	1552	A <sup>4</sup>	.....	A-D	B : H	
	6	Powell	1562	A <sup>5</sup>	.....	A-D	B : H	
	7	[Marsh]	1573	C	X <sup>3</sup>	A-D	B	aii, first line, Gloucester
28	1	Berthelet	1535	A <sup>3</sup>	X <sup>3</sup>	A-H	B : H	aii, first line, Gloucester
	2	Berthelet	1543	A <sup>4</sup>	X <sup>3</sup>	A-H	B : CJ	
	3	Berthelet	1546	A <sup>4</sup>	X <sup>3</sup>	A-H	B : C : CJ : H	
	4	Berthelet	1547	A <sup>4</sup>	X <sup>4</sup>	A-H	H	
	5	Powell	1557	A <sup>5</sup>	X <sup>4</sup>	A-H	B : H	
	6	Powell	1562	A <sup>5</sup>	X <sup>4</sup>	A-H	B : H	
29	1	[Marsh]	1573	C	.....	A-H	B :	No "Arma Regis" cut
	2	Berthelet	1530	A <sup>3</sup>	.....	A-E	B : H : O	
	3	Berthelet	153-	A <sup>4</sup>	X <sup>4</sup>	A-D	C	Leaves not numbered
	4	Berthelet	1543	A <sup>4</sup>	X <sup>4</sup>	A-D	B : C : CJ : H	daye: T. B. excud.
	5	[Powell]	1552	A <sup>4</sup>	X <sup>4</sup>	A-D	B : H	day
	6	[Marsh]	1573	C	X <sup>4</sup>	A-D	B	
30	1	Berthelet	1539	.....	X <sup>3</sup>	A-E	B : CJ	[L to R] Anno: Kyng
	2	Berthelet	1539	.....	X <sup>3</sup>	A-E	C	[L to R] Anno: Kyng
	3	Berthelet	1546	.....	X <sup>3</sup>	A-E	B : C : H	[L to R] Anno: Kyng [L to R] [L to L] [L Up]
	4	Berthelet	1552	.....	X <sup>4</sup>	A-E	B : H	[L to R] Anno: Kyng
	5	[Powell]	1562	A <sup>5</sup>	X <sup>4</sup>	A-E	B : H	[L to L] Anno.
	6	[Marsh]	1573	C	.....	A-E	B : H	
31	1	Berthelet	1540	.....	.....	A-M	B	XXVIII of Apryl, the xxxi yere: No leaf.
	2	Berthelet	154-	.....	.....	A-M	B : CJ	XXVIII of Apryl, the xxxi yere: [L Rev]
	3	Berthelet	1543	.....	X <sup>4</sup>	A-M	B : H	the xxxii yere. Colo. God save the Kinge.
	4	Berthelet	1552	.....	.....	A-M	B : H	the xxxii yere. Colo. God save the Kinge.
	5	[Powell]	1562	.....	.....	A-M	B : C : H	the xxxii yere.
	6	[Marsh]	1573	.....	.....	A-M	B : H	the xxxii yere.
33	1	Berthelet	1542	A <sup>4</sup>	X <sup>4</sup>	A-M	B	[L to L] Anno XXXII.
	2	Berthelet	1542	A <sup>4</sup>	X <sup>4</sup>	A-M	B	Victoryouse ... folowynge
	3	Berthelet	1542	A <sup>4</sup>	X <sup>4</sup>	A-M	C : H : O	Victoryouse ... folowynge
	4	Berthelet	1542	A <sup>4</sup>	X <sup>4</sup>	A-M	B : CJ	Victoryouse ... folowynge

## SESSION—LAWS—Continued

Regnal Year	List No.	Printer	Date	Border	Cuts	Colla.	Libraries	Distinguishing Marks
34-35	4	Berthelet	[1552]	A <sup>6</sup>	X <sup>6</sup>	A-M	B:H	Victorouse . . . folowyng
	5	[Powell]	[1562]	A <sup>6</sup>	X <sup>6</sup>	A-M	B:H	[L to R] Anno XXXIII.
	6	[Marsh]	[1573]	C		A-M	B	
	1	Berthelet	1543			A-F, A-C	B:B:CJ	Colo. [L to R] Imprinted
	2	Berthelet	[154-]		Z	A-I, A-B	B:B:C:H:L	Colo. T. B. r. i. excud.
	3	Berthelet	1547		X <sup>6</sup>	A-L	B:B:C:H:L	Colo. Imprinted
35	4	[Powell]	[1556]			A-I	H	No colo
	5	[Powell]	[1562]	A <sup>6</sup>		A-I	B:H	
	6	[Marsh]	[1573]	C		A-I	B	
	1	Berthelet	1544			A-F	B:B:C:CJ:H	Kyng
	2	Berthelet	[1552]			A-F	B:B:C	Kyng: Colo. Imprinted
	3	[Powell]	1562			A-F	H	Kyng: Colo. Imprinted
37	4	[Marsh]	1573			A-F	B	Colo. Year
	1	Berthelet	1546	B	X <sup>6</sup>	A-F, A-C	B:B:C:CJ:H	
	2	Powell	1557	B	X <sup>6</sup>	A-F	H	
	3	Powell	[1562]	A <sup>6</sup>	X <sup>6</sup>	A-F	B:H	
	4	[Marsh]	[1573]	C		A-F	B:H	
Edward VI 1	1	Grafton	1548	E <sup>2</sup>		A-F+A	B:C	Parliam <sup>nt</sup>
	2	Grafton	1548	E <sup>2</sup>		A-F+A	B:H	Parliamente
	3	Grafton	[155-]	D <sup>2</sup>		A-F+A	B O	¶Anno primo: Colo. Excusum
	4	Grafton	[155-]	D <sup>2</sup>		A-F	B:H	Anno primo: Westminster
	5	[Tottel]	[156-]	D <sup>4</sup>		A-F	B:B:C:CJ:CH:H	Anno primo: Westminster
	6	[Tottel]	[157-]	D <sup>4</sup>		A-F	B:CJ	¶Anno primo: Colo. ¶ Excusum
2-3	1	Grafton	1549	D <sup>2</sup>		A-M	C:H	Parliament: Colo. Mense Aprilis
	2	Grafton	1549	D <sup>2</sup>		A-M	B:C	Parliament: Colo. Mense Iunil
	3	Grafton	1552	D <sup>2</sup>		A-M	B:H	Parlament: Colo. R. G.
	4	Grafton	1552	D <sup>2</sup>		A-M	B:CJ:O	¶Actes: parliament
	5	[Tottel]	[156-]	D <sup>4</sup>		A-M	B:CJ:CH:H	Parlament: Colo. ¶ R. G.
	1	Grafton	1550	D <sup>2</sup>		A-F	B:C:H	Anno tertio
3-4	1	Grafton	1553	D <sup>2</sup>		A-F	B:H	Anno III
	2	Grafton	1553	D <sup>2</sup>		A-F	B:H	

## SESSION-LAWS—Continued

Regnal Year	List No.	Printer	Date	Border	Cuts	Colla.	Libraries	Distinguishing Marks
5-6	3	Grafton	1553	D <sup>a</sup>	.....	A-F	B : CJ : H : O	¶Anno III: Edwardi sexti
	4	[Tottel]	[156-]	D <sup>a</sup>	.....	A-F	B : CH : CJ : H	¶Anno III: Edwardi sfixti
	1	Grafton	1552	D <sup>a</sup>	.....	A-F	C : H	Colo. Mense Aprili MDLII
	2	Grafton	1552	D <sup>a</sup>	.....	A-F	C	Colo. Mense Aprili 1552
7	3	Grafton	1552	D <sup>a</sup>	.....	A-F	B : H	Anno quinto. Colo. Mense Iunii MDLII
	4	Grafton	1552	D <sup>a</sup>	.....	A-F	B : CH : CJ : H : O	¶Anno quinto. Colo. Mense Iunii MDLII
	5	Grafton	[155-]	D <sup>a</sup>	.....	A-F	B : CJ	¶Anno quinto. Colo. Mense Iunii 1552
	6	Grafton	[155-]	D <sup>a</sup>	.....	A-F	B : CJ : H	¶Anno quinto. Colo. Mense Iunii MDLII
	1	Grafton	1553	D <sup>a</sup>	.....	A-H	B : C : CJ : H	Parlemente
	2	Grafton	1553	D <sup>a</sup>	.....	A-H	B : CH : H : O	Parlement
Mary 1, 1st	3	Grafton	1553	D <sup>a</sup>	.....	A-H	C	Parlement
	4	Oswen	1553	?	.....	A-H		
	1	Cawood	1554	A <sup>4</sup>	.....	A-E	B : C : H	Actes: begonne: catchword aii, or
	2	Cawood	1554	A <sup>4</sup>	.....	A-E	B : H	Actes: begonne: catchword aii, by
1, 2d	3	Cawood	[155-]	F <sup>a</sup>	.....	A-E	CH : H	Actes: begon
	4	Cawood	[155-]	F <sup>a</sup>	.....	A-E	B : CJ	Actes: begun
	5	Cawood	[155-]	F <sup>a</sup>	.....	A-E	O	¶Actes: begun
	1	Cawood	1554	F <sup>a</sup>	.....	A-D	B : H	Parlement
	2	Cawood	1554	F <sup>a</sup>	.....	A-D	B : C : CH : H : L	Parlyamente
	3	Cawood	1554	A <sup>4</sup>	.....	A-D	CJ : H	
Philip & Mary 1, 2	4	[Tottel]	[156-]	G <sup>1</sup>	.....	A-E	B	Colo. ¶Excusum
	5	[Tottel]	[157-]	G <sup>2</sup>	.....	A-D	B CJ : O	Colo. Excusum
	1	Cawood	1555	F <sup>a</sup>	.....	A-F	B : H	Table (reverse of title): An Act touchyng
	2	Cawood	1555	F <sup>a</sup>	.....	A-F	C : H	Table: An Acte touchyng
	3	Cawood	[155-]	H <sup>1</sup>	.....	A-F	H	
2, 3	4	[Tottel]	[157-]	G <sup>2</sup>	.....	A-F	B : CH : CJ	Colo. Excusum
	5	[Tottel]	[157-]	G <sup>2</sup>	.....	A-F	B : CJ : O	Colo. ¶Excusum
	1	Cawood	1555	F <sup>a</sup>	.....	A-K	B : CH : CJ	Colo. ¶Excusum
	2	Cawood	1555	H <sup>1</sup>	.....	A-K	H	Begon

SESSION - LAWS — *Continued*

Regnal Year	List No.	Printer	Date	Border	Cuts	Colla.	Libraries	Distinguishing Marks
4, 5	3	Cawood	1555	H <sup>1</sup>	.....	A-K	B : CJ : O	Beginne
	4	[Tottell]	[157-]	G <sup>2</sup>	.....	A-K	B : C : H	[L to R] Actes
	1	Cawood	1558	F <sup>2</sup>	.....	A-G	H	Actes: Colo. ¶Excusum
	2	Cawood	1558	F <sup>2</sup>	.....	A-G	B : C : CH : C	Actes: Colo. [L to R] Excusum
	3	Cawood	[156-]	F <sup>2</sup>	.....	A-G	B	
Elizabeth 1	4	Cawood	[156-]	I	.....	A-G	H	
	5	[Tottell]	[157-]	G <sup>2</sup>	.....	A-G	B : CJ : O	
	1	Jugge & Cawood	1559	E <sup>2</sup>	.....	A-F, A-C	B	Colo. [L to R] Imprinted
	2	Jugge & Cawood	1559	E <sup>2</sup>	.....	A-F, A-C	B : CH : CJ	Colo. ¶Imprinted
	3	Jugge & Cawood	[156-]	H <sup>2</sup>	.....	A-F, A-C	B : H : O	Colo. [L to R] Imprinted
5	4	Jugge & Cawood	[156-]	H <sup>2</sup>	.....	A-F, A-C	C	Colo. ¶Imprinted
	5	Jugge	[1572-5]	H <sup>2</sup>	.....	A-F, A-C	B : CJ	Yeere
	6	Jugge	[1572-5]	H <sup>2</sup>	.....	A-F, A-C	B : H	Yeere
	1	Jugge & Cawood	1563	F <sup>2</sup>	.....	A-E, A-C, A	B	Colo. [L to R] Imprinted
	2	Jugge & Cawood	1563	F <sup>2</sup>	.....	A-F, A-C	B	Colo. ¶Imprinted
	3	Jugge & Cawood	1563	F <sup>2</sup>	.....	A-F, A-C	CJ	Colo. ¶Imprinted: Jhon Cawood
	4	Jugge & Cawood	1563	I <sup>2</sup>	.....	A-F, A-C	C : CH	
8	5	Jugge & Cawood	[156-]	F <sup>2</sup>	.....	A-M, A-C	B	Colo. ¶Imprinted: John Cawood
	6	Jugge	[1572-5]	H <sup>2</sup>	.....	A-P	H	Fyfh yeere
	7	Jugge	[1572-5]	I <sup>2</sup>	.....	A-M, A-C	B : H : O	Fifth yeere
	8	Jugge	[1572-5]	I <sup>2</sup>	.....	A-M, A-C	B : CJ	
	1	Cawood & Jugge	1566	F <sup>2</sup>	.....	A-E, A-C, F	CH : H	



## SESSION—LAWS—Continued

Regnal Year	List No.	Printer	Date	Border	Cuts	Colla.	Libraries	Distinguishing Marks
13	2	Jugge	{1572-5}	H <sup>2</sup>	A-I	A-E, A-C, F	B : C : CJ : H	Anno: Colo. Rycharde Jugge
	3	Jugge	{1572-5}	H <sup>2</sup>	.....	A-I	B : CJ : O	¶ Anno.
	4	Jugge	{1572-5}	H <sup>2</sup>	.....	A-I	B	Anno: Colo. Richard Jugge
	1	Jugge & Cawood	1571	G <sup>2</sup>	.....	A-G, A-B, A-C, ¶	B	The seconde of April
	2	Jugge & Cawood	1571	G <sup>2</sup>	.....	A-G, A-B, A-C, t	CJ : H	The second of Apryll: Colo. Powles
14	3	Jugge & Cawood	1571	G <sup>2</sup>	.....	A-M	B : CH : H	The second of Apryll: Colo. Poules
	4	Jugge	{1572-5}	G <sup>2</sup>	.....	A-G, A-B, A-C, ¶	B	
	5	Barker	1578	.....	.....	A-M	CJ	
	1	Jugge	1572	G <sup>2</sup>	.....	A-D	B : CJ	The eight of May
	2	Jugge	1572	G <sup>2</sup>	.....	A-F, A-C, A	B : CJ : H : O	The eyght of May
18	1	Jugge	1575	G <sup>2</sup>	.....	A-K	CJ	
	2	Jugge	1575	G <sup>2</sup>	.....	A-I, Aa-Dd, ¶	B : CJ : H : O	
	1	Barker	1581	K <sup>1</sup>	.....	A-I, Aa-Fi	B : CJ : H : O	
	1	Barker	1585	K <sup>1</sup>	.....	A-B, Aa-Ff	B : CJ : CP : H : O	
	1	Barker	1587	K <sup>1</sup>	.....	A-E, Aa-Dd	B : CJ : CP : H : O	
23	1	Barker	1589	K <sup>1</sup>	.....	A-E, Aa-Ee	B : CJ : O	Ladie: Colo. 3d line italic.
	1	Barker (dep.)	1589	K <sup>1</sup>	.....	A-	CP	Ladie: Colo. 2d line italic.
	2	Barker (dep.)	1589	K <sup>1</sup>	.....	A-E, ¶-¶, Aa-Ee	H	Lady
	3	Barker (dep.)	1589	K <sup>1</sup>	.....	A-K	B : CJ : L : O	Colo. Imprinted
	1	Barker (dep.)	1593	K <sup>1</sup>	.....	A-I, Aa-Gg	H	Colo. [L to R] Imprinted
35	2	Barker (dep.)	1593	K <sup>1</sup>	.....	A-F, Aa-Gg	B : CP : H : O	
	1	Barker (dep.)	1597	K <sup>1</sup>	.....	A-F, Aa-Gg	B : H : O	
	1	R. Barker	1601	K <sup>2</sup>	.....			
	1							
	1							
39	1							
	1							
	1							
	1							
	1							
43	1							
	1							
	1							
	1							
	1							

## COMMERCIAL LETTERS OF CREDIT

**T**HE commercial letter of credit has a long mercantile history. It has a much shorter legal history. But it is no new thing in English and American law. And yet, after an experience of over a century, the law upon this important subject is confused and uncertain.

Although merchants and bankers have been using commercial letters of credit for decades and from long experience, more or less uniform, understand in a business way the business obligations which are created as a result of their issue, it is nevertheless uncertain in what manner or at what moment of time the law predicates upon them legal rights and obligations. Do rights and obligations arise at the moment the letter is issued as the result of a contract which is formed at that time, or do obligations and rights arise at some subsequent time? If they arise at a subsequent time, is it because the letter is an offer which, when accepted, becomes a contract, or is it because the letter amounts to a representation which, when acted upon, creates some legal right by estoppel? Upon the answer to these questions depends the solution of the important problems of the effect of revocation, fraud, mistake, failure of consideration, insolvency, and assignment. Some of these problems have never been presented for solution; others have been dealt with in an uncertain and unsatisfactory manner.

This situation is undesirable both from a mercantile and from a legal point of view. Commercial letters of credit are in constant use; they involve large amounts; their nature and effect are well understood in the business world. Certainty in law is therefore a matter of importance. But no banker or merchant can rely upon the law as it is at the present time, and no lawyer can safely advise clients.

This confusion in legal analysis is referable to a large extent, if not solely, to an imperfect understanding of the business transaction and to an attempt to fit all letters of credit into one

category both factual and legal. No correct legal analysis can be made unless there is first made a correct business analysis. The law is seeking to give effect to the expressed will of the parties, and not to force the parties into a preconceived legal notion of what their will ought to be. The actual business transaction in the particular case is consequently the essential basis of the legal result. If the business transaction may assume a variety of forms, each differing materially in its facts and in the relation of the parties, the legal analysis is necessarily affected.

The business transaction which gives rise to commercial letters of credit will, therefore, merit an extensive examination before the legal transaction can be discussed.

## I

### THE BUSINESS TRANSACTION<sup>1</sup>

When a prospective buyer in one locality desires to purchase goods of a prospective seller in another locality there arises the problem of financing the sale. If the seller is to manufacture the goods, or to procure the merchandise from some third person, he wishes to be certain that the buyer will take and pay for them when they come into existence, or are procured, and put on board the ship or cars. If the seller already has the goods, he desires to be paid the purchase price upon shipment. The buyer, on the other hand, wishes to be certain that the goods have been shipped according to instructions and he does not desire to pay before they have been

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<sup>1</sup> There is no complete account of the business transaction to be found in any one book. The best description of the use of commercial letters of credit will be found in WHITAKER, *FOREIGN EXCHANGE* (N. Y., 1919). Other useful books are: ESCHER, *FOREIGN EXCHANGE EXPLAINED* (N. Y., 1920); PRECIADO, *EXPORTING TO THE WORLD* (N. Y., 1920); SILVER, *COMMERCIAL BANKING AND CREDITS* (N. Y., 1920); UNITED STATES DEPARTMENT OF COMMERCE, *PAPER WORK IN EXPORT TRADE* (Wash., 1920); YORK, *FOREIGN EXCHANGE, THEORY AND PRACTICE* (N. Y., 1920); SAVAY, *PRINCIPLES OF FOREIGN TRADE* (N. Y., 1919); WOLFE, *THEORY AND PRACTICE OF INTERNATIONAL COMMERCE* (N. Y., 1919); BROWN, *PRINCIPLES OF COMMERCE* (N. Y., 1918); DUDENEY, *THE EXPORTER'S HANDBOOK* (London, 1916); ESCHER, *ELEMENTS OF FOREIGN EXCHANGE* (N. Y., 1915); HOUGH, *PRACTICAL EXPORTING* (N. Y., 1915); SPALDING, *FOREIGN EXCHANGE AND FOREIGN BILLS* (London, 1915); UNITED STATES DEPARTMENT OF COMMERCE AND LABOR, *FOREIGN CREDITS* (Wash., 1912); MODERN BUSINESS, Vol. 6 (N. Y., 1910); BROOKS, *FOREIGN EXCHANGE TEXT BOOK* (Chicago, 1908); MARGRAFF, *INTERNATIONAL EXCHANGE* (Chicago, 1903). See also special pamphlets published by New York banks.

received and marketed. Payment may be made, according to the terms of the sales contract, in one of five ways: (1) cash with the order or against shipping documents; (2) the buyer's promissory note, or the note of a third person, or bills of exchange on a person other than the buyer, properly accepted and indorsed, sent with the order, or surrendered against shipping documents; (3) open, or book, credit with subsequent remittance in cash or commercial paper; (4) trade acceptance, or bills of exchange drawn by the seller on the buyer; (5) letter of credit.

None of the first four methods is satisfactory both to the buyer and to the seller. To compel the buyer to send cash with the order or to pay cash against shipping documents would often put an impossible burden upon his capital. His desire to postpone actual payment is met when he sends his own note. The seller, however, will often refuse to do business on such terms, for in a place where the maker is not known the paper is not marketable. The seller must at all events trust the credit of the buyer. When the note, or the accepted draft, of a third person, usually a bank, is given, the seller has commercial paper of greater marketability, but, on the other hand, the buyer has had to pay the bank cash for the paper or has had to give security, and it is important to note that the goods which form the subject matter of the sales contract cannot conveniently be used for this purpose. Moreover, from the buyer's point of view, there is a further disadvantage: he is anxious to turn over notes or drafts against shipping documents, and in order to accomplish this result he must forward the negotiable instruments to some agent in the seller's town or country with proper instructions to the seller and to the agent. The open credit places upon the seller the entire burden of the buyer's honesty and solvency. The trade acceptance is also open to objections by the seller. If the draft is a clean bill of exchange, not only is it not readily marketable but the chances of secondary liability of the seller as drawer are considerable. If a purchaser for the bill is obtained, it is usually because he relies entirely on the financial standing of the drawer. Many banks refuse to discount this kind of paper, not simply because they are unwilling to trust the unsecured credit of the drawer, but because they do not care to purchase paper which is likely to be protested. If the draft is a documentary bill of exchange, a purchaser is more easily obtained, for he now has the security of

the goods in addition to the secondary liability of the drawer. Nevertheless, he prefers to rely on neither of these. He dislikes handling the goods or proceeding against parties secondarily liable. He is concerned chiefly with having the draft accepted and paid, and of acceptance and payment he is in doubt. Hence, very often the seller is forced to deposit for collection.

The business problem is how to meet the desires of both the buyer and the seller; how to enable the seller to receive his money upon shipment; how to enable the buyer to postpone actual payment until the goods have been received and resold; how to enable a bank to lend its credit and not its funds; how to utilize the goods as security in the meantime. The instrumentality of the commercial letter of credit meets these requirements perfectly.

#### DEFINITION OF TERMS

To attempt to define a commercial letter of credit would be more than futile. That the use of a definition as a starting point serves to obscure analysis and is a source of legal error is nowhere more evident than in the subject of letters of credit. Their variations are almost infinite. In the broadest sense, and a sense often used by the courts, a letter of credit is any letter whereby the writer arranges for some other person to obtain credit.<sup>2</sup> But in mercantile language the term has a much narrower meaning, and is coming more and more to have a connotation which is definite, restricted, and precise. The commercial letter of credit is most commonly used in connection with the sale of goods. For the purpose of this article the discussion will be confined to letters which are so used. Such letters may be best understood by a consideration of their object, which is to enable the seller of goods

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<sup>2</sup> The orthodox legal definition is to be found in STORY, *BILLS OF EXCHANGE*, 3 ed., § 459 (1853). See also BYLES, *BILLS OF EXCHANGE*, 16 ed., p. 111 (1899); CHALMERS, *BILLS OF EXCHANGE*, 6 ed., pp. 183-184 (1903); 2 DANIEL, *NEGOTIABLE INSTRUMENTS*, 6 ed., § 1790 (1914); 18 *AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW*, 2 ed., p. 831; BLACK, *LAW DICTIONARY*, Tit. "Letter of Credit"; BOUVIER, *LAW DICTIONARY*, Tit. "Letter of Credit"; *American Steel Co. v. Irving National Bank*, 266 Fed. 41, 43 (1920); *Liggett and Levy v. Union National Bank*, 233 Mo. 590, 136 S. W. 299 (1911); *Bank of Montreal v. Thomas*, 16 Ont. 503 (1888); *Bissell v. Lewis*, 4 Mich. 450 (1857); *Union Bank of Louisiana v. Coster*, 3 N. Y. 203 (1850); *Birchhead v. Brown*, 5 Hill (N. Y.) 634 (1843), 2 Den. (N. Y.) 375 (1845). For a judicial dissent from this orthodox definition see Van Brunt, P. J., in *Johannessen v. Munroe*, 84 Hun. (N. Y.) 594 (1895).

to obtain cash upon shipment, or to discount a draft for the purchase price rather than to deposit for collection. The letter is therefore designed to assure the seller that cash will be paid, or to authorize a designated person to draw bills of exchange and to enable the seller to show this authority in order to discount the drafts, or simply to assure the seller that the drafts will be purchased. It is therefore common to provide authority for the drawing of drafts upon some person whose financial standing is better known than the buyer's. In most cases this is a bank, and the credit is in consequence often called a *bank credit*. Commercial letters of credit are, however, by no means confined either to those which provide for the drawing of drafts on some person other than the buyer or to those which are written by bankers.

A commercial letter of credit may roughly be said to be:

(1) Any letter whereby the writer authorizes some other person to draw bills of exchange on the writer or upon some designated third person and undertakes either expressly or by implication that drafts drawn in compliance with the terms of the letter will be accepted and paid. The credit in connection with which this letter is used is known as the *acceptance credit*. It is the normal letter of credit transaction.

(2) Any letter whereby the writer agrees to pay, or undertakes that some other person will pay, a designated amount of money, in cash, for specified shipping documents. The credit in connection with which this letter is used is known as the *cash credit*. The money is paid without the interposition of an acceptance or discount of a bill of exchange. In other respects it is the same as the acceptance credit. It is not the normal letter of credit transaction.

(3) Any letter whereby the writer agrees to purchase drafts drawn upon a designated person. The credit in connection with which this letter is used is known as the *negotiation credit*. It is less common than either the acceptance or the cash credit.

Mercantile writers tend to exclude the cash credit from the subject of letters of credit, and to confine letters of credit to those letters used in connection with the acceptance credit.<sup>3</sup> Many writers, however, include in the subject of letters of credit those

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<sup>3</sup> See WHITAKER, p. 131; HOUGH, pp. 544-546; U. S. DEPT. OF COMMERCE, PAPER WORK IN EXPORT TRADE, p. 131; SILVER, p. 84; SPALDING, p. 147; ESCHER, FOREIGN TRADE EXPLAINED, pp. 109, 143; PRECIADO, pp. 280, 287.

letters used in connection with the negotiation credit. The business principle of the cash credit is in every respect the same as the principle of the acceptance credit. The discussion in this article will therefore be confined to those letters used in connection with the negotiation and the acceptance credits, more particularly the latter.

A letter of credit may be clean or documentary. A *clean letter of credit* provides for an acceptance or negotiation of a draft unaccompanied by shipping documents. A *documentary letter of credit* provides for an acceptance or negotiation of a draft accompanied by shipping documents. The *documentary acceptance letter of credit* is the type in ordinary use.

In mercantile language, the person who arranges for the credit and procures the letter of credit is known as the *applicant for the credit* (he is usually the buyer of the goods); the person who is to draw the drafts, or to whom cash is to be paid, is known as the *beneficiary of the credit* (he is usually the seller of the goods); the writer of the letter of credit is known as the *issuer* or *credit-issuing bank*; the person upon whom the drafts are to be drawn is known as the *drawee* or *accepting bank*; the person who is to discount the drafts is known as the *draft-buying* or *negotiating bank*. The beneficiary is the *accredited party*. The negotiating bank is the *accrediting party*.<sup>4</sup>

In judicial language, the writer is sometimes spoken of as the *issuer*; the person in whose behalf the letter of credit is issued, as the *holder*; and the person to whom it is written, as the *addressee*.<sup>5</sup> But such terminology is neither illuminating nor conducive to clear analysis. The writer may be the buyer or he may be some person other than the buyer; the writer may be the drawee bank or he may be some other bank. The term *holder* is misleading for two reasons: first, because, although the letter is usually delivered to the person at whose behest it is written, it is often sent directly by the writer to the person to whom it is written without the interposition of the person on whose behalf it was issued; and secondly, because the term *holder* has a technical meaning in the law of bills

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<sup>4</sup> As between the credit-issuing bank, the beneficiary of the credit, and the negotiating bank the negotiating bank is the accrediting party. It is in this sense that the term is here used.

<sup>5</sup> See Omer F. Hershey, "Letters of Credit," 32 HARV. L. REV. 1 (1918).

and notes. The term *addressee* is the most confusing and useless of the three, for the letter may be written to the buyer, or to the seller, or to the person upon whom the drafts are to be drawn, or to the world at large, and it may be sent to one other than the person to whom it is ostensibly written. The essential inquiry analytically is, To whom is the promise made?

Since the commercial letter of credit is used chiefly to facilitate payments under sales contracts, it seems desirable for the sake of clearness of analysis to combine the terminology of the sales contract with the mercantile terminology of letters of credit and to use the following terms:

*Buyer.* This is the person to whom the goods are sold under the sales contract. Generally, he is the *applicant for the credit*.

*Seller.* This is the person by whom the goods are sold under the sales contract. Generally, he is the *beneficiary of the credit* and the *accredited party*.

*Credit-opening bank.* This is the individual or firm with which the applicant for the credit arranges for the issuing of the letter of credit.

*Issuing bank.* This is the individual or firm, other than the buyer, that writes the letter of credit.

*Drawee bank.* This is the individual or firm, other than the buyer, upon which the drafts under the letter of credit are to be drawn.

*Purchasing bank, or purchaser.* This is the individual or firm which discounts the drafts drawn under the letter of credit. It is the *accrediting party*.

These terms will be used throughout this article.

#### TYPES OF COMMERCIAL LETTERS OF CREDIT

The mechanism of the letter of credit method of financing shipments, the nature of the transaction, and the relation of the parties are best understood through an examination of the ways in which it is employed. Commercial letters of credit may be classified functionally<sup>6</sup> under three types: letters written by the buyer; letters written by some one other than the buyer; combinations of these two used in conjunction.

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<sup>6</sup> For a different classification see Hershey, *op. cit.*



### 1. Letters Written by the Buyer

A few examples of letters written by the buyer may be noted. The list is not intended to be exhaustive.

(1) The letter is written to the seller and authorizes him to draw bills of exchange in a specified manner on the buyer.<sup>7</sup>

(2) The letter is addressed to whom it may concern and authorizes the seller to draw on the buyer.<sup>8</sup>

(3) The letter is written either to the seller or to whom it may concern and authorizes the seller to draw in a specified manner upon a designated third person. The buyer undertakes that the drafts will be accepted and paid. It is sent to the seller.

(4) The letter is addressed to a third person and authorizes the seller to draw on the third person and the third person to accept and pay. It may be sent to the seller, or to the third person, or a copy may be sent to each.<sup>9</sup>

(5) The letter is addressed to a third person and authorizes the third person to purchase specified drafts which the seller will draw on the buyer.<sup>10</sup> The buyer undertakes to accept and pay.

<sup>7</sup> This form was used in the following cases: Putnam National Bank v. Snow, 172 Mass. 569, 52 N. E. 1079 (1899); Exchange Bank v. Hubbard, 62 Fed. 112 (1894); Nevada Bank v. Luce, 139 Mass. 488, 1 N. E. 926 (1885); Allen v. Hornor, 2 McGloin (La.) 177 (1884); First National Bank of Flora v. Clark, 61 Md. 400 (1883); Young v. Lehman, 63 Ala. 519 (1879); Franklin Bank of Baltimore v. Lynch, 52 Md. 270 (1879); Second National Bank v. Diefendorf, 90 Ill. 396 (1878); Miltenberger v. Cooke, 18 Wall. (U. S.) 241 (1873); Smith v. Ledyard, 49 Ala. 279 (1873); Merchants' Exchange National Bank v. Cardozo, 35 N. Y. Sup. Ct. 162 (1872); Exchange Bank of St. Louis v. Rice, 98 Mass. 288 (1867); Vallé v. Cerré's Adm'r, 36 Mo. 575 (1865); Lugrue v. Woodruff, 29 Ga. 648 (1860); Bissell v. Lewis, 4 Mich. 450 (1857); Lewis v. Kramer, 3 Md. 265 (1852); Forman v. Walker, 4 La. Ann. 409 (1849); Lonsdale v. Lafayette Bank, 18 Ohio, 126 (1849); Nisbett v. Galbraith, 3 La. Ann. 690 (1848); Murdock v. Mills, 11 Metc. (Mass.) 5 (1846); Ulster County Bank v. McFarlan, 3 Den. (N. Y.) 553 (1846); Worcester Bank v. Wells, 8 Metc. (Mass.) 107 (1844); Michigan Bank v. Ely, 17 Wend. (N. Y.) 508 (1837); Parker v. Greele, 5 Wend. (N. Y.) 414 (1830); Lanusse v. Barker, 3 Wheat. (U. S.) 101 (1818); Urquhart v. M'Iver, 4 Johns. (N. Y.) 103 (1809).

<sup>8</sup> Merchants' Bank of Canada v. Griswold, 72 N. Y. 472 (1878).

<sup>9</sup> This is similar to the agreement which the buyer signs for Type 3 letters of credit. See *infra*, pp. 551-553.

<sup>10</sup> This form was used in the following cases: Wilson & Co. v. Niffenegger, 211 Mich. 311, 178 N. W. 667 (1920); American National Bank v. Pillman, 176 Mo. App. 430, 158 S. W. 433 (1913); Bank of Beaver County v. Bradstreet, 89 Neb. 186, 130 N. W. 1038 (1911); Baeschlin v. Chamberlain Banking House, 67 Neb. 196, 93 N. W. 412 (1903); Lyon v. Van Raden, 126 Mich. 259, 85 N. W. 727 (1901); Burke v. Utah

The writer may attach whatever conditions he pleases. He may state as conditions precedent to acceptance and payment that the shipping documents accompany or be attached to the draft, that the acceptor or purchasing bank make a notation of the letter on the draft and of the draft on the letter, and he may expressly limit the duration of the authority and the maximum amount for which drafts may be drawn. The requirements of the buyer are thus met. But a letter written by a buyer, unless he is well known, adds but little to the marketability of the draft. Consequently this type of letter is of slight importance in international trade. Its use is confined to domestic commerce, where it is most frequently employed by principals in the case of their purchasing agents.

## 2. *Letters Written by Some One Other than the Buyer*

A few illustrative examples of letters written by some one other than the buyer may be noted. In this connection it is immaterial to inquire into the motives of the writer, or to ask whether there was any agreement between the writer and the person to whom title to the goods passed.

(1) The letter is addressed to the seller. It requests that goods be furnished the buyer. The writer undertakes to pay the purchase price.<sup>11</sup>

(2) The letter is addressed to the seller, and requests that goods be furnished the buyer. The writer undertakes to pay the purchase price in case the buyer does not pay.<sup>12</sup>

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National Bank, 47 Neb. 247, 66 N. W. 295 (1896); Union Bank v. Shea, 57 Minn. 180, 58 N. W. 985 (1894); Palmer v. Rice, 36 Neb. 844, 55 N. W. 256 (1893); First National Bank v. Fiske, 133 Pa. St. 241, 19 Atl. 554 (1890); Hall v. First National Bank, 35 Ill. App. 116 (1889), 133 Ill. 234, 24 N. E. 546 (1890); First National Bank v. Bensley, 2 Fed. 609 (1886); Brinkman v. Hunter, 73 Mo. 172 (1880); White's Bank of Buffalo v. Myles, 73 N. Y. 335 (1878); Johnson v. Blakemore, 28 La. Ann. 140 (1876); Burns v. Rowland, 40 Barb. (N. Y.) 368 (1863); Dickens v. Beal, 10 Pet. (U. S.) 572 (1836); Boyce v. Edwards, 4 Pet. (U. S.) 111 (1830).

<sup>11</sup> This form was used in the following cases: Fletcher Guano Co. v. Burnside, 142 Ga. 803, 83 S. E. 935 (1914); Krakauer v. Chapman, 16 App. Div. 115, 45 N. Y. Supp. 127 (1897); Cheever v. Schall, 87 Hun (N. Y.) 32 (1895); Smith v. Montgomery, 3 Tex. 199 (1848); Kennedy v. Geddes, 3 Ala. 581 (1842); Lienow v. Pitcairn, Fed. Cas. No. 8,341 (1832); Edmonston v. Drake, 5 Pet. (U. S.) 624 (1831); Sollee v. Meugy, 1 Bailey Law (S. C.) 620 (1830); Walsh and Beekman v. Bailee, 10 Johns. (N. Y.) 180 (1813); Grant v. Naylor, 4 Cranch (U. S.) 224 (1808).

<sup>12</sup> This form was used in the following cases: Holmes v. Schwab & Sons, 141 Ga. 44, 80 S. E. 313 (1913); Crane Co. v. Specht, 39 Neb. 123, 57 N. W. 1015 (1894);

(3) The letter is the same as subtypes (1) and (2) except that it is addressed to whom it may concern. It is delivered to the buyer.<sup>13</sup>

(4) The letter is addressed to the buyer (or to the seller) and authorizes the buyer to draw specified drafts in favor of the seller which the writer undertakes to accept and pay.<sup>14</sup>

(5) The letter is addressed to the buyer and authorizes him to draw on the writer, who undertakes to honor the drafts.<sup>15</sup>

(6) The letter is addressed to the seller and authorizes him to draw on the writer who undertakes to honor the drafts.<sup>16</sup>

(7) The letter is addressed to whom it may concern (or to the seller, or to a third person) and authorizes the seller to draw on a third person drafts which the writer undertakes will be accepted and paid.<sup>17</sup>

(8) The letter is addressed to whom it may concern and authorizes the buyer (or the seller) to draw specified drafts on the writer who undertakes to honor them.<sup>18</sup>

(9) The letter is addressed to the seller (or to the buyer, or to a third person, or to whom it may concern) and promises to purchase specified drafts.<sup>19</sup>

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Taylor v. Wetmore, 10 Ohio, 490 (1841); Adams v. Jones, 12 Pet. (U. S.) 207 (1838); Douglass v. Reynolds, 7 Pet. (U. S.) 113 (1833); Robbins v. Bingham, 4 Johns. (N. Y.) 476 (1809).

<sup>13</sup> This form was used in the following cases: Johnson v. Brown, 51 Ga. 498 (1874); Lawrason v. Mason, 3 Cranch (U. S.) 492 (1806).

<sup>14</sup> This form was used in the following cases: Sigel-Campion Live Stock Commission Co. v. Davis, 69 Colo. 511, 194 Pac. 468 (1921); People's Saving Bank & Trust Co. v. Landstreet, 87 So. 227 (Fla., 1920); North Atchison Bank v. Garretson, 51 Fed. 168 (1892); Lindley v. First National Bank, 76 Iowa, 629, 41 N. W. 381 (1889).

<sup>15</sup> This form was used in the following cases: Springfield Bank v. Mitchell, 48 Ill. App. 486 (1892); Ranger v. Sargent, 36 Tex. 26 (1871); Nelson v. First National Bank, 48 Ill. 36 (1868); Monroe v. Pilkington, 14 How. Pr. (N. Y.) 250 (1857).

<sup>16</sup> This form was used in the following cases: Brown v. Ambler, 66 Md. 391, 7 Atl. 903 (1887); Lockwood v. Brownson, 53 Tex. 523 (1880); Young v. Lehman, 63 Ala. 519 (1879); Ilsley v. Jones, 12 Gray (Mass.) 260 (1858).

<sup>17</sup> This form was used in the following cases: Cutler v. American Exchange National Bank, 113 N. Y. 593, 21 N. E. 710 (1889); Evansville National Bank v. Kaufmann, 93 N. Y. 273 (1883); Pollock v. Helm, 54 Miss. 1 (1876); Omaha National Bank v. First National Bank, 59 Ill. 428 (1871).

<sup>18</sup> This form was used in the following cases: Bank of Seneca v. First National Bank of Carthage, 105 Mo. App. 722, 78 S. W. 1092 (1904); Roman v. Serna, 40 Tex. 306 (1874); Union Bank v. Coster, 3 N. Y. 203 (1850).

<sup>19</sup> This is the same as the authority to draw and the letter of advice discussed *infra*, pp. 549-551.

The writer may attach conditions in respect to goods, drafts, shipping documents, duration of time, and the like. These numerous sub-types are given for the purpose of showing the great variety of forms which they may take.

### 3. *Letters Written by the Buyer and Letters Written by Some One Other than the Buyer used in Combination*

The combinations of the sub-types of the first and second types may be numerous. There are, however, five combinations which are in common use. These combinations give rise to certain letters which are employed to such an extent, especially in export and import trade, that the designation *letter of credit* is coming to be used among merchants and bankers to refer to them exclusively. It is with these well-recognized and understood letters, in reference to which the term *letter of credit* has a fairly definite and exclusive meaning, that this article will deal. These five letters are: (1) authority to purchase drafts, (2) direct import letter of credit, (3) indirect import letter of credit, (4) direct export letter of credit and advice of credit opened, and (5) seller's export letter of credit.

(1) *Authority to purchase drafts.*<sup>20</sup> This letter is used to facilitate the trade acceptance. The buyer issues to his local bank a letter which states that the seller has authority to draw drafts on the buyer, requests the bank to buy the drafts, promises to accept and pay them, and sometimes requests further that the bank arrange for some bank in the seller's country to purchase the drafts in the first instance. This letter is known as an *authority to draw*.<sup>21</sup> It contains a definite description of the drafts to be drawn and of

<sup>20</sup> See WOLFE, p. 241.

<sup>21</sup> See SPALDING, p. 152; WHITAKER, p. 173; HOUGH, p. 547.

The buyer's authority is sometimes called an *importer's guaranty to bankers*. See HOUGH, p. 548. These forms vary in minor respects among bankers. A typical form is given below:

#### FORM OF AUTHORITY TO DRAW.

"To . . . [Here insert name of Issuing Bank] . . .

DEAR SIR: In consideration of your negotiating drafts to be drawn by . . . [Here insert name of the seller] . . . on . . . [Here insert the name of the buyer] . . . [Here follows a description of the drafts] . . . I hereby agree to accept and pay the said drafts. The drafts must be accompanied by . . . [Here follows a description of the shipping documents]. . .

[Here follows a power of sale to the bank]. It is expressly agreed that the Issuing

the shipping documents to be attached. The bank may then write a *letter of advice* directly to the seller and inform him that it will buy the drafts when presented.<sup>22</sup> Or it may send to another bank, the purchasing bank, in the country where the seller resides, a letter requesting it to purchase the drafts. This letter is known as an *authority to purchase drafts*.<sup>23</sup> The purchasing bank, thus authorized, may then communicate with the seller by means of a letter of advice.

The credit in connection with which these letters are used is known as the *negotiation credit*. These authorities to draw and to purchase and letters of advice are considered by the business world as creating no binding obligations from the moment of issue. They

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Bank assumes no liability in respect to forged or altered shipping documents or defects in quality or quantity of the goods.

It is understood that negotiation of the said drafts shall be optional on the part of the Issuing Bank.

(Signed) . . . [name of buyer]. . ."

<sup>22</sup> This letter is sometimes called a *banker's authority to draw*. See HOUGH, p. 528. More properly it is a *letter of advice* or *instruction*.

FORM OF THE BANKER'S LETTER OF ADVICE USED IN CONNECTION WITH THE  
AUTHORITY TO PURCHASE AND THE AUTHORITY TO DRAW.

"To . . . [Here insert the name of the seller] . . .

DEAR SIR: We are instructed to purchase your drafts drawn on . . . [Here insert the name of the buyer] . . . [Here follows a description of the drafts] . . . accompanied by . . . [Here follows a description of the shipping documents].

Please note that this is not to be considered as being a bank credit and does not relieve you from the liability usually attaching to the drawer of a bill of exchange, also that although it is to be considered to be open for . . . from date it may be cancelled by us upon giving you notice.

(Signed) . . . [here insert name of Issuing Bank]. . ."

The negotiation credit may be requested *with recourse*, in which case the bank has recourse against the seller as drawer, or *without recourse*. The form given is the negotiation credit with recourse. This is the usual form. See WOLFE, pp. 414, 420.

<sup>23</sup> The form is similar to the authority to draw set forth *supra*, note 21, with some modifications. See WHITAKER, p. 175; HOUGH, p. 528; WOLFE, p. 420.

For cases where the negotiation credit was involved see: *Bank of Plant City v. Canal Commercial Trust and Savings Bank*, 270 Fed. 477 (1921); *Lemon Importing Co. v. Garfield Savings Bank*, 187 App. Div. 932, 105 Misc. 627, 173 N. Y. Supp. 551 (1919); *Friedlander v. Bank of Australasia*, 8 C. L. R. (H. C. Australia) 85 (1909); *Basse and Selve v. Bank of Australasia*, 90 L. T. R. 618 (1904); *Borthwick v. Bank of New Zealand*, 17 T. L. R. 2 (1900); *Burke v. Utah National Bank*, 47 Neb. 247, 66 N. W. 295 (1896); *Palmer v. Rice*, 36 Neb. 844, 55 N. W. 256 (1893); *Hall v. First National Bank*, 133 Ill. 234, 24 N. E. 546 (1890); *White's Bank of Buffalo v. Myles*, 73 N. Y. 335 (1878); *Pollock v. Helm*, 54 Miss. 1 (1876); *Waterston v. Edinburgh and Glasgow Bank*, 20 Ct. Sess. 642 (1858); *Orr & Barber v. Union Bank of Scotland*, 1 Macq. 513 (1854).

are regarded as revocable or subject to modification at any time prior to the presentation of the drafts for negotiation.<sup>24</sup> Indeed, they usually contain an express clause to this effect.

(2) *Direct import letter of credit.* This letter is so called because it is issued by a bank in the buyer's country, at the request of the buyer, for the purpose of facilitating importation of merchandise, and authorizes the seller to draw directly upon the issuing bank.

A concrete case will best show its use. The buyer, the American Importing Company of New York, and the seller, the British Exporting Company of London, are contemplating a sale of goods. The American Importing Company wishes to postpone actual payment for ninety days after the goods are shipped. By that time the merchandise will have arrived in New York, will have been delivered to the buyer, and resold. The goods will thus be made to pay for themselves without any outlay of capital on the part of the Importing Company. The British Exporting Company, on the other hand, wishes to be paid in cash as soon as the goods are shipped. Generally the sales contract is made first and stipulates that the buyer shall procure<sup>25</sup> either an irrevocable or a revocable letter of credit in favor of the seller from the buyer's local bank, the Issuing Bank of New York; or sometimes in contemplation of making the sales contract the buyer will procure the letter of credit in advance.<sup>26</sup>

The Importing Company accordingly applies to the Issuing Bank for a direct import letter of credit. The buyer signs and delivers to the bank a written statement containing four main provisions:<sup>27</sup> first, the buyer agrees to the terms of the letter of

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<sup>24</sup> See WHITAKER, pp. 176-178.

<sup>25</sup> Bank of Taiwan, Ltd. v. Gorgas-Pierie Mfg. Co., 273 Fed. 660 (1921); Imbrie v. D. Nagase & Co., Ltd., 187 N. Y. Supp. 692 (1921); Parker v. Simon, 194 App. Div. 342, 185 N. Y. Supp. 339 (1920); Frey & Son v. Sherburne Co. and the National City Bank, 193 App. Div. 849, 184 N. Y. Supp. 661 (1920); Lemon Importing Co. v. Garfield Savings Bank, 187 App. Div. 932, 105 Misc. 627, 173 N. Y. Supp. 551 (1919); Hindley & Co. v. Tothill, Watson & Co., 13 N. Z. L. R. 13 (C. A., 1894). See ESCHER, FOREIGN TRADE EXPLAINED, p. 123. See also UNITED STATES DEPARTMENT OF COMMERCE, PAPER WORK IN EXPORT TRADE, p. 134.

<sup>26</sup> Roman v. Seina, 40 Tex. 306 (1874); Edmonston v. Drake, 5 Pet. (U. S.) 624 (1831).

<sup>27</sup> See MARGRAFF, pp. 91-92; ESCHER, FOREIGN TRADE EXPLAINED, pp. 113, 149; WHITAKER, pp. 132, 148; SILVER, p. 192; BROOKS, p. 176. This form varies slightly among bankers. A typical form is the following:

credit issued by the bank; secondly, in consideration of the issue of the letter of credit he agrees further to pay the bank in a specified

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FORM OF BUYER'S AGREEMENT.

"To . . . [name of Issuing Bank] . . .

DEAR SIR: In consideration of your issuing at the request of the undersigned your (Revocable) (Irrevocable) Letter of Credit No. . . . as per copy on reverse side, we hereby agree to its terms and bind ourselves to pay to you in cash at . . . on demand, the amount of each draft drawn at sight thereunder plus interest at the prevailing rate when required, or the amount of each acceptance made thereunder at least one day prior to the maturity of such acceptance or on demand, and in either case your commission at the rate of . . . per cent, on such part as may be used, and any and all charges and expenses.

The undersigned hereby authorize you to charge their account with you with any and all amounts that may at any time or times be owing from them to you hereunder or otherwise.

In the absence of written instructions to the contrary, the undersigned hereby authorize you to accept as "bills of lading" under the said credit, any documents issued by or on behalf of any carrier, including lighterage receipts, which acknowledge receipt of goods for transportation, whatever the other specific provisions of such documents, and the date of every such document is to be regarded as the date of "shipment" within the said credit.

Neither you nor your correspondents shall be responsible for the acts of the beneficiaries of the said credit, nor for the character, kind, quality, quantity, delivery, or existence of the merchandise purporting to be represented by the documents; nor for any difference in character, kind, quality, quantity of merchandise purporting to be imported under this credit from that expressed in the invoice accompanying the drafts; nor for the validity, genuineness, sufficiency, form or correctness of documents, even if such documents should, in fact, prove to be in any or all respects incorrect, defective, irregular, fraudulent, or forged; nor for the time, place, manner or order in which shipment is made; nor for partial or incomplete shipments; nor for the kind, covering, character, adequacy, validity, or genuineness of any insurance or the solvency or responsibility of any insurer or any other risk connected with insurance; nor for any default, delay, fraud, or deviation from instructions of the shipper or any one else in connection with the said merchandise, the shipping thereof, or the shipping or any other documents with respect thereto; nor for delay in arrival or failure to arrive either of the merchandise or of any documents; nor for errors, omissions, interruptions or delays in the transmission or delivery of messages by mail, cable, telegraph or wireless, whether or not the same be in cipher; nor for any other cause beyond your control. The undersigned agree to procure promptly all necessary import, export, or other licenses for the said merchandise, and will keep the same adequately covered by policies of fire, marine and war risk insurance in companies satisfactory to you, assigning the policies or the certificates of insurance to you or making the loss or adjustment, if any, payable to you at your option.

Legal title to all merchandise shipped under the said credit shall be and remain in you until advances made by you have been paid, and the bills of lading, policies of insurance and other documents relating to the same and any or all other funds, property or securities, including also any or all collection items and proceeds thereof, now or hereafter handed to you or for any purpose left in your possession by the undersigned or for their account are hereby made security for this obligation and also for

manner the amount of the drafts drawn under the letter of credit at least one day before they become due, together with a specified commission; thirdly, the buyer agrees that the bank shall hold legal title to the goods as security until the amounts due from the buyer to the bank shall have been paid, that additional security shall be furnished on demand, and that the bank shall have power to sell and pledge the merchandise; and fourthly, this statement may contain express clauses to the effect that the buyer will hold the bank to no responsibility in respect to invalid bills of lading, defects in quality and quantity of the goods, and the like. Actual cash is practically never paid by the buyer for the letter of credit. Nor is a present loan arranged. The commission may, however, be paid in advance.<sup>28</sup>

The bank then issues its letter of credit,<sup>29</sup> which may be addressed

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any and all other obligations or liabilities, absolute or contingent, due or not due, which are or may hereafter be owing by the undersigned to you, all of which, in the event of default by the undersigned in any part thereof, or of bankruptcy, insolvency, receivership, or general assignment of the undersigned, shall forthwith become due and payable; and the undersigned agree, whenever the security aforesaid shall seem to you insufficient, to furnish you on your request additional security to your satisfaction, and hereby authorize you, if at any time they fail to do so, or if any obligation covered by this instrument remains unpaid when due, forthwith, without further demand or notice or advertisement of any kind, all of which are hereby expressly waived, to sell the whole or any part of such merchandise, property, or other security arrived or to arrive, at any broker's exchange or at public or private sale, at your option, and yourselves to become the purchasers in whole or part, without accountability save for the purchase price and free from any right of redemption which is hereby waived and released; and to apply the net proceeds of such merchandise or security against any or all obligations or liabilities of the undersigned to you, howsoever arising.

The obligations hereof shall continue in force notwithstanding any change in the membership of any partnership of the undersigned, whether arising from the death or retirement of one or more partners, or from the accession of one or more new partners.

This letter of credit can be revoked only with the consent of all parties in interest. [This clause is modified accordingly if the letter of credit is to be in the revocable form.]

(Signed) . . . [name of the buyer] . . . "

<sup>28</sup> See *Ex parte* Agra Bank, *In re* Barber & Co., L. R. 9 Eq. 725 (1870); *In re* Agra Bank, *Ex parte* Tondeur, L. R. 5 Eq. 160 (1867).

<sup>29</sup> See YORK, p. 137; WHITAKER, p. 132; WOLFE, p. 422; SILVER, p. 191; SPALDING, p. 148; U. S. DEPT. OF COMMERCE, PAPER WORK IN EXPORT TRADE, p. 131.

This form varies slightly among banks.

#### FORM OF DIRECT IMPORT LETTER OF CREDIT.

"To . . . [Name of seller] . . .

DEAR SIR: At the request and for the account of . . . [Name of buyer] . . . we hereby authorize you to value on [the Issuing Bank] at . . . for any sum or sums not exceeding a total of . . . accompanied by commercial invoice, consular invoice,



to the British Exporting Company<sup>30</sup> or to the American Importing Company.<sup>31</sup> It is generally addressed, however, directly to the seller. It contains seven main provisions: first, it states that it has been issued at the request and for the account of the American Importing Company in reference to a specified sales contract; secondly, it authorizes the seller to draw bills of exchange on the Issuing Bank at ninety days after sight or date not to exceed in all a specified amount; thirdly, it states the requirements in respect to the shipping documents; fourthly, it sets a time limit within which the drafts must be presented for acceptance; fifthly, it specifies that all drafts drawn under the letter must be indorsed by bills of lading . . . representing . . . shipment of . . . insurance . . . Bills of lading for such shipment must be drawn to the order of . . . A copy of the invoice, consular invoice and one bill of lading must be sent by the bank negotiating drafts direct to . . . attaching to the draft a statement to that effect. The amount of each draft negotiated must be indorsed hereon. Drafts drawn under this credit must bear the clause 'drawn under letter of credit no. . . . dated . . .'

We hereby agree with the drawer and bona fide holders that all drafts drawn by virtue of this credit, and in accordance with the above stipulated terms, shall meet with due honor upon presentation at the Issuing Bank if drawn and negotiated on or before . . .

Respectfully yours,

(Signed) . . . [Issuing Bank.] . . ."

<sup>30</sup> In the following cases the letter of credit was addressed to the seller and conferred authority upon the seller to draw on the issuing bank: *International Banking Corporation v. Irving National Bank*, 274 Fed. 122 (1921); *Bank of Taiwan, Ltd. v. Gorgas-Pierie Mfg. Co.*, 273 Fed. 660 (1921); *Imbrie v. D. Nagase & Co.*, 187 N. Y. Supp. 692 (1921); *American Steel Co. v. Irving National Bank*, 266 Fed. 41 (1920); *Frey & Son v. Sherburne Co. and the National City Bank*, 193 App. Div. 849, 184 N. Y. Supp. 661 (1920); *Moers v. Den Norske Handelsbank*, 191 App. Div. 114, 180 N. Y. Supp. 743 (1920); *Hindley & Co. v. Tothill, Watson & Co.*, 13 N. Z. L. R. 13 (C. A., 1894); *Ex parte Dever, In re Suse*, 13 Q. B. D. 766 (C. A. 1884); *Lockwood v. Brownson*, 53 Tex. 523 (1880); *Gelpcke v. Quentell*, 74 N. Y. 599 (1878); *In re BARNED'S Banking Co., Banner & Young v. Johnston*, L. R. 5 H. L. 157 (1871); *Ex parte Agra Bank, In re Barber & Co.*, L. R. 9 Eq. 725 (1870); *In re BARNED'S Banking Co., Coupland's Claim*, L. R. 5 Ch. App. 167 (1869); *In re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation*, L. R. 2 Ch. App. 391 (1867); *Baring v. Lyman*, Fed. Cas. No. 983 (1841).

<sup>31</sup> In the following cases the letter of credit was addressed to the buyer and conferred authority upon the buyer to draw on the issuing bank: *Kuehne v. Union Trust Co.*, 133 Mich. 602, 95 N. W. 715 (1903). (This is the normal type of the traveler's letter of credit.) *Chartered Bank of India, Australia & China v. Macfayden & Co.*, 64 L. J. Q. B. 367 (1895); *Craig v. Marx*, 65 Tex. 649 (1886); *Roman v. Serna*, 40 Tex. 306 (1874); *Monroe v. Pilkington*, 14 How. Pr. (N. Y.) 250 (1857).

In the following cases the letter of credit was addressed to the buyer and conferred authority upon the seller to draw on the issuing bank: *Prehn v. Royal Bank of Liverpool*, L. R. 5 Ex. 92 (1870); *Bell v. Moss*, 5 Whart. (Pa.) 189 (1840).

purchasers on the letter and the number of the letter must be indorsed on the drafts; sixthly, it agrees with all *bona fide* holders of drafts drawn in compliance with the terms of the letter of credit that they will be honored; seventhly, it contains an express provision to the effect that it is irrevocable or revocable, as the case may be. The Issuing Bank may send this letter directly to the seller, but it is usual for it to deliver the letter to the buyer, who sends it to the seller.

Upon receipt of the letter of credit the Exporting Company proceeds with the manufacture of the goods, ships them, takes out the required shipping documents, and presents the drafts, together with the shipping documents and the letter of credit, to a local bank, the purchasing bank, for discount. This bank purchases the draft. If the sales contract provides for several shipments at intervals of time, and the letter of credit provides for drafts to correspond to these shipments, the purchasing bank will make the proper notation on the draft and on the letter of credit and return the letter to the seller. But if the shipment is the only or final shipment, the purchasing bank will take up the letter, cancel it, and attach it to the other documents. The papers are forwarded to the Issuing Bank, which accepts the drafts and detaches the shipping documents. When the goods arrive in New York the bank surrenders them to the buyer on some arrangement, usually on a trust receipt or on a bailee (more properly agency) receipt.<sup>32</sup> The American Importing Company then proceeds to resell the goods. When the time arrives for putting the Issuing Bank in funds the Importing Company will have the proceeds from the resales.<sup>33</sup> It pays the bank in the manner provided. The draft then falls due and is paid by the bank; but payment by the bank is in no respect conditioned in business understanding upon previous performance of the buyer's agreement.

Thus, neither the buyer nor the issuing bank uses cash or its equivalent in the letter of credit transaction. The purchasing bank advances the actual money. The issuing bank lends its credit, not its funds, in return for a commission.

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<sup>32</sup> See WHITAKER, p. 160.

<sup>33</sup> Usually, under a trust receipt or agency receipt, the proceeds from the sale of the goods are turned over to the bank as fast as the goods are resold. The arrangement modifies to this extent the previous letter of credit arrangement.

The credit in connection with which the direct import letter of credit is used may be either the *acceptance credit* or the *cash credit*. The credit which has been described is the acceptance credit, which is the normal letter of credit transaction. The business transaction of the cash credit is the same in principle as the acceptance credit. The only difference is that the issuing bank undertakes to pay the seller cash on certain conditions without the interposition of the acceptance of a bill of exchange. In the cash credit there is no purchasing bank or accrediting party. It is not the normal letter of credit transaction.

Two banks are usually involved in the direct import acceptance letter of credit transaction. The credit-opening bank, the issuing bank, and the drawee bank coincide. The second bank is the purchasing bank. The drafts may be presented, however, directly by the drawer for acceptance, in which case the purchasing bank is eliminated from the letter of credit transaction, although it may subsequently discount the accepted draft.

The direct import letter of credit may be issued in two forms: *revocable* and *irrevocable*. The revocable letter of credit expressly states that it is revocable. It is regarded by merchants and bankers as revocable or subject to modification at any time before drafts drawn under it are negotiated, or, in the case that the seller presents the drafts for acceptance, at any time prior to presentation. It is the practice, however, of most banks to issue the direct import letter of credit only in the irrevocable form. The irrevocable letter of credit is regarded as creating a binding obligation from the moment of issue, and subject to revocation or modification only with the consent of all the parties concerned.<sup>34</sup>

(3) *Indirect import letter of credit*. The business transaction is the same as that discussed under the direct import letter of credit with the following exceptions. The sales contract provides for a letter of credit issued by a bank in the buyer's country authorizing the seller to draw on some bank in his own country. The buyer agrees to put the issuing bank in funds at least twelve or fifteen days prior to the maturity of the drafts, and, in case the other bank is asked to confirm the credit, to pay an additional commission. The issuing bank accordingly, instead of authorizing

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<sup>34</sup> See WHITAKER, p. 169.

the seller to draw on itself, issues a letter of credit which authorizes him to draw on another named bank, the drawee bank.<sup>36</sup> This letter may be sent by the issuing bank directly to the seller,<sup>36</sup> or it may be sent to the drawee bank,<sup>37</sup> or it may be delivered to the buyer and by him sent to the seller.<sup>38</sup> But it is usual to issue this letter in four parts.<sup>39</sup> Two copies are given to the buyer. One of these he retains; the other he forwards to the seller. The issuing bank retains one copy and sends the fourth copy to the drawee bank.

Three banks are usually involved in the indirect import letter

<sup>36</sup> This type of letter of credit is frequently called a sterling letter of credit because it usually authorizes the drawing upon an English bank. See WHITAKER, p. 136. The form is the same, with the necessary modification that drafts are to be drawn on the drawee bank and that the issuing bank promises that the drawee bank will accept and pay, as that set forth *supra*, note 29.

The letter of credit may be addressed to the drawee bank authorizing the seller to draw. *Friedlander v. Bank of Australasia*, 8 C. L. R. 85 (1909); *Johannessen v. Munroe*, 158 N. Y. 641, 53 N. E. 535 (1899); *Cutler v. American Exchange National Bank*, 113 N. Y. 593, 21 N. E. 710 (1889); *Bank of Montreal v. Recknagel*, 109 N. Y. 482, 17 N. E. 217 (1888); *Lafargue v. Harrison*, 70 Cal. 380, 11 Pac. 636 (1886); *Ulster Bank v. Synnott*, I. R. 5 Eq. 595 (1871); *In re Agra Bank, Ex parte Tondeur*, L. R. 5 Eq. 160 (1867); *Woods v. Thiedemann*, 1 H. & C. 478 (1862); *Carnegie v. Morrison*, 2 Metc. (Mass.) 381 (1841). See HOUGH, p. 544; ESCHER, ELEMENTS OF FOREIGN EXCHANGE, pp. 143-153; BROWN, p. 96; SILVER, pp. 198-201.

The letter may be addressed to the seller authorizing the seller to draw: *Lamborn v. Lake Shore Banking & Trust Co.*, 196 App. Div. 504, 188 N. Y. Supp. 162 (1921); *Vaughan v. Massachusetts Hide Corporation*, 209 Fed. 667 (1913); *Munroe v. Bonanno*, 16 App. Div. 421, 45 N. Y. Supp. 61 (1897); *Gelpcke v. Quantell*, 74 N. Y. 599 (1878); *Maitland v. Chartered Bank*, 38 L. J. Ch. 363 (1869); *Brazilian & Portuguese Bank v. British & American Exchange Banking Corporation*, 18 L. T. R. 823 (1868); *Russell v. Wiggin*, 2 Story 213 (1842). See ESCHER, FOREIGN EXCHANGE EXPLAINED, p. 110.

The letter may be addressed to the buyer authorizing the buyer to draw: *Bank of Toronto v. Ansell*, 7 R. L. 262 (1875); *Duncan v. Edgerton*, 19 N. Y. Super. Ct. (6 Bosw.) 36 (1860).

<sup>37</sup> *Gelpcke v. Quantell*, 74 N. Y. 599 (1878).

<sup>38</sup> *Friedlander v. Bank of Australasia*, 8 C. L. R. 85 (1909); *Gelpcke v. Quantell*, 74 N. Y. 599 (1878); *Ulster Bank v. Synnott*, I. R. 5 Eq. 595 (1871); *Woods v. Thiedemann*, 1 H. & C. 478 (1862).

<sup>39</sup> *Johannessen v. Munroe*, 158 N. Y. 641, 53 N. E. 535 (1899); *Cutler v. American Exchange National Bank*, 113 N. Y. 593, 21 N. E. 710 (1889); *Bank of Montreal v. Recknagel*, 109 N. Y. 482, 17 N. E. 217 (1888); *Lafargue v. Harrison*, 70 Cal. 380, 11 Pac. 636 (1886); *Brazilian & Portuguese Bank v. British & American Exchange Banking Corporation*, 18 L. T. R. 823 (1868); *In re Agra Bank, Ex parte Tondeur*, L. R. 5 Eq. 160 (1867); *Russell v. Wiggin*, 2 Story, 213 (1842); *Carnegie v. Morrison*, 2 Metc. (Mass.) 381 (1841).

<sup>40</sup> See MARGRAFF, p. 91; BROOKS, pp. 173-174.

of credit transaction. The credit-opening bank and the issuing bank coincide. The second bank is the drawee bank. The third bank is the purchasing bank. Where the credit is a cash credit, or where the credit is an acceptance credit but the drawer presents the drafts for acceptance, the purchasing bank is eliminated from the letter of credit transaction.

The indirect import letter of credit may be issued either in the revocable or in the irrevocable form,<sup>40</sup> but it is customary to issue it only in the irrevocable form.

It may happen that the relation of principal and agent does not exist between the issuing and drawee banks.<sup>41</sup> There may be simply prior business dealings between them. The drawee bank may, however, be the agent of the issuing bank,<sup>42</sup> or the issuing bank may be the agent of the drawee bank.<sup>43</sup> The letter may purport to be issued solely on behalf of the issuing bank,<sup>44</sup> or solely on behalf of the drawee bank,<sup>45</sup> or it may purport to be issued by the issuing bank on its own behalf as agent as well as on behalf of the drawee bank as principal, and to constitute a contract with both banks.<sup>46</sup>

(4) *Direct export letter of credit and advice of credit opened.*<sup>47</sup> This letter is so called because it is issued by a bank in the seller's country, the drawee bank, at the request of a bank in the buyer's country, the issuing bank, in order to aid the exportation of merchandise, and authorizes the seller to draw directly upon itself. It is used in connection with the indirect import letter of credit.

<sup>40</sup> See WHITAKER, p. 169.

<sup>41</sup> *Gelpcke v. Quentell*, 74 N. Y. 599 (1878); *Ulster Bank v. Synnott*, 1 R. 5 Eq. 595 (1871).

<sup>42</sup> *Johannessen v. Munroe*, 158 N. Y. 641, 53 N. E. 535 (1899); *Bank of Montreal v. Recknagel*, 109 N. Y. 482, 17 N. E. 217 (1888); *Maitland v. Chartered Bank*, 38 L. J. Ch. 363 (1869).

<sup>43</sup> *Vaughan v. Massachusetts Hide Corporation*, 209 Fed. 667 (1913); *Brazilian & Portuguese Bank v. British & American Exchange Banking Corporation*, 18 L. T. R. 823 (1868); *In re Agra Bank, Ex parte Tondeur*, L. R. 5 Eq. 160 (1867); *Russell v. Wiggin*, 2 Story, 213 (1842); *Carnegie v. Morrison*, 2 Metc. (Mass.) 381 (1841).

<sup>44</sup> *Lamborn v. Lake Shore Banking & Trust Co.*, 196 App. Div. 504, 188 N. Y. Supp. 162 (1921); *Lafargue v. Harrison*, 70 Cal. 380, 11 Pac. 636 (1886); *Brazilian & Portuguese Bank v. British & American Banking Corporation*, 18 L. T. R. 823 (1868).

<sup>45</sup> *Vaughan v. Massachusetts Hide Corporation*, 209 Fed. 667 (1913); *Carnegie v. Morrison*, 2 Metc. (Mass.) 381 (1841).

<sup>46</sup> *Russell v. Wiggin*, 2 Story, 213 (1842).

<sup>47</sup> *Gelpcke v. Quentell*, 74 N. Y. 599 (1878).

The seller frequently desires some authorization from the drawee bank in addition to and in confirmation of the authority which he has received from the issuing bank. Upon receipt of information that the issuing bank has issued its indirect import letter of credit the drawee bank may do one of six things: it may decline to issue any letter, it may issue its own direct revocable letter,<sup>48</sup> it may issue its letter of instruction,<sup>49</sup> it may issue its advice of credit opened unconfirmed,<sup>50</sup> it may issue its own direct irrevocable letter,<sup>51</sup> or it may issue its advice of credit opened confirmed.<sup>52</sup>

<sup>48</sup> The form is the same as the direct import letter of credit. See WOLFE, pp. 421, 423.

<sup>49</sup> This is sometimes called a *banker's permission to draw*. See HOUGH, p. 546.

<sup>50</sup> See YORK, p. 137. The form varies among bankers.

FORM OF ADVICE OF CREDIT OPENED UNCONFIRMED.

"To . . . [name of the seller] . . .

DEAR SIR: Our correspondent, mentioned below, has authorized us as per their . . . dated . . . to pay you . . . for account of . . . [Buyer] . . . amount . . . , against delivery of draft . . . document required. . . . All documents must be in form satisfactory to us and to represent and cover the following merchandise. . . . Our correspondent states that this authorization to us expires on . . . unless previously cancelled. Above credit opened by . . . [Issuing Bank] . . . This is an unconfirmed [or revocable] credit. It is not to be regarded as an agreement on our part, and is therefore subject to modification or revocation at any time.

Respectfully yours,

(Signed) . . . [Drawee Bank] . . ."

<sup>51</sup> See YORK, p. 137; HOUGH, p. 546; WOLFE, p. 424. The form is the same as the direct irrevocable import letter of credit.

<sup>52</sup> The form varies among bankers. See YORK, p. 137; WHITAKER, p. 169; HOUGH, p. 278; U. S. DEPT. OF COMMERCE, PAPER WORK IN EXPORT TRADE, p. 132; SILVER, p. 301; PRECIADO, p. 279; SAVAY, p. 301.

FORM OF ADVICE OF CREDIT OPENED CONFIRMED.

"To . . . [name of the seller] . . .

DEAR SIR: We have been requested to open a credit in your favor under the terms and conditions stipulated below:

Opened by . . . [Issuing Bank] . . . Account . . . [Buyer] . . . available by draft . . . covering . . . Drafts drawn under this credit must be presented not later than. . . . Documents required . . . This is to be regarded as a confirmed credit.

Respectfully yours,

(Signed) . . . [Drawee Bank] . . ."

The terms *revocable* and *irrevocable* are properly applicable to direct import letters of credit, indirect import letters of credit, direct export letters of credit, and seller's export letters of credit. The terms *unconfirmed* and *confirmed* are sometimes used interchangeably with the terms *revocable* and *irrevocable* but are properly applicable only to those letters of advice which the drawee bank issues at the request of the credit-opening bank. "Where the drawee bank and the bank which grants the credit are different institutions, there may arise what is called the 'confirmed credit' . . . A con-

It is customary, however, for the drawee bank to issue either an advice of credit opened unconfirmed, or an advice of credit opened confirmed, depending upon the circumstances of the case, or to issue no letter at all. It is unusual for the direct letter of credit to be employed in this connection.

The direct export letters of credit and the advices of credit opened may be issued without any previous issue of an indirect import letter of credit. When time is an important element the buyer may go to a bank in his own country, sign the necessary agreement, and provide for a *cable credit* to be opened in favor of the seller. The buyer's bank cables to the seller and to the drawee bank, or frequently only to the drawee bank, and instructs the drawee bank to issue a specified letter to the seller. The letters usually requested in connection with a cable credit are the irrevocable direct export letter of credit or the advice of credit opened confirmed.

Three banks are usually involved in the confirmed credit and the direct export letter of credit transaction. The bank with which the buyer arranges for the credit is the credit-opening bank. If it writes its own indirect import letter of credit, it is the issuing bank in respect to that letter. This bank will be referred to, for the sake of uniformity, simply as the issuing bank. The second bank is the drawee bank, and is also the issuing bank in respect to its direct export letter of credit or advice of credit opened. This bank will be referred to, for the sake of uniformity, simply as the drawee bank. The third bank is the purchasing bank, which may in a given case be eliminated from the transaction.

The credit in connection with which the indirect import letter of credit and the direct export letter of credit, or advice of credit opened, are used may be either the acceptance credit, which is the normal letter of credit transaction, or the cash credit.<sup>53</sup>

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firmed credit is regarded as an exceptionally secure basis for the manufacture or collection of goods for export. If the agreement of sale between the merchants calls for a confirmed credit, the importer will ask his bank for the same and pay an extra commission. This bank will then advise the drawee (or London) bank to issue the confirmation and will pay it its commission for this action. In the majority of cases confirmation of the letters of credit of our bankers upon foreign institutions is not demanded. It is obvious that where a bank issues a letter of credit authorizing drafts on itself there is no point to a separate confirmation." — WHITTAKER, *FOREIGN EXCHANGE*, pp. 169, 171 (1919).

<sup>53</sup> See *Morgan v. Larivière*, L. R. 7 H. L. 423 (1875).

The revocable direct export letter of credit and the advice of credit opened unconfirmed are understood in the business world to create no obligations from the time of issue.<sup>54</sup> They are subject to revocation in the same manner as the revocable import letters of credit. But they are in use to a much greater extent. The parties know that normally as a matter of banking business the drafts will be accepted and paid. But the banks do not, for a variety of business reasons, wish to enter into binding obligations at the time of issue. Exporters, however, are willing to rely on the normal course of business. The irrevocable direct export letter of credit and the advice of credit opened confirmed are considered as creating binding obligations from the moment of issue.<sup>55</sup>

The course of transaction which takes place under the indirect import letters of credit and the direct export letters of credit is practically the same as that which takes place under the direct import letter of credit. The seller presents the draft on the drawee bank with documents attached to his local bank for discount. At the same time he produces the letter of credit. The purchasing bank makes the necessary notations, detaches the shipping documents, and sends them directly to the issuing bank and the draft to the drawee bank. The drawee bank accepts the draft and charges the account of the issuing bank. The issuing bank surrenders, on an arrangement satisfactory to it, the bills of lading to the buyer, who resells the goods. The buyer then pays the amount due to the issuing bank, which remits to the drawee bank in time for it to meet its acceptance.

(5) *Seller's export letter of credit.*<sup>56</sup> This letter is procured by the seller and is usually of the indirect type. Suppose the seller is in New York and the buyer is in some place where banking facilities are poor and consequently it is impracticable for the buyer to procure a letter of credit. The seller goes to his New York bank and signs an agreement to reimburse similar in every respect to the

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<sup>54</sup> See U. S. DEPT. OF COMMERCE, *PAPER WORK IN EXPORT TRADE*, p. 132; *PRECIADO*, p. 279.

<sup>55</sup> See U. S. DEPT. OF COMMERCE, *PAPER WORK IN EXPORT TRADE*, p. 132; *PRECIADO*, p. 278; *MARGRAFF*, p. 89.

<sup>56</sup> See *HOUGH*, pp. 594-596; U. S. DEPT. OF COMMERCE, *FOREIGN CREDITS*, p. 54; *ESCHER, FOREIGN EXCHANGE EXPLAINED*, p. 139. See also *Germania National Bank v. Taaks*, 101 N. Y. 442, 5 N. E. 76 (1886); *Union Bank of Canada v. Cole*, 47 L. J. Q. B. 100 (1877); *Carrollton Bank v. Tayleur*, 16 L. 490 (1840).



agreement which the buyer signs in connection with the other forms of letters of credit. At the same time he gives the issuing bank a draft on the buyer, with the shipping documents attached, which is forwarded for collection. The seller is given a letter of credit which authorizes him to draw on another bank, usually a London bank.<sup>57</sup> This method combines the trade acceptance with the letter of credit. The seller's export letter of credit is usually a clean acceptance letter of credit.

The business transaction, in connection with which letters of credit are used, presents, therefore, many material variations which have real significance in the understanding and intention of the parties. When a specific case involving a letter of credit comes before a court the correct business analysis is an essential prerequisite to the legal determination. There is no magic in the term *letter of credit*; it is no nice formula which may be applied without discrimination. Any attempt to make it one can result only in confusion.

Commercial letters of credit raise many legal questions: which letters, if any, create legal rights and obligations from the time of issue? if they create legal rights and obligations from the time of issue, upon what theory must the conclusion be based? if they do not create legal rights and obligations from the time of issue, may legal rights subsequently arise and, if so, how? what is the relation of the sales contract to the letter of credit? what is the effect of fraud on the part of the buyer in procuring the letter or of the seller in using it? what is the effect of supervening insolvency of the buyer or of the bank? is there a suretyship element in the letter of credit transaction? are the letters negotiable or assignable? It is the purpose of this article to discuss these legal questions which are raised by commercial letters of credit, particularly those letters which have been classified under Type 3.

The confusion in the subject of letters of credit is due to a failure consciously to perceive and keep in mind that they have two dis-

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<sup>57</sup> The following variations of letters of credit in general may be noted:

*Marginal Letters of Credit.* The letter of credit is written in the margin of the draft. See *Maitland v. Chartered Bank*, 38 L. J. Ch. 363 (1869).

*Revolving Letters of Credit.* The letter of credit is automatically renewed when the buyer puts the bank in funds. See *WOLFE*, p. 415; *Chartered Bank v. Macfayden*, 54 L. J. Q. B. 367 (1895).

tinct aspects: (1) an authority to one person to draw drafts; and (2) a promise to another person that if he purchases the drafts they will be honored. In other words, there is one person, known as the accredited party, to whom credit is to be furnished, and another person, known as the accrediting party, who is to furnish the credit. Some letters, such as those used in connection with the cash credit, and some used in connection with the acceptance credit, direct attention exclusively to one aspect. But the modern commercial acceptance letter of credit contains both. The direct letter of credit, for example, contains two promises, one from the issuing bank to the seller, and the other from the issuing bank to purchasers of drafts. The indirect letter may contain an additional promise to the drawee bank. Most of the cases have arisen under the second aspect, where the problems are comparatively simple, and as a result the legal vocabulary of letters of credit is framed wholly in reference to that aspect. The more difficult questions, however, arise under the first aspect. And we shall therefore examine first the nature of the authority which is conferred by a letter of credit in order to determine the rights of the seller, as the accredited party, against the issuing and drawee banks.

## II

### RIGHTS OF THE SELLER AGAINST THE ISSUING AND DRAWEE BANKS

#### *1. Is the Letter of Credit to be Recognized as a Mercantile Specialty which Requires no Consideration?*

In countries which have the civil law, commercial letters of credit do not present a particularly difficult problem. No consideration is necessary to support a business promise.<sup>58</sup> But it is a fundamental principle of the common law that a promise not under seal in order to be binding must be supported by consideration.<sup>59</sup> The promisor may solemnly declare that his promise shall be irrevocable, and yet, if no consideration has been given for it, it is at best nothing more than a continuing offer which may be revoked before it has been accepted. The first problem in reference

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<sup>58</sup> For a discussion of letters of credit in continental law see Omer F. Hershey, "Letters of Credit," 32 HARV. L. REV. 1, 4-9 (1918).

<sup>59</sup> See 1 WILLISTON, CONTRACTS, §§ 107, 108, 109 (1920).

to the seller which letters of credit present is therefore the problem of consideration. It is the most important problem, because upon its solution the solution of all the other problems connected with these letters depends.

It may be urged with force from a business point of view that commercial letters of credit should be legally recognized as mercantile specialties which require no consideration.<sup>60</sup> Bankers, it may be argued, regard certain types of these letters as creating binding obligations; sellers in whose behalf they are issued rely upon them; the law should give its sanction to the business principle that a man's deliberate promise made in the course of business should be as good as his bond. To this it may be answered that customs of merchants should be given effect wherever possible, but wherever possible the effect should be given according to the principles of existing law.

Three objections may be made to the recognition of letters of credit as self-sufficing instruments of the law merchant. In the first place, these letters have not reached that point of uniformity that bills of exchange and promissory notes have attained.<sup>61</sup> There are many types, some of which are considered in the business world as creating binding obligations upon issue, and others of which are looked upon as revocable at will. If business ideas on the subject are not uniform, judicial ideas are chaotic. Moreover, letters of credit vary in formality from telegraphic communications and simple memoranda to letters written in ordinary epistolary form. There is considerable variation in the forms and in the transaction which gives rise to the letter. For an instrument to be a specialty it must have reached a high degree of formality. In the

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<sup>60</sup> See Omer F. Hershey, "Letters of Credit," 32 HARV. L. REV. 1 (1918). For cases which have a bearing upon the specialty aspects of letters of credit see *British Linen Co. v. Caledonian Insurance Co.*, 4 Macq. 107 (1861); *Waterston v. Edinburgh & Glasgow Bank*, 20 Ct. Sess. 642 (1858); *Orr & Barber v. Union Bank of Scotland*, 1 Macq. 513 (1854).

This is unquestionably the desirable solution for the irrevocable and confirmed types of letters of credit. It is a significant commentary on the inadequacy of the common law to deal with simple business problems that it is extremely difficult for the rights of the seller to be worked out under the prevailing doctrine of consideration; so much so that it may be said to be still doubtful whether the seller acquires any rights at the time of issue.

<sup>61</sup> See J. F. Beal, "Utility of Letters of Credit in Export Trade — A Plea for Standard Forms," 95 BANKERS' MAGAZINE, 271 (N. Y., 1917).

second place, even if a letter of credit be recognized as a mercantile specialty, it does not follow that consideration is unnecessary. The trend of the common law has been to give effect to the custom of merchants which makes certain *choses in action* negotiable, but not to give effect to the custom of merchants which makes specialty promises binding without consideration. There is an essential difference between recognizing, in furtherance of commerce, that certain *choses in action* are assignable so as to confer upon the assignee original in distinction to derivative rights, and in recognizing that certain promises need no consideration to be legally enforceable. In the one case the question relates to the transferability of an existing legal right; in the other case the question concerns the creation of that right. To some extent, to be sure, especially in the matter of negotiable instruments, the common law has expanded and modified its strict conception of what constitutes consideration. But the law has never abolished its necessity. There was a time when consideration was thought to be a matter of evidence rather than a requirement of substantive law. Lord Mansfield in *Pillans v. Van Nierop*,<sup>62</sup> confusing in a strange way consideration with the Statute of Frauds, tried to abolish the requirement of consideration, in so far as written commercial promises were concerned, on the theory that the writing is sufficient proof of the existence of the contract. He was soon overruled, and this conspicuous failure of a great judge has been a warning to all later judges. The conception that the doctrine of *nudum pactum* does not apply to mercantile contracts is entirely exploded,<sup>63</sup> and it is now settled that even for negotiable instruments consideration is required as between the immediate parties.<sup>64</sup> In the third place, the tendency, legislative as well as judicial, is toward consideration and not away from it. The efficacy of seals has been almost everywhere abolished. At the same time there is a legislative tendency, evidential and procedural, not substantive, to give *prima facie* effect to any promise in writing.

The doctrine of consideration is due to accidents of history; it is peculiar to the common law; it may be thought of as pro-

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<sup>62</sup> 3 Burr. 1663 (1765).

<sup>63</sup> See *Bank of Ireland v. Archer and Daly*, 11 M. & W. 383, 389 (1843).

<sup>64</sup> See *Holliday v. Atkinson*, 5 B. & C. 501 (1826). See also 1 WILLISTON, CONTRACTS, § 108 (1920).

vincial; it may not be desirable; but it exists as a firmly established principle of English and American law. Courts might well modify the common-law conception of what constitutes consideration. This would be legitimate judicial extension of and deduction from established principle. But to abolish it is surely not within the province of the courts. In the past, no court has decided that a letter of credit needs no consideration. In the future, courts may treat these letters as mercantile specialties. But the opinion may be ventured that no court will, without legislative enactment, openly and consciously declare that they need no consideration for their support. The legal analysis of letters of credit must therefore be made according to common-law principles, but it is submitted that, once the correct business analysis is made in the particular case, the common law is adequate to deal with them.

2. *Is the Letter of Credit an Offer from the Issuing and Drawee Banks to the Seller for a Unilateral Contract?*

Some letters of credit constitute offers to the seller. A letter which requests S to sell goods to B and promises that the writer will pay,<sup>65</sup> or be responsible,<sup>66</sup> or be security for payment,<sup>67</sup> or pay if B does not pay,<sup>68</sup> is an offer. So, too, if the buyer furnishes the consideration to the issuing bank in the form of an executory promise to put the bank in funds on a specified date in return for a letter of credit which authorizes the buyer to draw on the issuing bank or on the drawee bank in favor of a named seller, or in favor of no specified person,<sup>69</sup> the letter is an offer to the designated

<sup>65</sup> *Krakauer v. Chapman*, 16 App. Div. 115, 45 N. Y. Supp. 127 (1897); *Cheever v. Schall*, 87 Hun, 32, 33 N. Y. Supp. 751 (1895); *North Atchison Bank v. Garretson*, 51 Fed. 168 (1892); *Smith v. Montgomery*, 3 Tex. 199 (1848); *Lienow v. Pitcairn*, Fed. Cas. No. 8,341 (1832); *Edmonston v. Drake*, 5 Pet. (U. S.) 624 (1831); *Grant v. Naylor*, 4 Cranch (U. S.) 224 (1808).

<sup>66</sup> *Fletcher Guano Co. v. Burnside*, 142 Ga. 803, 83 S. E. 935 (1914); *Taylor v. Wetmore*, 10 Ohio, 490 (1841); *Walsh and Beekman v. Bailie*, 10 Johns. (N. Y.) 180 (1813).

<sup>67</sup> *Adams v. Jones*, 12 Pet. (U. S.) 207 (1838); *Robbins v. Bingham*, 4 Johns. (N. Y.) 476 (1809).

<sup>68</sup> *Holmes v. Schwab & Sons*, 141 Ga. 44, 80 S. E. 313 (1913); *London & San Francisco Bank v. Parrott*, 125 Cal. 472, 58 Pac. 164 (1899); *Crane Co. v. Specht*, 39 Neb. 123, 57 N. W. 1015 (1894); *Johnson v. Brown*, 51 Ga. 498 (1874); *Douglass v. Reynolds*, 7 Pet. (U. S.) 113 (1833); *Sollee v. Meugy*, 1 Bailey Law (S. C.) 620 (1830).

<sup>69</sup> *Nelson v. First National Bank of Chicago*, 48 Ill. 36 (1868); *Lawrason v. Mason*, 3 Cranch (U. S.) 492 (1806).

seller, or to any one if no specified seller is named, that, if the drafts are taken according to the terms of the letter, the issuing bank, if the letter is of the direct type, or the drawee bank, if it is of the indirect type, will accept and pay them at maturity.<sup>70</sup> The buyer's agreement with the issuing bank plus the letter of credit constitutes a bilateral contract between the bank and the buyer. But the letter of credit is no less an offer to the seller. The same instrument may be a contract with one person and an offer to another.

The authority to draw<sup>71</sup> and the authority to purchase drafts<sup>72</sup> are also offers. When the buyer delivers to the issuing bank his authority to draw he requests the issuing bank to issue to the purchasing bank its authority to purchase, and it is further contemplated that the purchasing bank will issue its letter of advice to the seller. The offer of the buyer to the issuing bank consequently is not simply that, if the issuing bank purchases a specified draft drawn by the seller on the buyer, the buyer will honor it, but that the buyer will honor it if the issuing bank comes under legal liability as a result of the contemplated transaction.<sup>73</sup> The authority to draw used in conjunction with the authority to purchase and with the letter of advice may comprise three dependent offers: one from the buyer to the issuing bank; a second from the issuing bank to the purchasing bank; a third from the purchasing bank to the seller. When the seller presents to the purchasing bank for discount the draft on the buyer all three offers are accepted simultaneously. The purchasing bank comes under a contract

<sup>70</sup> In such a case the seller is in the position of the accrediting party. This is the usual type of the traveler's letter of credit. See WHITAKER, pp. 181-189; BROOKS, pp. 139-141.

<sup>71</sup> *Wilson & Co. v. Niffenegger*, 211 Mich. 311, 178 N. W. 667 (1920); *Lyon v. Van Raden*, 126 Mich. 259, 85 N. W. 727 (1901); *Hall v. First National Bank*, 133 Ill. 234, 24 N. E. 546 (1890); *Johnson v. Blakemore*, 28 La. Ann. 140 (1876); *Michigan State Bank v. Estate of Leavenworth*, 28 Vt. 209 (1855); *Union Bank of Louisiana v. Coster*, 3 N. Y. 203 (1850).

<sup>72</sup> *Sigel-Campion Live Stock Commission Co. v. Davis*, 69 Colo. 511, 194 Pac. 468 (1921); *Bank of Plant City v. Canal-Commercial Trust & Savings Bank*, 270 Fed. 477 (1921); *Lemon Importing Co. v. Garfield Savings Bank*, 187 App. Div. 932, 173 N. Y. Supp. 551 (1919); *Borthwick v. Bank of New Zealand*, 17 T. L. R. 2 (1900); *Second National Bank v. Diefendorf*, 90 Ill. 396 (1878); *White's Bank of Buffalo v. Myles*, 73 N. Y. 335 (1878); *Omaha National Bank v. First National Bank*, 59 Ill. 428 (1871); *Waterston v. Edinburgh & Glasgow Bank*, 20 Ct. Sess. 642 (1858).

<sup>73</sup> *Borthwick v. Bank of New Zealand*, 17 T. L. R. 2 (1900).

liability, its liability is an acceptance of the issuing bank's offer, and the issuing bank's ensuing liability is an acceptance of the buyer's offer. Consequently it may be stated that an authority to draw and an authority to purchase cannot be revoked or modified after the draft has been presented by the seller for its first contemplated negotiation.<sup>74</sup>

Similarly, the direct import letter of credit, if issued in the revocable form, is an offer.<sup>75</sup> The buyer's agreement, although said to be made in consideration of the issue of the revocable letter of credit, is nothing more than an offer. But since it contemplates an offer to be made in turn by the issuing bank to the seller, it is an offer which is accepted when the issuing bank comes under a legal obligation as the result of the issue of its revocable letter of credit. This revocable letter of credit contains two offers: one an express offer to the seller; and the other either an express or an implied offer to purchasers of the drafts. Consequently, the offer of the issuing bank is accepted when the seller first negotiates the draft or when he presents it for acceptance.<sup>76</sup> At that moment there also comes into existence a contract between the buyer and the issuing bank.<sup>77</sup>

In the same manner the indirect import letter of credit, if issued in the revocable form, may be analyzed as an offer. The buyer's agreement is a preliminary offer. The letter of credit itself contains three offers: one from the issuing bank to the seller; a second from the issuing bank to purchasers of drafts; a third from the issuing bank to the drawee bank. And if the drawee bank issues its own revocable direct export letter of credit, or its letter of advice, or its advice of credit opened unconfirmed, these are also offers to the seller and to purchasers of the drafts. Upon presentation of the specified drafts by the seller to the drawee bank or upon first negotiation, three unilateral contracts come into existence simultaneously. Hence at that time these revocable letters become irrevocable in respect to that particular transaction.

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<sup>74</sup> See *Gelpcke v. Quantell*, 74 N. Y. 599 (1878).

<sup>75</sup> See *De Tastett v. Crousillat*, Fed. Cas. No. 3,828 (1807). See also *infra*, note 158.

<sup>76</sup> *Gelpcke v. Quantell*, 74 N. Y. 599 (1878); *Isley v. Jones*, 12 Gray (Mass.) 260 (1858).

<sup>77</sup> *Lienow v. Pitcairn*, Fed. Cas. No. 8,341 (1832).

If more than one draft is contemplated these letters constitute a series of continuing offers which may be revoked as to future transactions.

This analysis of these types of letters of credit conforms to the intention of the parties. The seller may improperly perform the sales contract, business conditions may change, the buyer may become insolvent, or he may have procured the letter fraudulently. If any of these events have happened the offer has only to be revoked. The offer theory, therefore, when applied to these letters is not only sound but it is adequate. The only risk is that revocation may not be made in time.

But the direct import letter of credit, the indirect import letter of credit, and the direct export letter of credit, if issued in the irrevocable form, and the advice of credit opened confirmed, cannot be analyzed as offers to the seller without doing violence to facts. If the letter is an offer from the bank to the seller for a unilateral contract what is the act which is consideration for the bank's promise? It is not the making of the sales contract:<sup>78</sup> first, because banks are not in the business of bargaining for sales contracts to be made; and secondly, because the sales contract is usually already made before the letter of credit is issued. It is not the manufacture or the starting manufacture by the seller: first, because this is not what the bank is bargaining for; and secondly, because performance by the seller of an act which he is already legally bound to perform cannot be consideration for the bank's promise.<sup>79</sup> If the letter of credit is an offer it is an offer to accept a draft with specified shipping documents attached. Hence there is an interval between the issue of the letter of credit and the presentation of the drafts during which the bank could revoke its offer with legal impunity to itself and with possibly dire results to the seller. If the buyer were discovered to have been fraudulent, or if he became insolvent, the issuing bank could at once revoke the unaccepted offer. But the very purpose of the letter of credit is to guard against such possibilities. The contemplation of the parties is that these letters constitute irrevocable and binding obligations upon the issuing and drawee banks in favor of the seller from the moment they are issued. The offer theory nullifies this intention.

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<sup>78</sup> See *Edmonston v. Drake*, 5 Pet. (U. S.) 624 (1837).

<sup>79</sup> But see *Bell v. Moss*, 5 Whart. (Pa.) 189 (1840).



It is at this point that the danger of definition becomes acute. Early types of letters of credit were requests to the seller for sales to be made. The modern type of irrevocable letter of credit contains two promises: one to the seller, and the other to purchasers of drafts. The promise to purchasers of drafts, as will subsequently appear, is an offer. Hence it is not surprising to find the orthodox judicial definition of a letter of credit ignoring the nature of the authority conferred upon the seller and directed either to the request for the sale of goods or to the request for the furnishing of money, and therefore phrased in the language of request and offer.<sup>80</sup> There is danger that courts, having defined letters of credit in terms of one characteristic, will apply the definition indiscriminately to the other and wholly different characteristic. In a few instances this has happened.<sup>81</sup> The great weight of judicial decision, however, is against the theory that irrevocable and confirmed types of letters of credit constitute offers to the seller.

3. *Does the Letter of Credit Constitute a Bilateral Contract between the Issuing and Drawee Banks and the Seller with Consideration Moving from the Seller as Promisee?*

The seller's irrevocable export letter of credit taken together with the seller's agreement to reimburse constitutes a bilateral contract between the issuing bank and the seller. Consideration moves from the seller as promisee to the issuing bank as promisor. Consequently this type of letter presents no difficulties. Whatever rights the seller has against the drawee bank depend upon principles of agency.<sup>82</sup>

But letters of credit procured by the buyer do not constitute bilateral contracts between issuing bank and seller with consideration moving from the seller as promisee. Since an offer for a unilateral contract affords the offeree no protection after he has started, but before he has completed, performance, courts will, if possible, always construe an offer as an offer for a bilateral con-

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<sup>80</sup> See *supra*, note 2.

<sup>81</sup> See *Lafargue v. Harrison*, 70 Cal. 380, 11 Pac. 636 (1886).

<sup>82</sup> See *Carrollton Bank v. Tayleur*, 16 La. 490 (1840). See also *supra*, note 56. Where the letter is written by the buyer the sales contract would be sufficient to support the seller's authority to draw.

tract.<sup>83</sup> The irrevocable letter of credit is not an offer to the seller. But if it is an offer it is so clearly an offer for a unilateral contract that it would be almost impossible to give it any other construction. If the sales contract is not made until after the seller receives the letter of credit, the seller's promise to the buyer, if requested by the issuing bank, would be sufficient consideration for the bank's promise to the seller. The fatal objection is that the making of the sales contract is not what is requested by the bank in return for its letter of credit. There is therefore no consideration in fact. If the sales contract has already been made, as is usually the situation, the seller would be promising to perform what he was already under a legal duty to perform. There would be no consideration in law. Moreover, if the irrevocable indirect import letter of credit constitutes a bilateral contract between issuing bank and seller for which the seller furnishes the consideration, there is a further difficulty in working out contract rights of the seller, against the drawee bank in those cases where the relation of principal and agent does not exist between the two banks. The direct letter which the drawee bank issues to confirm the indirect letter cannot be held to be a bilateral contract with the seller, for which the seller furnishes the consideration, because the seller is already legally bound to the issuing bank to perform the same act. Unless, therefore, a novation is worked out between the seller and the two banks, or, unless a solution is to be found in ratification, the irrevocable direct export letter of credit of the drawee bank or the advice of credit opened confirmed would create no legal obligation on the part of the drawee bank. A novation would be contrary to their intentions. A solution might be found in ratification.

In the case of the direct import letter of credit, what the parties have in mind is a contract with the buyer, the seller, and the issuing banks as parties, the consideration for the buyer's promise to the bank being the bank's promise to the seller, and the consideration for the bank's promise to the seller being the buyer's promise to the bank to put it in funds on a specified day plus payment of a commission. In the case of the indirect letter of credit the parties have the same thing in mind. If the relation of principal and agent

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<sup>83</sup> For an extreme case see *Los Angeles Traction Co. v. Wilshire*, 135 Cal. 654, 67 Pac. 1086 (1902).

exists between the two banks, it is further contemplated that the drawee bank shall also be bound to the seller, but if no such relation exists, then the irrevocable direct export letter of credit or advice of credit opened confirmed shall constitute another contract between the drawee bank and the seller with the consideration moving from the issuing bank to the drawee bank, or else a ratification of a contract made on behalf of the drawee bank.

The question is whether such contracts can confer rights upon the seller. To answer this question fully, it will be necessary to examine three methods of solution: (1) contract between the buyer and the issuing bank for the benefit of the seller; (2) contract between the bank and the seller with consideration moving to the bank from the buyer; (3) contract between the buyer and the bank with a simultaneous assignment by the buyer to the seller.

*4. Is the Letter of Credit a Bilateral Contract between the Issuing and Drawee Banks and the Buyer for the Benefit of the Seller?*

In *Carnegie v. Morrison*<sup>84</sup> one Bradford, the buyer, in consideration of the issue of a letter of credit, promised to cover the drafts at maturity. The issuing bank, acting as agent for the drawee bank, gave the buyer the following letter:

"Boston, 4 March, 1837.

"Messrs. MORRISON, CRYDER & Co., [Drawee Bank]  
London.

"Mr. John Bradford [Buyer] of this city having requested that a credit may be opened with you for his account in favor of Messrs. D. Carnegie & Co. [seller] of Gothenburg for three thousand pounds sterling, I have assured him that the same will be accorded by you on the usual terms and conditions.

Respectfully your obt. serv't.

FRANCIS J. OLIVER [Issuing Bank]

"For £3000"

This letter was delivered to the buyer, who sent it to the seller. Shortly afterwards the drawee bank wrote the seller that the credit could not be granted. Nevertheless, the seller drew the bill of exchange on Morrison, Cryder & Co. and, acceptance having been refused, brought an action against the drawee bank. It was held that the seller could maintain the action in his own name. It is

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<sup>84</sup> 2 Metc. (Mass.) 381 (1841).

not certain upon what ground the court based its decision, although the general tenor of the opinion seems to be that the seller was the beneficiary of a contract made between the drawee bank and the buyer.

*Carnegie v. Morrison*<sup>86</sup> is the only case which approaches the view that a letter of credit is a contract between the buyer and the bank for the benefit of the seller. It will be noted that the letter in that case was a peculiar one, of a type not now in ordinary use. When the letter is procured by the buyer and is addressed to the drawee bank, or when it is addressed to the buyer and authorizes the seller to draw on the issuing or drawee banks, there is basis for construing the transaction as a contract between the buyer and the banks for the benefit of the seller. The essential inquiry, however, is not who procures the letter or to whom it is addressed or to whom it is delivered, but to whom the promise is made. The intention of the parties usually is that the bank shall make a direct promise to the seller. This feature prevents the transaction from being a contract for the benefit of a third person.

Indeed, to construe the letter of credit as a contract for the benefit of the seller would not only ignore the intention of the parties but would be unfortunate in its business results. In England<sup>86</sup> and in some American states the seller as beneficiary could maintain no action against the issuing or drawee banks. Even in jurisdictions where he can maintain an action at law in his own name his rights are derivative, and consequently he would take the benefits of the contract subject to all defenses which the issuing and drawee banks had against the buyer.<sup>87</sup> Thus fraud in the inception, supervening fraud, failure of consideration, insolvency of the buyer, would all be defenses available to the banks. Both from the seller's and from the buyer's point of view this result would destroy the value and usefulness of the irrevocable letter of credit.

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<sup>86</sup> 2 Metc. (Mass.) 381 (1841).

<sup>86</sup> *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.*, [1915] A. C. 847.

<sup>87</sup> *Jenness v. Simpson*, 84 Vt. 127, 139, 143, 78 Atl. 886 (1911); *Green v. Turner*, 86 Fed. 837 (1898); *Clay v. Woodrum*, 45 Kan. 116, 25 Pac. 619 (1891); *Maxfield v. Schwartz*, 45 Minn. 150, 47 N. W. 448 (1890); *Amonett v. Montague*, 75 Mo. 43 (1881); *Benedict v. Hunt*, 32 Iowa, 27 (1871); See also 1 WILLISTON, CONTRACTS, § 394 (1920).

5. *Is the Letter of Credit a Contract between the Issuing and Drawee Banks as Promisors and the Seller as Promisee with Consideration Moving from One Other than the Promisee?*

When the direct import letter of credit is issued in the irrevocable form the parties have in mind a contract whereby the buyer promises the issuing bank to put it in funds at a future date and to pay a specified commission in return for the promise of the issuing bank made directly to the seller on certain conditions precedent. When the indirect import letter of credit is issued in the irrevocable form the same result is in the minds of the parties. If no relation of principal and agent exists between the drawee and issuing banks, the parties contemplate that the buyer is furnishing the consideration, in the form of an executory promise to the issuing bank, and frequently in the form of a cash payment of the commission, in return for the promise of the issuing bank made directly to the seller that the drawee bank will accept and pay drafts of the seller drawn upon it. The letter is also an offer to the drawee bank from the issuing bank. When the drawee bank accepts the draft a unilateral contract is formed between the two banks, and when the drawee bank pays the draft the contract of the issuing bank with the seller is discharged. If a confirmed credit is requested and the drawee bank issues its own direct export letter of credit in the irrevocable form, or its advice of credit opened confirmed, there are two contracts in existence: one contract between the buyer, issuing bank, and seller with the consideration moving from the buyer to the issuing bank for its promise made directly to the seller; the other a contract between the issuing bank, drawee bank, and seller with the consideration moving from the issuing bank to the drawee bank for its promise made directly to the seller. Or the confirmed letter may amount to a ratification of the previous contract. If the relation of principal and agent exists between the drawee bank as principal and the issuing bank as agent, then the indirect import letter of credit is intended to confer immediate contract rights upon the seller against the drawee bank, and upon its failure to accept and pay, against the issuing bank. If a direct irrevocable export letter of credit or an advice of credit opened confirmed is requested and issued by the drawee bank, this is simply a confirmation of the agency, and the giving to the seller of an

instrument which he can use in negotiating his drafts to better advantage than the letter of the issuing bank.

If the sales contract is made before the letter of credit is issued, then, if the irrevocable direct or indirect import letter is sent by the bank to the seller the contract is complete with the seller on mailing. If the letter of credit is given to the buyer for the purpose of being sent by the buyer to the seller the contract is formed when the letter is issued and delivered to the buyer.<sup>88</sup> The seller in either case has assented in advance. If the irrevocable letter of credit is issued before the sales contract is made, which would be a rare situation, the seller acquires a contract right subject to disaffirmance.

This being the contemplation of the parties, can legal effect be given to it? If A makes a promise to B in exchange for B's promise made not to A but to C, or made both to A and C, can C maintain an action on the contract as promisee against B as promisor?

Historically, consideration is bound up in the tort of deceit. Hence it is that while many courts define consideration as detriment to the promisee or benefit to the promisor, most courts in practice insist upon detriment to the promisee as the sole test. There are three conceivable conceptions of consideration: benefit to the promisor with no detriment to any one; detriment to the promisee; detriment to one other than the promisee given as benefit to the promisor. In the case of the letter of credit it is not necessary to go to the extent of saying that benefit alone to the promisor is sufficient consideration. It is only necessary to broaden and modify the common-law conception of consideration to include detriment to one other than the promisee. The law has been constantly broadening its conception of consideration. It is settled that consideration need not move to the promisor. Consideration moving from the promisee to a third person at the request of the promisor is sufficient to support the contract. Certainly this is

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<sup>88</sup> Compare *Union Bank of Canada v. Cole*, 47 L. J. Q. B. 100 (C. A. 1877).

In *Carnegie v. Morrison*, 2 Metc. (Mass.) 381 (1841) the letter of credit was written and delivered to the buyer in Boston, authorizing the seller to draw on a London bank. The buyer sent the letter to the seller in Sweden. In an action in Massachusetts by the seller against the drawee bank for cancelling the credit it was held that the contract was made in Boston and that Massachusetts law governed.

See *Sovereign Bank of Canada v. Bellhouse, Dillon & Co.*, 23 Q. R. (K. B.) 413 (1914).

so in unilateral contracts. And it would seem that consideration moving to the promisor from a third person on behalf of the promisee is sufficient consideration to support the contract in favor of the promisee. Upon performance it would give the promisor a right against the third person, for as to that person the promisor is in the position of promisee giving consideration to a designated person at the request of the promisor. It is only necessary to extend this unilateral situation to the bilateral or trilateral situation to give all the parties rights on the contract. Such an extension of consideration would not be revolutionary, but would be a legitimate judicial development of existing principles. There is no reason in the nature of things why even in bilateral contracts consideration need move from the promisee. There is no reason why primitive ideas of consideration should remain immutable.<sup>89</sup>

This situation is quite different from the contract for the benefit of a third person. The reason why a beneficiary should not be able to sue is not that he is a volunteer. The reason is that he is not a party to the contract. In other words, the difficulty is not one of consideration. But in the contract where one other than the promisee furnishes the consideration there is no question but that the promisee is a party. The only question is one of consideration. The judges in *Lawrence v. Fox*<sup>90</sup> clearly perceived this distinction. The *ratio decidendi* of Judge Denio, allowing the beneficiary to recover, was that the beneficiary is a party to the contract as promisee. The other judges of the majority declined to base their decision on the proposition that the beneficiary was a promisee. The dissenting judges dissented solely on the ground that he was not a promisee.

In the United States the law seems to be settled that consideration need not move from the promisee. Since the time of *Lawrence v. Fox*<sup>91</sup> a long line of American cases have squarely decided that a promisee can enforce a contract where the consideration moves to the promisor from one other than the promisee.<sup>92</sup> This is the

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<sup>89</sup> See 1 WILLISTON, CONTRACTS, § 114 (1920).

<sup>90</sup> 20 N. Y. 268 (1859).

<sup>91</sup> 20 N. Y. 268 (1859).

<sup>92</sup> *Bobrick v. Second National Bank of Hoboken*, 175 App. Div. 550, 162 N. Y. Supp. 147, 115 N. E. 1034 (1916); *Hamilton v. Hamilton*, 127 App. Div. 871, 112 N. Y. Supp. 10 (1908); *Bell v. Sappington*, 111 Ga. 391, 36 S. E. 780 (1900); *Palmer Savings Bank v. Insurance Co. of North America*, 166 Mass. 189, 44 N. E. 211 (1896); *Williamson*

favorite Massachusetts device of construction for reaching the result of *Lawrence v. Fox*.<sup>93</sup>

The American cases which have examined the rights of the seller under the irrevocable letters of credit have almost always based their results on the theory that the letter of credit is a contract between the bank as promisor and the seller as promisee with consideration moving from one other than the promisee.

In *Carnegie v. Morrison*,<sup>94</sup> discussed previously in another connection, Phillips *arguendo* <sup>95</sup> insisted that there was a valid contract to which the seller was a party as promisee with consideration furnished by the buyer to the bank as promisor.

"Where a valid simple contract, as this is admitted to be, bears on its face, as this does, that it is made in favor of a party and in his behalf, on a sufficient consideration applicable to the contract, whencesoever that consideration may have come, and the party, in whose favor and behalf it is made, assents to, adopts and acts upon it, as the contract imports or requires, he is a party to that contract. There may be decisions to the contrary; but if there are, they are opposed to the general current of jurisprudence. How far we may go, by evidence *aliunde*, to show who the party interested is, we need not inquire; for we have here such party named in the contract.

"The same instrument may be, and often is, a contract by one person with divers others, who, if their interests and damage be joint, have a joint action; if separate, and so it appears by the contract, they have separate actions. The question is, what does the contracting party undertake to pay or do, and to whom, and for whose benefit? It is not material that a contract in an epistolary form should be addressed to the person with whom it is intended to be made. . . . Letters of credit are very frequently not so addressed."

It is not certain what the *ratio decidendi* of the court was. But there is language in the opinion of Chief Justice Shaw to the effect that the seller was a party to the contract.<sup>96</sup>

"The objection to such an action and the ground of this defence are, that the immediate parties to the transaction were Bradford [the buyer]

v. Yager, 91 Ky. 282, 15 S. W. 660 (1891); Rector of St. Mark's Church v. Teed, 120 N. Y. 583, 24 N. E. 1014 (1890); Van Eman v. Stanchfield, 10 Minn. 255 (1865); Cabot v. Haskins, 3 Pick. (Mass.) 83 (1825). See 1 WILLISTON, CONTRACTS, § 114 (1920).

<sup>93</sup> 20 N. Y. 268 (1859).

<sup>94</sup> 2 Metc. (Mass.) 381 (1841).

<sup>95</sup> 2 Metc. (Mass.) 381, 385-386 (1841).

<sup>96</sup> 2 Metc. (Mass.) 381, 396, 400 (1841).



on the one side, and the defendants [drawee bank] on the other; that to this transaction the plaintiffs [the seller] were strangers; and that as Bradford acquired some right under it, and had a remedy upon it against the defendants, their contract must be deemed to be made with him and not with the plaintiffs. But this position presupposes that the same instrument may not constitute a contract between the original parties, and also between one or both of them and others, who may subsequently assent to, and become interested in its execution; an assumption quite too broad and unlimited, which the law does not warrant. . . .

"Regarding it as a question of principle and not of technical law, it was an undertaking, in which the plaintiffs had an interest, nearly or quite as direct and as great, as if the promise had been in terms to them."

In *Johannessen v. Munroe*,<sup>97</sup> which will be discussed subsequently in another connection, the sole question before the court was whether there was a sufficient allegation in the seller's declaration that the buyer had furnished consideration.

In *Sovereign Bank of Canada v. Bellhouse, Dillon & Co.*,<sup>98</sup> the buyer, after having procured an irrevocable letter of credit in favor of the seller, instructed the bank to cancel it. In an action by the seller against the bank it was held that the letter could not be lawfully revoked. The court went on the ground that the contract is not between the bank and the buyer, but is between the bank and the seller. The headnote, which accurately expresses the opinion of the court, says:

"No rule of law prevents a person, furnishing consideration in favor of another person, from binding the latter with a third."

In *American Steel Company v. Irving National Bank*,<sup>99</sup> the court, quoting the case of *Sovereign Bank of Canada v. Bellhouse, Dillon & Co.*<sup>100</sup> with approval, based its decision on the proposition that a binding executory contract was formed between the bank and the seller as soon as the letter was issued.

"The liability of the bank on the letter of credit as agreed upon between plaintiff and defendant was absolute from the time it was

<sup>97</sup> 84 Hun, 594, 32 N. Y. Supp. 863 (1895); 9 App. Div. 409, 41 N. Y. Supp. 586 (1896); 158 N. Y. 641, 53 N. E. 535 (1899).

<sup>98</sup> 23 Q. R. (K. B.) 413 (1914).

<sup>99</sup> 266 Fed. 41, 43, 44 (1920).

<sup>100</sup> 23 Q. R. (K. B.) 413 (1914).

issued. . . . The law is that a bank issuing a letter of credit like the one here involved cannot justify its refusal to honor its obligations by reason of the contract relations existing between the bank and its depositor. . . . There is but one vital question involved in this case. It is whether the letter of credit already set forth herein is a complete and independent contract between the plaintiff [seller] and the defendant [issuing bank]. This court is satisfied that it is. . . ."

Other recent American cases adopt the same analysis.<sup>101</sup>

On this theory, the buyer would also have a right of action against the bank if the bank expressly or impliedly makes a promise to the buyer. The consideration moving from the buyer would be sufficient to support a promise made by the bank to the buyer and a promise made by the bank to the seller.

If this analysis is adopted, namely, that the letter of credit is a contract between the issuing and drawee banks as promisors and the seller as promisee with consideration furnished by one other than the promisee, would supervening insolvency of the buyer or failure of consideration or fraud on the part of the buyer in procuring the letter of credit constitute defenses to the bank against the seller? It has been held that supervening insolvency of the buyer or failure of consideration constitute no defense to the bank against the seller.<sup>102</sup> No case has raised the question of fraud. But its effect, it would seem, should be controlled by the same principles. These principles must be deduced by analogy. No analogy can be drawn from the doctrine that an assignee of a simple *chose in action* is subject to the defenses to which his assignor was subject, for that doctrine is based on the fact that the assignee's rights are derivative, whereas in this situation the seller's rights are original. The doctrine that the beneficiary of a contract is subject to defenses existing between the contracting parties furnishes no aid if that doctrine is based on the argument that the beneficiary's rights are derivative. It would furnish a direct analogy if the doctrine is based on the fact that the beneficiary

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<sup>101</sup> See *International Banking Corporation v. Irving National Bank*, 274 Fed. 122 (1921); *Frey & Son v. Sherburne Co. and the National City Bank*, 193 App. Div. 849, 184 N. Y. Supp. 661 (1920). See also *Duncan v. Edgerton*, 19 N. Y. Super. Ct. (6 Bosw.) 36 (1860); *Russell v. Wiggin*, 2 Story, 213, 229, 230 (1842). For an interesting recent case involving interpleader see *Bank of Taiwan v. Gorgas-Pierie Mfg. Co.*, 273 Fed. 660 (1921).

<sup>102</sup> See *infra* note 182.

is a donee. There are also other principles to be borne in mind. If one person is induced to make a contract with another by the fraud of a third, that fraud is no ground for avoiding the contract, unless the fraudulent person was agent for the promisee, or unless the promisee is a donee.<sup>103</sup> Unless, therefore, the seller is to be considered a donee of the letter of credit, or unless the buyer is agent for the seller in making the letter of credit contract, fraud of the buyer in the inception of the contract would constitute no defense to the bank against the seller. Whether the seller is donee or whether the buyer is agent for the seller are questions of extreme difficulty, and no aid in their solution is to be found in the decisions. The problem is as yet judicially unsolved. A suggestion may be ventured. The sales contract, under this analysis, is wholly independent of the letter of credit. And yet both transactions, in the contemplation of all the parties, are bound up together. This fact may be sufficient to prevent the seller from being a donee, although strictly in a legal sense he is probably a donee of the bank's promise. He is not a donee in a business sense. At any rate, after the seller receives the letter of credit and starts to manufacture the goods, since the fraud of the buyer constitutes a breach of that part of the sales contract which provides that a letter of credit shall be procured, so that the seller could sue the buyer or rescind the sale, the fraud of the buyer against the bank amounting to a fraud against the seller, the non-action of the seller against the buyer should be a sufficient change of position for the seller to be considered to have given value, on the same principle that a surrender of an antecedent debt is considered value.<sup>104</sup> Or, looked at in another way, the procuring of a letter of credit is a condition precedent of the seller's promise in the sales contract. The seller waives this condition upon receipt of the letter of credit, and this is value.

Under this explanation, although so far as consideration goes the letter of credit is irrevocable from the moment of issue, nevertheless revocation could be made for defenses at any time before the seller gave this value. In order to make the letter irrevocable

<sup>103</sup> See *Scholefield v. Templar*, 4 De Gex & J. 429 (1859); See also 3 WILLISTON, CONTRACTS, § 1518 (1920).

<sup>104</sup> See *London and County Banking Co. v. London and River Plate Bank*, 21 Q. B. D. 535 (C. A. 1888).

for all purposes from the moment of issue a better explanation perhaps is that the commission covers the risks of fraud and insolvency of the buyer, and that as a matter of business expediency the risk should be borne legally by the bank. The parties contemplate this result. There is no reason why legal effect should not be given to their intention. Nor should the buyer be considered as agent for the seller in making the contract.<sup>105</sup> The bank has no affirmative right against the seller. For this purpose the buyer and the seller should be regarded as wholly independent of each other. From a business point of view it would be unfortunate to subject the seller to the fraud of the buyer. The purpose of the letter of credit is to put the buyer in a negligible position and to substitute for his responsibility the responsibility of a bank. It would seem that all defenses which the bank seeks to set up because of conduct of the buyer should be treated in the same way. Therefore, the cases which hold that insolvency of the buyer and failure of consideration are no defenses are authority for the proposition that fraud of the buyer is equally no defense. However it may be decided that the issuing bank may rescind, it is difficult to see upon what theory the drawee bank, in cases of indirect import and direct export letters of credit, could rescind where there is no agency between the two banks, and it has issued its own irrevocable letter.

In England, it is to be feared that the irrevocable letter of credit cannot be supported on the theory that it is a contract between the issuing and drawee banks and the seller with consideration moving from one other than the promisee. The English courts started with the doctrine that consideration must move from the promisee. Then came a series of cases in which it was decided that consideration need not move from the promisee.<sup>106</sup> But in 1915 the House of Lords in *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.*<sup>107</sup> reverted to the original doctrine. As an alternate ground of decision it was laid down as fundamental that the promi-

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<sup>105</sup> See *infra* notes 203, 205. For business reasons the risk of fraudulent conduct of the seller falls on the buyer. For business reasons the fraudulent conduct of the buyer should fall on the bank.

<sup>106</sup> See 1 WILLISTON, CONTRACTS, § 114 (1920). See also *Thomas v. Thomas*, 2 Q. B. 851 (1842). See *Lilly v. Hays*, 5 A. & E. 548 (1836).

<sup>107</sup> [1915] A. C. 847, 853.

see, even if he were an undisclosed principal, in order to maintain an action on the contract must have furnished the consideration. Lord Haldane in delivering his judgment was quite clear on this point.<sup>108</sup>

"My lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. . . . A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request."

No allusion was made to the fairly long line of English cases which had held the contrary. But these cases must be regarded as overruled.

In England, therefore, the seller as promisee could have no contract right against the issuing and drawee banks on the analysis that the buyer furnished the consideration for the promise. There is some indication that the offer analysis might be applied.<sup>109</sup> There is clear indication that estoppel would not be applied.<sup>110</sup> A third possible analysis for the English courts is that the letter of credit is a bilateral contract between the buyer and the bank and a simultaneous assignment to the seller by the buyer with immediate notice to the bank.

6. *Is the Letter of Credit a Bilateral Contract between the Issuing and Drawee Banks and the Buyer and a Simultaneous Assignment by the Buyer to the Seller?*

All courts will agree that the irrevocable types of letters of credit create contracts with some one from the moment of issue. The disagreement comes in recognizing the seller's right under this contract. As between the buyer and the issuing bank the buyer's agreement is more than an offer to reimburse; it is more than an offer for a unilateral contract; the buyer bargains for a bilateral contract; he is interested not merely in performance but in the promise to perform; he bargains for a promise made directly to the

<sup>108</sup> [1915] A. C. 847, 853.

<sup>109</sup> See *In re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation*, 2 Ch. App. 391 (1867).

<sup>110</sup> *Morgan v. Larivière*, L. R. 7 H. L. 423 (1875). See *infra*, p. 586.

seller. There is in terms no express promise ordinarily made by the bank to the buyer, but it is not difficult to imply from the circumstances of the transaction that the bank promises the buyer to perform. Hence for default the buyer would have an action which he could not have if acceptance and payment of drafts by the bank were merely conditions of his promise. To find a bilateral contract between the buyer and the bank is easy. The essential thing, however, is not the bank's express or implied promise to the buyer, but the bank's written promise to the seller. It is this feature which puts the transaction into a category other than a contract for the benefit of a third person. It is only an adherence to the strict common-law conception of consideration that prevents legal effect from being given to the transaction as the parties contemplate it.

There is some indication in the English cases,<sup>111</sup> and in a few American cases,<sup>112</sup> that the direct and indirect types of irrevocable import letters of credit might be treated as contracts between the issuing and drawee banks and the buyer with an immediate assignment by the buyer to the seller. It strains the facts somewhat to follow this construction when the letter is addressed to the seller and sent directly to him by the bank. It is more plausible when the letter is addressed to the buyer authorizing the seller to draw, or when it is addressed to the seller but is delivered to the buyer and by him sent to the seller.

This theory is not wholly satisfactory. It confers upon the seller only equitable or derivative rights. Any defense which the bank might have against the buyer prior to notice of the assignment could be set up against the seller. Thus fraud in the inception would vitiate the transaction as against the seller.<sup>113</sup>

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<sup>111</sup> See *Hindley & Co. v. Tothill, Watson & Co.*, 13 N. Z. L. R. 13 (C. A. 1894); *Union Bank of Canada v. Cole*, 47 L. J. Q. B. 100 (C. A. 1877); *Prehn v. Royal Bank of Liverpool*, L. R. 5 Ex. 92 (1870); *In re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation*, L. R. 2 Ch. App. 391 (1867); *In re Agra Bank, Ex parte Tondeur*, L. R. 5 Eq. 160 (1867).

<sup>112</sup> See *Kuehne v. Union Trust Co.*, 133 Mich. 602, 95 N. W. 715 (1903); *Larfargue v. Harrison*, 70 Cal. 380, 11 Pac. 636 (1886); *Nelson v. First National Bank of Chicago*, 48 Ill. 36 (1868); *Duncan v. Edgerton*, 19 N. Y. Super. Ct. (6 Bosw.) 36 (1860); *Baring v. Lyman*, Fed. Cas. No. 983 (1841).

<sup>113</sup> See POMEROY, *EQUITY JURISPRUDENCE*, 4 ed., §§ 703, 704 (1918). See also 1 WILLISTON, *CONTRACTS*, §§ 432, 433 (1920).

In order to preclude the setting up of these defenses it would be necessary to go a step further and find a novation assented to in advance by the seller. Thus, where the sales contract provides that the buyer shall procure an irrevocable letter of credit, this amounts to an assent in advance by the seller to release the buyer from obligations of payment in return for the procurement of the letter of credit. The buyer procures the letter of credit, which amounts to an immediate assignment to the seller of the buyer's contract right against the bank. The transaction contains an immediate notice to the bank and a promise by the bank to pay. Defenses against the buyer-assignor which exist at the time of the novation could not be availed of against the seller-assignee by the obligor-bank even though the obligor-bank were ignorant of them at the time of the novation. If there is a novation the seller would have no right against the buyer, and the buyer would have no right against the bank. There is some indication that the courts might take this further step.<sup>114</sup>

*7. Does the Letter of Credit Amount to a Representation that the Issuing and Drawee Banks have Received Money or its Equivalent to the Use of the Seller which the Banks are Estopped to Deny after the Seller has Acted in Reliance thereon?*

It is necessary to examine one other theory that has been advanced to explain the letter of credit transaction before our analysis of the first aspect, the rights of the seller, the accredited party, against the issuing and drawee banks, is complete. It has been argued<sup>115</sup> that the confirmed and irrevocable letters of credit amount to a representation that the issuing or drawee bank has received funds from the buyer to the use of the seller which the bank is estopped to deny after the seller has acted in reliance on the representation. It is the usual thing, it is argued, for the buyer to deposit money with the issuing bank to be paid to the seller on the performance of certain conditions; if the buyer does not deposit actual money he arranges for a present loan, which amounts to the same thing, — this is the only meaning which *confirmed* and

<sup>114</sup> See *In re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation*, L. R. 2 Ch. App. 391 (1867); *Hindley & Co. v. Tothill, Watson & Co.*, 13 N. Z. L. R. 13 (C. A. 1894) (*semble*). *Contra*, *Bell v. Moss*, 5 Whart. (Pa.) 189 (1839).

<sup>115</sup> See Omer F. Hershey, "Letters of Credit," 32 HARV. L. REV. 1 (1918).

*irrevocable* can have; this is what the term *opening of credit*<sup>116</sup> means, — if the bank issues an irrevocable or a confirmed letter of credit without these preliminaries having been done it is estopped to deny the receipt of the money after the seller has acted on the representation. It is said that this theory will reconcile all the cases. It may reconcile all the cases, in the sense that estoppel can be used to explain anything, but it is submitted that this argument has no support either in fact or in judicial decision.

It has no support in fact. If the buyer actually deposits money with a bank for the use of the seller, or arranges for a present loan to the seller, different problems are raised.<sup>117</sup> But the buyer does neither of these things. It practically never happens that the purchase money under the sales contract is actually paid for the letter of credit,<sup>118</sup> although it is not unusual for the commission to be paid in advance. It is still rarer for the buyer to arrange a present loan in favor of the seller. Such would be contrary to the very purpose of the letter of credit. The purpose is to have a bank accept a time draft, to have that draft negotiated on the exchanges upon the credit of the bank, to enable the seller thus to get cash at once, to enable the buyer to receive the goods and market them before being obliged to pay for them in actual money. As one writer has put it, the issuing bank is lending not its funds but its credit.<sup>119</sup> In the last analysis, the bank which is actually supplying the money, or making the loan, is the bank which purchases the seller's drafts. Any other procedure would destroy the usefulness of the commercial letter of credit. Hence, since the buyer practically never deposits the purchase money with the issuing bank, and practically never arranges for a present loan in favor of the seller, and since the letter of credit method is well understood in the business world, how can the issue of such a letter amount to

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<sup>116</sup> But see UNITED STATES DEPARTMENT OF COMMERCE, PAPER WORK IN EXPORT TRADE, p. 131 (1920). "A credit is the contract of a banker to place a specified sum at the disposal of a client, subject to certain requirements stated therein. When the contract is made, the banker is said to have opened a credit for account of his client."

<sup>117</sup> See Harlan F. Stone, "Some Legal Problems Involved in the Transmission of Funds," 21 COL. L. REV. 507 (1921).

<sup>118</sup> For two cases where cash was paid in advance for the letter of credit, see *British Linen Co. v. Caledonian Ins. Co.*, 4 Macq. 107 (1861); *Orr & Barber v. Union Bank of Scotland*, 1 Macq. 513 (1854).

<sup>119</sup> See SILVER, p. 190.



a representation that the issuing bank has received money to the use of the seller? There is more basis for the argument of estoppel in the case of the cash credit than in the case of the acceptance credit. But as between buyer, bank, and seller the principle of the two credits is the same. In reference to the acceptance credit, there is also more basis for such an argument, simply on the words of the letter, in the case of the advice of credit opened confirmed than in the case of the irrevocable letters. But both letters mean practically the same thing. The meaning of *irrevocable* and *confirmed* is plain. The bank which issues an irrevocable letter of credit says in effect that a binding contract has been made in favor of the seller and that the bank promises to pay on certain conditions. The bank which issues an advice of credit opened confirmed says in effect that it confirms the issue of the indirect irrevocable letter of credit, and either admits the authority of the bank which issued that letter to bind it, or admits that a binding contract has been made in favor of the seller and that the bank promises to pay on certain conditions. The undertaking of the bank is promissory. The only fact which it represents is that the buyer or the correspondent bank has requested the letter of credit in the form to make a binding contract and not a revocable offer.

Courts have recognized that this is the essence of the transaction. There is nothing of a trust or an equitable assignment.<sup>120</sup> The relation is that of debtor-creditor. The mere statements in the letter of credit are not sufficient to raise an estoppel. Estoppel must depend upon the facts of the particular case.<sup>121</sup>

The House of Lords has dealt decisively with this argument of estoppel. In *Morgan v. Larivière*<sup>122</sup> the French government, as buyer, entered into a sales contract with the plaintiff, as seller, for cartridges. The seller asked for a deposit of the purchase price in a London bank. No money was deposited. But the defendant bank wrote to the plaintiff a letter of credit containing the following language: ". . . We are instructed by Mr. L. Joulin [the French ambassador] to advise you that a special credit for

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<sup>120</sup> See *Carpenter v. Sparta Savings Bank*, 182 N. Y. Supp. 172 (1920); *Taussig v. Carnegie Trust Co.*, 156 App. Div. 519, 141 N. Y. Supp. 347 (1913); *Kuehne v. Union Trust Co.*, 133 Mich. 602, 95 N. W. 715 (1903); *Roman v. Serna*, 40 Tex. 306 (1874).

<sup>121</sup> See *Low v. Bouverie*, [1891] 3 Ch. 82.

<sup>122</sup> L. R. 7 H. L. 423 (1875).

the sum of £40,000 has been opened with us in your favour, and that it will be paid to you ratably as the goods are delivered, upon receipt of certificates of reception issued by the French ambassador. . .” The French ambassador, claiming that a condition of the sales contract had not been performed, directed the cancellation of the credit. The seller filed a bill in equity for a declaration of trust. The Court of Chancery held that the letter of credit created an equitable assignment to the plaintiff of £40,000 of the funds of the French government then in the hands of the defendant, and ordered this money to be paid into court for the satisfaction of the plaintiff’s claims to the extent to which they should be proved. Upon appeal the House of Lords reversed this order. The plaintiff’s counsel argued for an estoppel, saying: <sup>123</sup>

“The declaration that they had opened a credit in favour of the Respondent was a declaration that they had control over a fund of a certain specific amount appropriated to a certain specified purpose. Surely that is the declaration of a trust as to that specified fund, and shews that the fund itself was impressed with a trust. The Appellants could not afterwards deny what they had thus written. . . .”

Lord Cairns answered this argument: <sup>124</sup>

“What is there in this letter which constitutes an equitable assignment, or what is there in it which impresses with a trust any particular sum of money? I can find no expression in this letter which could authorize such a conclusion. It appears to me to be simply a statement by a banker that he has opened a credit under instructions in favour of a particular person. That is an expression well known to bankers, and well known to all persons engaged in commerce. . . . I read this letter as being nothing more than this: a statement by bankers to a tradesman who supplies goods to a customer of the bankers that they, the bankers, on behalf of their customers, will act as paymasters to the tradesman up to a certain amount of money; but that, in order to call upon them to act as paymasters, he, the tradesman, must bring with him certain certificates shewing that the goods have been delivered to their customer. In a transaction of that kind there is nothing of an equitable assignment, there is nothing of trust; and it appears to me that any banker who had given an undertaking of that kind would be very much surprised to find that it was held that a certain portion of

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<sup>123</sup> L. R. 7 H. L. 423, 428 (1875).

<sup>124</sup> L. R. 7 H. L. 423, 432 (1875).

the funds of his customer in his hands had been impressed with a trust, had been equitably assigned, and had, in fact, ceased to be the moneys of the customer, and had become the moneys of the tradesman who was to supply the goods . . . that is the whole of this case."

In *Morgan v. Larivière*<sup>126</sup> the advice of credit opened was in the normal form. Moreover, the credit was a cash credit. Language which could not reasonably be understood to create an equitable assignment of funds actually in existence would be insufficient to estop the writer when he held in his possession no funds of the buyer.

There is only one American case which employs the doctrine of estoppel in working out the rights of the seller under an irrevocable letter of credit. The case is very illuminating when it is analyzed.

In *Johannessen v. Munroe*,<sup>126</sup> one Boe was indebted to Johannessen for a claim arising out of the breach of a charter party. Boe procured from the defendant bank the following letter of credit:

"No. 5687 OFFICE OF JOHN MUNROE & Co., Bankers  
No. 32 Nassau Street,  
New York, February 26, 1892.

"Messrs. MUNROE & Co., Paris.

"*Gentlemen:* We hereby open a credit with you in favor of Captain J. A. Johannessen, S/S Raylton Dixon, for fcs. 15,000, available in bills at 90 days date; on acceptance of any bill or bills drawn under this credit you are to draw on Carsten Boe, New York, at seventy-five days date; payable at the current rate of exchange for first-class bankers' bills on Paris on day of maturity. Commission is arranged.

"Bills under this credit to be drawn at any time prior to May 1, 1892.

Truly yours,  
JOHN MUNROE & Co.

"The bill may be availed of in sterling, if desired; say £600 sterling.  
J. M. & Co."

Boe offered this letter to Johannessen together with \$500 in full settlement of the claim. Before accepting it Johannessen

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<sup>126</sup> L. R. 7 H. L. 423 (1875).

<sup>126</sup> 84 Hun, 594, 32 N. Y. Supp. 863 (1895); 9 App. Div. 409, 41 N. Y. Supp. 586 (1896); 158 N. Y. 641, 53 N. E. 535 (1899).

inquired of the issuing bank concerning the transaction. He was informed that the letter had been issued for a valuable consideration and was good and genuine. Johannessen thereupon took the letter and the \$500 in absolute satisfaction of the debt. Shortly afterwards the issuing bank cancelled the letter of credit. The drawee bank accordingly refused to honor Johannessen's draft. Johannessen brought an action against the issuing bank. The complaint did not allege that the letter of credit was issued for a consideration. The trial court, on motion of the issuing bank, dismissed the action. The question before the Appellate Division was whether the facts stated in the complaint constituted a cause of action without the specific allegation of consideration. The court held that the letter of credit was a simple contract, and that therefore it was necessary to allege consideration, unless the plaintiff relied on estoppel to prevent the defendant from saying that he received no consideration. The court granted a new trial, saying: <sup>127</sup>

"Where it appears that the person sought to be charged, for a valuable consideration, issued a letter of credit, and that upon the faith of it the plaintiff gave value for the benefits thereunder, a cause of action is stated, and, we think, in addition, that if the plaintiff, relying upon the faith of representations or statements of defendants that the letter was issued for a valuable consideration, parted with value, then a cause of action is stated. A right to recover in such case is based on an estoppel."

One justice dissented on the ground that the issuing bank made no representation that it had received consideration from Boe.

On the second trial the plaintiff amended his complaint and obtained a judgment. The defendant bank appealed. The Appellate Division affirmed the judgment in an opinion which was practically a quotation from the first opinion.<sup>128</sup> The issuing bank thereupon took the case to the Court of Appeals. In affirming the judgment that court said: <sup>129</sup>

"The plaintiff suing here is not a stranger to this transaction, but is the party in whose favor the letter of credit was drawn. . . . We are

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<sup>127</sup> 84 Hun, 594, 598, 599, 32 N. Y. Supp. 863 (1895).

<sup>128</sup> Johannessen v. Munroe, 9 App. Div. 409, 41 N. Y. Supp. 586 (1896).

<sup>129</sup> Johannessen v. Munroe, 158 N. Y. 641, 646, 647, 648, 53 N. E. 535 (1899).

of opinion that this entire transaction, beginning with the issuing of the letter of credit and closing with the settlement referred to, presents all the elements of an estoppel, and defendants are precluded from setting up a defense based upon the alleged invalidity of the letter of credit for any cause. . . . The peculiar facts of this case control the disposition to be made of it."

Therefore, from an examination of this case it appears: (1) that there was probably a novation; (2) that the representation which gave rise to the estoppel was a representation *dehors* the letter of credit; (3) that the representation was a representation that the buyer had furnished consideration to the bank for the letter of credit, and not a representation that the bank had received money to the use of the seller; (4) that the legal question was whether there was sufficient allegation and proof that the buyer furnished consideration for the letter of credit, which bases the solution upon the theory which most American courts advocate.

In concluding a discussion of the first aspect of letters of credit, the rights of the seller, or accredited party, against the issuing and drawee banks, one thing must be emphasized: there are many types of letters of credit, and no one legal analysis will fit them all. Some letters of credit are offers; others are binding contracts from the moment of issue for which the seller furnishes the consideration as promisee; others may be contracts between the bank and the buyer for the benefit of the seller; others are contracts between the bank and the seller for which the buyer furnishes the consideration; others still may be contracts between the bank and the buyer with an assignment to the seller; there may be a novation; in exceptional cases the transaction may give rise to an estoppel. The facts of the particular transaction are controlling. But it is submitted that the usual situation, in the case of the irrevocable and confirmed letters of credit, is that the buyer furnishes the consideration for the issuing bank's promise made directly to the seller, and in those cases where agency does not exist, the issuing bank furnishes consideration for the drawee bank's promise made directly to the seller, and that this analysis, namely, that the letter of credit is a contract between the bank as promisor and the seller as promisee with the consideration moving to the promisor from one other than the promisee, is the most satis-

factory analysis in that it conforms to what the parties have in mind.

*Summary of the Rights of the Seller against the Issuing  
and Drawee Banks*

The rights of the seller against the issuing and drawee banks may be summarized as follows:

I. The authority to draw and the authority to purchase and the letter of advice are offers for unilateral contracts. As such they may be revoked at any time prior to presentation of the drafts for the first contemplated negotiation.

II. The revocable forms of the direct and indirect import letters of credit and the direct export letter of credit, and the advice of credit opened unconfirmed are offers to the seller for unilateral contracts.

III. The seller's export letter of credit is a bilateral contract between the issuing bank and the seller with consideration moving from the seller as promisee.

IV. The irrevocable forms of the direct and indirect import letters of credit, if the promise of the issuing bank does not run to the seller, may constitute contracts between the issuing bank and the buyer for the benefit of the seller.

V. Where, however, the promise runs to the seller, there is some authority that the letter constitutes an offer to the seller, and consequently is subject to revocation or modification as long as it remains an offer.

VI. There is some indication that in England the irrevocable forms of the letter of credit would be regarded as constituting contracts with the buyer which are assigned immediately to the seller.

VII. There is some American authority to the effect that the letter of credit amounts to a representation and that consequently the seller acquires a legal right against the issuing bank as soon as he acts in reliance thereon. This, however, rests upon the authority of one case only, which can be explained on its own facts, and the general proposition is unsound.

VIII. By the better and more recent view — and the trend of American decision is in this direction — the irrevocable forms

of the letter of credit are contracts between the seller as promisee and the bank as promisor with the consideration moving to the promisor from one other than the promisee. These letters of credit confer upon the seller legal rights against the bank from the moment of issue. Thus:

(1) The seller has an immediate contract right, subject to conditions, against a bank which issues a direct or an indirect import letter of credit in the irrevocable form.

(2) The seller, under an indirect letter of credit in the irrevocable form, has an immediate contract right, subject to conditions, against the drawee bank, provided the issuing bank is agent for the drawee bank.

(3) But in the absence of agency the seller acquires no contract right against the drawee bank unless and until it issues its own direct irrevocable export letter of credit, or its advice of credit opened confirmed.

In a future article an examination will be made of:

III. Rights of the purchasing bank against the issuing and drawee banks.

1. Rights under the letter of credit as a contract.
2. Rights on the bill of exchange: (a) Against the issuing and drawee banks as acceptor.
3. Rights on the bill of exchange: (b) Against the issuing and drawee banks as drawer.
4. Effect of revocation of the letter of credit.

IV. Rights of the issuing and drawee banks.

1. Relation of the sales contract to the letter of credit.
2. Conditions.
3. Conduct of the buyer.
4. Conduct of the seller.
5. Right to the goods.

V. The suretyship element in the letter of credit transaction.

VI. Assignability of the letter of credit.

*William E. McCurdy.*

HARVARD LAW SCHOOL.

*(To be concluded.)*

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WILL ACQUIESCENCE VALIDATE AN IRREGULARLY ADOPTED STATE CONSTITUTIONAL AMENDMENT? — It has almost universally been held by state courts that the validity of the adoption of a constitutional amendment is a judicial question.<sup>1</sup> Of the expediency of a proposed change the final determination rests with those bodies to whom the constitution in question has delegated the amending power.<sup>2</sup> Under the typical state constitution, the valid exercise of this power requires the concurrence of two conditions: (1) the expression of assent to the amendment by the prescribed proportions of the legislature and electorate; and (2) that this expression be accomplished by a prescribed procedure involving certain ministerial acts. Whether or not these latter requirements are met in a given case is in its nature a judicial question.<sup>3</sup>

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<sup>1</sup> *McConaughy v. Secretary of State*, 106 Minn. 392, 119 N. W. 408 (1909); *State v. Powell*, 77 Miss. 543, 27 So. 927 (1900); *Rice v. Palmer*, 78 Ark. 432, 96 S. W. 396 (1906); *Bott v. Secretary of State*, 63 N. J. L. 289, 43 Atl. 744 (1899); *Ellingham v. Dye*, 178 Ind. 336, 99 N. E. 1 (1912).

<sup>2</sup> See COOLEY, *CONSTITUTIONAL LIMITATIONS*, 7 ed., 62, 63; *Varney v. Justice*, 86 Ky. 596, 6 S. W. 457 (1888); *Mulnix v. Mutual Benefit Life Ins. Co.*, 23 Colo. 71, 46 Pac. 123 (1896).

<sup>3</sup> But whether or not a constitution has been properly adopted has usually been considered a political question. A court holding office under the old constitution might not legally *in totobesse* if the new one were valid and hence would be incapable of decid-



Therefore, on the accepted theory that constitutional provisions are mandatory,<sup>4</sup> state courts have frequently held that amendments never became part of the constitution in cases where some one of the procedural details required by the amending clause had been omitted.<sup>5</sup> There is a body of authority, however, which considers such provisions directory rather than mandatory, so that substantial compliance therewith is deemed sufficient to validate the amendment.<sup>6</sup> It is true that the usual state constitution of to-day is a lengthy document replete with detailed provisions, but it would seem a dangerous rule to allow any words in it to be interpreted in such fashion as to make them nugatory. A constitution is the fundamental law adopted by the people for their government and none of its contents can be considered mere surplusage.<sup>7</sup> The requirements of the amending clause are the greatest safeguards against hasty and ill-advised tampering with a constitution. Yet courts which take the second view insist that "substance of right is grander and more potent than method of form,"<sup>8</sup> and then declare that the procedural provisions are only matters of form. An examination of these cases will show that in the majority the courts need not have laid down so broad a rule, as they are supportable on the theory that an ambiguous constitutional provision may be reasonably construed.<sup>9</sup>

But where an irregularly adopted amendment has been acquiesced in by the various departments of the state government and by the people over a period of time, the courts may well feel loath to disturb rights which have become vested before the validity of the amendment is questioned. Logically it would seem that no distinction could be

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ing the problem judicially. See *Miller v. Johnson*, 92 Ky. 589, 18 S. W. 522 (1892); *Brickhouse v. Brooks*, 165 Fed. 534 (E. D. Va., 1908); *McConaughy v. Secretary of State*, *supra*. And see *Luther v. Borden*, 7 How. (U. S.) 1 (1849).

Whether or not a federal court may declare a state constitutional amendment invalid for some non-compliance with the requirements of the state constitution is disputed. See *Smith v. Good*, 34 Fed. 204 (D. R. I., 1888); *Knight v. Shelton*, 134 Fed. 423 (E. D. Ark. W. D., 1905).

<sup>4</sup> See *COOLEY, op. cit.*, 114.

<sup>5</sup> *Johnson v. Craft*, 205 Ala. 386, 87 So. 375 (1921); *Koehler v. Hill*, 60 Iowa, 543, 14 N. W. 738, 15 N. W. 609 (1883); *McBee v. Brady*, 15 Idaho, 761, 100 Pac. 97 (1909); *State v. Tuffy*, 19 Nev. 391, 12 Pac. 835 (1887). See *Opinion of the Justices*, 6 Cush. (Mass.) 573 (1833); 5 MINN. L. REV. 551. This result is necessarily reached in Montana, where the constitution expressly states that all its provisions are mandatory. *State v. Tooker*, 15 Mont. 8, 37 Pac. 840 (1894); *Durfee v. Harper*, 22 Mont. 354, 56 Pac. 582 (1899).

<sup>6</sup> *Prohibitory Amendment Cases*, 24 Kan. 700 (1881); *West v. State*, 50 Fla. 154, 39 So. 412 (1905); *State v. Winnett*, 78 Neb. 379, 110 N. W. 1113 (1907); *Oakland Paving Co. v. Tompkins*, 72 Cal. 5, 12 Pac. 801 (1887); *State v. Herried*, 10 S. D. 109, 72 N. W. 93 (1897).

<sup>7</sup> *COOLEY, op. cit.*, 114.

<sup>8</sup> *Brewer, J.*, in *Prohibitory Amendment Cases, supra*, at 710. The court went on to say that the only essential features of the amending process are the assent of the required proportion of the legislature and popular approval.

<sup>9</sup> Failure to enter the amendment in full on the House and Senate journals is the most frequent cause for attack on the validity of amendments. Where the constitution merely requires that the amendment be entered on the journals, without using the words "in full," many courts have construed an entering by title or identifying reference to be a sufficient compliance with the constitutional mandate. *Prohibitory Amendment Cases, supra*; *Oakland Paving Co. v. Tompkins, supra*; *State v. Herried*,

drawn between an allegedly void amendment immediately attacked and one whose validity is not challenged for many years. If it did not become a part of the constitution originally, how can the passing of time give it life? There is no presumption<sup>10</sup> of validity from mere acquiescence.<sup>11</sup> Yet there are a few instances where such amendments have been held valid after long executive, legislative, and popular recognition.<sup>12</sup> The language of some of the courts tends to give the impression that the constitutional requirement which was not complied with was considered merely directory.<sup>13</sup> But it will be noted that in each case the amendment attacked was one which made essential changes in the structure of the government and whose overthrow would so disrupt the functions of the state and destroy vital individual interests secured in reliance upon it that a situation approaching partial anarchy would be created.<sup>14</sup> In such a case the long acquiescence has had the effect of weaving the amendment almost indissolubly into the political fabric. A situation has arisen where the political aspect of the case has become so prominent as to override the possible result of a judicial inquiry.<sup>15</sup> Rather than disintegrate the political and social system of the state, courts

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*supra*; *Ex parte Ming*, 42 Nev. 472, 181 Pac. 319 (1919); *In re Senate File 31*, 25 Neb. 864, 41 N. W. 981 (1889). Where the words are susceptible of two reasonable meanings, courts will construe them in favor of that meaning which will validate the amendment. See *Hammond v. Clark*, 136 Ga. 313, 71 S. E. 479 (1911).

<sup>10</sup> It is true that acquiescence by the legislature in the exercise of one of its powers by the executive may raise a presumption that the executive act is valid. *United States v. Midwest Oil Co.*, 236 U. S. 459 (1915). In such a case the legislative assent does not create a new power in the executive but merely ratifies an act done by him. See 28 HARV. L. REV. 613. But in the case of a constitutional amendment the legislative power is usually non-delegable. As regards statutes, see *COOLEY, op. cit.*, 106, and cases cited.

<sup>11</sup> An interesting *dictum* as to the possibility of amending the Federal Constitution by acquiescence occurs in the recent case of *Leser v. Garnett*, 114 Atl. 840 (Md. 1921). The plaintiff attempted to show that the 19th Amendment was beyond the amending power. He sought to distinguish the 15th Amendment on the ground that acquiescence in it for fifty-one years was equivalent to express ratification by the states. In dismissing this contention, the court said (p. 846): "We cannot, in the face of the direct language of the Constitution describing the manner in which it may be amended, recognize the doctrine of amendment by acquiescence as a valid substitute for that method."

<sup>12</sup> *Nesbit v. People*, 19 Colo. 441, 36 Pac. 221 (1894); *Weston v. Ryan*, 70 Neb. 211, 97 N. W. 347 (1903); *Secombe v. Kittelson*, 29 Minn. 555, 12 N. W. 519 (1882).

<sup>13</sup> See *Nesbit v. People, supra*.

<sup>14</sup> In *Nesbit v. People, supra*, the amendment attacked provided that the biennial legislative sessions should be lengthened from forty to ninety days. Five successive legislatures over a period of nine years had sat for ninety days, and it was proved that 95 per cent of the legislation enacted at each session was passed during the last fifty days of the session. The court declined to rule that the amendment was invalid, stating that to do so would not only "affect rights and interests . . . in a degree wholly irreparable, but would disorganize the different departments of government . . . to such a degree as to almost produce a state of anarchy."

<sup>15</sup> See *DODD, REVISION AND AMENDMENT OF STATE CONSTITUTIONS*, 222-225. See also *Secombe v. Kittelson, supra*, note 11, and *Smith v. Good, supra*, note 3, in which cases there is language which suggests that the courts considered the validity of an amendment as well as of a constitution a political question. In this connection the word "political" indicates a situation in which the courts will not question the acts of the legislature or executive for reasons of policy or expediency.

will inevitably decline to interfere, permitting the governmental and popular recognition<sup>16</sup> of the amendment to control.<sup>17</sup>

These cases, however, must be deemed exceptional and not to be followed as general authorities. In a recent case in Alabama,<sup>18</sup> in which no such fatal consequences would have ensued from a refusal to sustain the amendment, the Supreme Court of that state was clearly right in declining to pronounce valid an irregularly adopted amendment, although that court itself had previously decided a case<sup>19</sup> under the amendment in question and it had been recognized by the political departments of the state. When constitutional provisions are unambiguous, courts ought not to yield to considerations of expediency in expounding them,<sup>20</sup> unless the situation has got beyond their control.

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EFFECT OF SECOND MORTGAGE ON THE RIGHTS OF A PARTY SUBROGATED TO THE SECURITY OF THE FIRST MORTGAGEE. — To secure a debt, D, holding an unincumbered fee in Blackacre, executed a first mortgage upon it in favor of C, who had the mortgage duly recorded. In the jurisdiction, it gave C a legal lien on the property. D then misapplied money belonging to S in paying the debt, C receiving it without notice of the wrong. This payment was not recorded. Later, D executed a second mortgage on Blackacre to P, who paid value and had no knowledge of the mortgage to C. Having discovered the misapplication of his money, S seeks to come in ahead of P against the security, claiming subrogation to the rights of C under the first mortgage.<sup>1</sup>

Subrogation is an equitable doctrine.<sup>2</sup> It seeks to afford to a party

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<sup>16</sup> It might also be argued that these cases could be rested on the proposition that since the ultimate power rests in the people, they may amend their constitution in a manner other than that therein provided. That is to say, that it is possible for the people by acquiescing in an amendment to place it in the constitution despite the procedural omission of their agent, the legislature. Whether in a given case such power has been exercised would be for the court to determine. But in order to support this argument it must be conceded that the situation, though analogous to one of private agency, is sufficiently dissimilar, so that it is possible for the people thus to adopt the amendment without knowledge of the legislative omission. Moreover, the court cannot affirmatively deny the constitution under which it acts.

<sup>17</sup> As a corollary to the proposition that the proper adoption of a constitution is a political question (see note 3, *supra*), acquiescence by the departments of a state government in a new constitution establishes its validity. *Taylor v. Commonwealth*, 101 Va. 829, 44 S. E. 754 (1903); *Brickhouse v. Brooks*, *supra*.

<sup>18</sup> *Hooper v. State*, 89 So. 593 (Ala., 1921). For the facts of this case, see RECENT CASES, *infra*, p. 615.

<sup>19</sup> *Cornelius v. Pruet*, 204 Ala. 189, 85 So. 430 (1920).

<sup>20</sup> See *Ellingham v. Dye*, *supra*, note 1; *COOLEY, op. cit.*, 107n.

<sup>1</sup> *McCullough v. Elliott*, [1921] 3 W. W. Rep. 361. For the facts of this case, see RECENT CASES, *infra*, p. 624. The holding of the court in favor of S was probably influenced by the fact, appearing from language in the decision, that P took his lien only upon the interest which D actually had at the time, whatever that interest might be. Upon this view of the case the decision was clearly right.

In the principal case, D had applied S's money in only partial liquidation of C's mortgage before P's mortgage was taken. This does not affect the problems presented by the case, however, since S did not seek subrogation until after C's claim had been entirely satisfied.

<sup>2</sup> The theory of subrogation is that, though payment to the creditor extinguishes the primary obligation of the debtor to him at law, equity recreates it, *eo instante*, in

whose property has been used<sup>3</sup> in the payment of another's debt every advantage by way of priority<sup>4</sup> or security<sup>5</sup> which the creditor had for enforcing his claim. But if, when a secured debt is paid by the use of the money of a third person, the entire legal interest becomes revested in the debtor, and if by the doctrine of subrogation the third party acquires only equitable rights in the security, these rights will be of no avail against a subsequent *bona fide* purchaser or mortgagee of the security. To determine the relative rights of the third person and the subsequent purchaser or mortgagee, the inquiry must be directed (1) to the nature of the interest which the mortgagor had in the security at the time of the execution of the second mortgage and (2) to the effect of the record as notice.

At common law, a mortgage is a conveyance of land as security for the payment of a debt within a specified time.<sup>6</sup> Upon due payment of the debt, the security is discharged, and title reverts in the mortgagor without the necessity of a reconveyance.<sup>7</sup> *A fortiori*, a reconveyance is not required if, instead of giving the mortgagee a defeasible title, the mortgage is regarded as creating only a legal lien.<sup>8</sup> Under either theory, if payment is made at or before maturity,<sup>9</sup> the most that equity can do is to place D under an obligation to hold the security in trust for S, and P will prevail unless the record can be relied upon as notice of S's interest.

If, however, under the common-law theory, payment is not made till after the law day, the condition upon which the mortgagee's title is defeated is not complied with, and the mortgagor is forced to procure a reconveyance before his legal title is revested.<sup>10</sup> Meanwhile, the mortgagee holds the legal title in constructive trust for the mortgagor, who continues to hold the equity of redemption. But since, in the principal

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favor of the party subrogated, and it further seeks to secure for this party whatever rights and advantages, subordinate to this primary obligation, the creditor may have had to enforce performance. It thus has a double effect. See C. C. Langdell, "A Brief Survey of Equitable Jurisdiction," 1 HARV. L. REV. 55, 68-70; 3 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 1211; 2 WILLISTON, CONTRACTS, § 1265.

<sup>3</sup> There is some slight authority that subrogation was granted originally only in the case of sureties. See *Heuser v. Sharman*, 89 Iowa, 355, 359, 56 N. W. 525, 526 (1893). It was later applied to cover cases of payment under compulsion or in order to protect an interest of the payer. *Emmert v. Thompson*, 40 Minn. 386, 52 N. W. 31 (1892); *Bank of Ipswich v. Brock*, 13 S. D. 409, 83 N. W. 436 (1900). See *SHELDON, SUBROGATION*, 2 ed., § 3. The tendency has been to extend it to all cases which in equity and good conscience merit such relief. See 26 HARV. L. REV. 261. Cf. 15 *Id.* 494; 16 *Id.* 307, commenting on *Thurstan v. Nottingham, etc., Society*, [1901] 1 Ch. 88; [1902] 1 Ch. 1; [1903] A. C. 6. The principal case is quite in harmony with this tendency.

<sup>4</sup> *Re Pathé Frères Phonograph Co. of Canada, Ltd.*, 20 Ont. W. Notes 476 (1921); *Love v. North America Co.*, 229 Fed. 103 (8th Circ., 1915).

<sup>5</sup> See 2 WILLISTON, CONTRACTS, §§ 1266-1268.

<sup>6</sup> Strictly speaking, payment must be made on a specified day. As to the effect of payment before the law day, see 1 JONES, MORTGAGES, 6 ed., §§ 886, 887.

<sup>7</sup> *Merrill v. Chase*, 3 Allen (Mass.) 339 (1862); *Town of Clinton v. Town of Westbrook*, 38 Conn. 9 (1871).

<sup>8</sup> *Shields v. Lozeau*, 34 N. J. L. 496 (1860); *Kortright v. Cady*, 21 N. Y. 343 (1860).

<sup>9</sup> If payment was made by a third person, a different result might be reached by an agreement for the assignment of the security. The rights of the third person would then be measured by the agreement. *Smith v. Commercial Nat'l Bank*, 7 S. D. 465, 64 N. W. 529 (1895); *Freeman v. M'Gaw*, 15 Pick. (Mass.) 82 (1833).

<sup>10</sup> See 1 JONES, MORTGAGES, 6 ed., § 889.

case, the mortgagor, D, has paid his debt by a fraud on S, and S is in equity entitled to repayment out of the security, this equitable interest will, in turn, in the hands of D,<sup>11</sup> be subject to a constructive trust in favor of S.<sup>12</sup> If, however, there is a subsequent assignment of this interest by D to a *bona fide* purchaser, the rights of the *cestui*, S, should, it is submitted,<sup>13</sup> be cut off. Aside from whatever effect the record may have, therefore, P should take his mortgage free and clear.

Under the lien theory, the analysis is different. The life of the lien is the debt, and whenever this is discharged, the lien is ordinarily extinguished with it.<sup>14</sup> Nevertheless, in form, the mortgage is a conveyance upon condition subsequent that the debt be paid on a certain day. If the condition is not satisfied, the automatic reversioning of title in the mortgagor on payment of the debt is somewhat anomalous, but the effect is something like that in cases of estoppel by deed. But, whereas in estoppel by deed the shooting of title is based on a legal obligation, in this case it is based on an equitable obligation.<sup>15</sup> In *Eyre v. Burmester*,<sup>16</sup> which

<sup>11</sup> In the principal case, there is no direct right from C to S. The position of C is that of an innocent transferee of a *res* which the transferor held in trust for a *cestui* and which he agreed to return to the transferor upon a condition subsequent. If the transferee knows that the transferor is about to commit a second breach of trust if the *res* is returned to him, to return it would be to collude in a breach of trust, and in that case there is a direct right in favor of the *cestui*. See Austin W. Scott, "The Nature of the Right of the *Cestui Que Trust*," 17 COL. L. REV. 269, 282, *et seq.*; 11 COL. L. REV. 686. But if there is no reason to believe that the transferor will deal with it improperly, it seems that the transferee, holding now subject to the trust, and further, having agreed to return the *res* to the trustee, is under a duty only to carry out this agreement. See HUSTON, ENFORCEMENT OF DECREES IN EQUITY, 138; Austin W. Scott, "Participation in a Breach of Trust," 34 HARV. L. REV. 454. Indeed, some cases have gone so far as to hold that even when there is collusion between the trustee and his transferee, the *cestui* obtained no direct right against the latter. *Parker v. Hall*, 2 Head (Tenn.) 641 (1859); *Hart v. Citizens' National Bank*, 105 Kan. 434, 185 Pac. 1 (1919). Such decisions are, however, insupportable. See 33 HARV. L. REV. 738; 20 COL. L. REV. 489.

<sup>12</sup> There need be no fiduciary relation between the parties. *Newton v. Porter*, 69 N. Y. 133 (1877); *Pioneer Mining Co. v. Tyberg*, 215 Fed. 501 (9th Circ., 1914). *Contra*, *Campbell v. Drake*, 4 Ired. Eq. (N. C.) 94 (1844).

<sup>13</sup> This proposition is based upon the theory that, though equity will not aid even an innocent purchaser in obtaining that to which he may be equitably entitled but the securing of which would cause the completion of a breach of trust, it will nevertheless not take from him that which he has already completely secured, whether it be a legal or an equitable interest. See J. B. Ames, "Purchase for Value Without Notice," 1 HARV. L. REV. 1. See also Ames, "The Doctrine of Price v. Neal," 4 HARV. L. REV. 297. If the assignment to P does divest D of all his equitable interest, P will prevail, despite S's prior equity which D merely held in trust. *Sturge v. Starn*, 2 M. & K. 195 (1833); *Lane v. Jackson*, 20 Beav. 535 (1855); *Penny v. Watts*, 2 De G. & Sm. 501 (1850); *Re French's Estate*, 21 L. R. Ir. 283 (1887). By the weight of authority at present, however, the prior equity will prevail. *Cave v. Cave*, 15 Ch. D. 639 (1880); *Hill v. Peters*, [1918] 2 Ch. 273. See Phillips v. Phillips, 4 De G., F. & J. 208 (1861). See also 2 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 682 *et seq.*

<sup>14</sup> *Shields v. Lozeau*, *supra*; *Kortright v. Cady*, *supra*. See 1 JONES, MORTGAGES, 6 ed., § 889.

<sup>15</sup> In this respect, the principal case is stronger than estoppel by deed for the point taken below (see *infra*), that the equities of the situation may govern the automatic operation of rules of law. Here, the equities of the situation need control only an equitable obligation, upon which the shooting of the title depends, whereas in estoppel by deed they control the legal obligation upon which the operation of the estoppel rests.

<sup>16</sup> 10 H. L. CAS. 90 (1862). See SCOTT, CASES ON TRUSTS, 674, note.

was a case of estoppel by deed, when the grantor acquired his interest subject to the equity of a third person, it was held that title did not shoot to the grantee.<sup>17</sup> In the principal case, to permit the automatic shooting of title from the mortgagee to the mortgagor might endanger<sup>18</sup> the equity of a third person, and it might well be similarly held that the title remained, therefore, in the mortgagee.<sup>19</sup> D would again have only an equity, and the results would be the same as under the common-law theory.

Wherever S's rights are subject to be cut off by a subsequent<sup>20</sup> *bona fide* purchase, the effect of the record as notice becomes of the first importance.<sup>21</sup> The record contains no reference to S; but it does show an outstanding claim against the property. Though this claim has been legally extinguished, an equitable interest in it still remains. The presence of this apparently outstanding claim on the record should put a reasonable purchaser on his inquiry as to its discharge.<sup>22</sup> If, after due diligence, he learns only that C has been paid and nothing of S's rights, he should be protected.<sup>23</sup> But to require the inquiry first, seems most in accord with the policy behind the recording acts.

<sup>17</sup> See 35 HARV. L. REV. 456.

<sup>18</sup> In this respect, the principal case is weaker than estoppel by deed for the argument here advanced, because there, the shooting of title would cut off the equity of a third person, whereas in the principal case it would only endanger it. However, the analogy is close. See note 15, *supra*.

This whole argument on the analogy to estoppel by deed is based upon the hypothesis that the assignment of an equitable interest to a *bona fide* purchaser will not cut off a prior equity. Otherwise, the failure of legal title to shoot to D would not afford any greater protection to S than if it did become revested in him. This hypothesis is against the view here advocated, but since we are considering the protection of S's interest as a matter of actual practice, we should take notice of the law as it is. As above stated, note 13, *supra*, the law is at present in accord with the doctrine of Cave v. Cave, *supra*, and this argument is, therefore, relevant.

<sup>19</sup> Of course equity is ordinarily powerless to control the situation at law. J. R. v. M. P., Y. B. 37 HENRY VI., folio 13, pl. 3. In addition to the exception cited, however, there is also the familiar one under the Statute of Uses, which, whenever it executes a use, reproduces the equitable situation at law.

<sup>20</sup> If the second mortgage was taken before the extinguishment of the legal interest of C, S should prevail. This would be almost the exact case of Eyre v. Burmester, *supra*. Cf. notes 15 and 18, *supra*.

<sup>21</sup> The record itself does not generally control the transmission of title directly. See WEBB, RECORD OF TITLES, §§ 4-6. Town of Clinton v. Town of Westbrook, *supra*.

<sup>22</sup> So far as the record shows, C is the only one entitled to have it cancelled, and it seems necessary that he be consulted. But if resort to him fails to put P on notice of S's rights, and if, still with no reason to suspect their existence, he takes the encumbrance, he should be protected.

<sup>23</sup> In McCullough v. Elliott, note 1, *supra*, there is a *dictum* to the effect that had the record of the senior incumbrance been cancelled, the plaintiff would still have been entitled to subrogation over a subsequent incumbrancer whose incumbrance had not been taken nor his position changed in reliance on the records showing the discharge. In support of this *dictum* Home Savings Bank v. Bierstadt, 168 Ill. 618, 48 N. E. 161, is cited, which contains also only a *dictum*. This view, however, apparently overlooks the fact that the right of the party subrogated cannot be greater than the original right of the creditor, which was limited by the recording act. See 3 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 1214.

RIGHTS IN LITERARY PROPERTY. — Wholly apart from statute, the author of every original work<sup>1</sup> of literature, science, or art,<sup>2</sup> has therein well-recognized legal rights. So soon as he has embodied his concept in a material form which renders it capable of identification, the common law<sup>3</sup> secures to him the product of his intellectual labors. He has the option of withholding it altogether from the knowledge of others or of originally giving it to the world.<sup>4</sup> And this control of the first publication is independent of any property in the material object which records and preserves his thought. Its basis is a right of property<sup>5</sup> in something incorporeal, — the arrangement and connection of words and ideas in a literary composition, or the collocation of sounds in a musical composition, — which vests irrespective of the intrinsic merits of the composition or of any intention on the author's part to publish it.<sup>6</sup> This property is subject to the same rules of transfer<sup>7</sup> and succession<sup>8</sup> which govern all other personal property.<sup>9</sup> It is protected by the same remedies<sup>10</sup> in so far as they are applicable. Once the author makes a general publication of his work, however, it becomes *publici juris*, and all the individual's rights in it at common law are extinguished.<sup>11</sup> Any communication or disclosure by the author which permits an unrestricted use of the subject matter by the public, or by those members of the public to whom it may be committed, is a general publication.<sup>12</sup> Thereafter the only protection afforded to the author is that which he may have secured by complying with the copyright laws. Such compliance assures to the author, as a substitute for the common-law rights which he must surrender, narrower rights to be measured by the terms of the

<sup>1</sup> This statement is sometimes made with the qualification that the work must be innocent in character. In *Southey v. Sherwood*, 2 Meriv. 435 (1817), an injunction was denied on the ground that the poem in question was libelous, for which reason the plaintiff would be barred from a recovery at law. There may be a sound policy in denying the protection of the copyright laws to one who publishes immoral, blasphemous, or libelous matter. But it is another thing to refuse an injunction to an author seeking to suppress all publication of the same. See SHORTT, *LAW OF LITERATURE*, 2 ed., 6.

<sup>2</sup> These rights may be had in books, dramatic or musical compositions, paintings, etchings, or other artistic or literary productions. See WEIL, *COPYRIGHT LAW*, § 267.

<sup>3</sup> These common-law rights have been abrogated in England by the Copyright Act of 1911, 1 & 2 GEO. 5, c. 46, § 31. The Act gives Copyright in unpublished as well as in published works (*id.*, § 1) for the life of the author and for a period of fifty years after his death (*id.*, § 3). See [1911] L. R. STAT. 182.

<sup>4</sup> *Bartlett v. Crittenden*, 5 McLean (U. S.) 32 (D. Ohio, 1849); *Palmer v. De Witt*, 47 N. Y. 532 (1872); *Prince Albert v. Strange*, 2 De G. & Sm. 652 (1848). See Sanborn, J., in *Harper Bros v. Donahue & Co.*, 144 Fed. 491, 492 (N. D. Ill., E. D., 1905).

<sup>5</sup> *Palmer v. De Witt*, *supra*. See Warren and Brandeis, "The Right to Privacy," 4 HARV. L. REV. 193, 205: "... the protection afforded to thoughts, sentiments and emotions, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone."

<sup>6</sup> *Woolsey v. Judd*, 4 Duer (N. Y.) 379 (1855); *Baker v. Libbie*, 210 Mass. 599, 97 N. E. 109 (1912).

<sup>7</sup> See *infra*, n. 14.

<sup>8</sup> *Queensberry v. Shebbeare*, 2 Eden 329 (1758).

<sup>9</sup> An able court has held literary property not to be leviable. *Dart v. Woodhouse*, 40 Mich. 399 (1879).

<sup>10</sup> See *Mansell v. Valley Printing Co.*, [1908] 2 Ch. 441, 446.

<sup>11</sup> *Wheaton v. Peters*, 8 Pet. (U. S.) 591 (1834); *Holmes v. Hurst*, 174 U. S. 82, 85 (1899).

<sup>12</sup> Cf. *Werckmeister v. American Lithographic Co.*, 134 Fed. 321 (2d. Circ., 1904).

particular statute.<sup>13</sup> Originally designed to protect the author's pecuniary interest in subsequent printings of his manuscript, copyright acts have uniformly granted a limited monopoly on the multiplication and disposition of copies thereof. The present American Act goes further, but it is at least doubtful whether even it covers all possible methods of reproduction.

The right of sale and transfer, an inseparable incident of all chattel property, attaches equally to literary property.<sup>14</sup> An author may sell his work, absolutely or conditionally.<sup>15</sup> The absolute sale and delivery of an unpublished manuscript carries with it *prima facie* the right to the first publication, but is not in itself a publication unless the parties so intend it.<sup>16</sup> However, parting with the manuscript does not necessarily involve a surrender of the right to publish, which may separately be transferred or retained.<sup>17</sup> If the author confers rights in any manner, reserving to himself the control of the first publication, the result is a mere license.<sup>18</sup> On the other hand, an assignment<sup>19</sup> without reservation vests the entire property in the assignee.<sup>20</sup> The latter has the right to publish the manuscript in the original or in an altered form, without incurring any liability in trespass to the author.<sup>21</sup>

A recent New York case<sup>22</sup> furnishes an interesting application of the foregoing principles. The defendant composer of a song sold all his rights therein to the plaintiff. He then copyrighted the composition under a slightly different name, sold copies of it, and licensed other defendants to reproduce it upon phonograph records. The court on demurrer rightly held that the plaintiff was upon these allegations entitled to injunctive relief against all the defendants. The sale vested in him the right to the first publication: The composer, having left no interest whatsoever in the subject matter, did not better his position by the attempted copyrighting.<sup>23</sup> Obviously, the printing and vending of copies by this wrongdoer could not constitute a general publication,<sup>24</sup> which the statute makes a condition to the obtaining of a copyright.<sup>25</sup>

<sup>13</sup> Cf. *Bobbs-Merrill Co. v. Straus*, 147 Fed. 15 (2d. Circ., 1906).

<sup>14</sup> *Parton v. Prang*, 3 Cliff. (U. S.) 537 (D. Mass., 1872). See *Palmer v. De Witt*, 47 N. Y. 532, 540 (1872); See *WELL, COPYRIGHT LAW*, § 277-282.

<sup>15</sup> *Press Pub. Co. v. Monroe*, 73 Fed. 196, 198 (2d. Circ., 1896); Cf. *Paige v. Banks*, 13 Wall. (U. S.) 608, 614 (1871).

<sup>16</sup> *Parton v. Prang*, *supra*, at 550.

<sup>17</sup> *American Tobacco Co. v. Werckmeister*, 207 U. S. 284 (1907).

<sup>18</sup> See *Werckmeister v. American Lithographic Co.*, *supra*, at 325; *Daly v. Walrath*, 40 App. Div. 220, 57 N. Y. Supp. 1125 (1899). Cf. *Public Ledger v. New York Times*, 275 Fed. 562 (S. D. N. Y., 1921).

<sup>19</sup> An oral assignment is valid in the absence of statute. *Callaghan v. Meyers*, 128 U. S. 617, 658 (1888); *White-Smith Pub. Co. v. Apollo Co.*, 139 Fed. 427, 429 (S. D. N. Y., 1905).

<sup>20</sup> *Dam v. Kirk La Shelle Co.*, 175 Fed. 902, 904 (2d. Circ., 1910); *Am. Law Book Co. v. Chamberlayne*, 165 Fed. 313 (2d. Circ., 1908).

<sup>21</sup> *Am. Law Book Co. v. Chamberlayne*, *supra*.

<sup>22</sup> *Kortlander v. Bradford et al.*, 190 N. Y. Supp. 311 (Sup. Ct., 1921). For the facts of this case see *RECENT CASES*, *infra*, p. 622.

<sup>23</sup> *Ferris v. Frohman*, 223 U. S. 424, 437 (1912); *Dielman v. White*, 102 Fed. 892 (D. Mass., 1900).

<sup>24</sup> *Boucicault v. Wood*, 3 Fed. Cas. No. 1693 (N. D. Ill., 1867).

<sup>25</sup> See 1916 U. S. COMP. STAT. ANN., § 9530 (Act March 4, 1909 c. 320, § 9). See



It follows that the defendant having no rights, common-law or statutory, could by license confer none upon his co-defendants. The making of phonograph records of the song, therefore, clearly constituted an infringement of the plaintiff's common-law right to the first publication. The potential difference between the scope of this right and of those conferred by copyright laws becomes here apparent. The latter are limited and defined according to the terms and interpretation of the Act. Thus the reproduction of a song by mechanical devices has been held not to violate the exclusive right of printing and vending copies conferred by a statute.<sup>26</sup>

CONFORMITY BY FEDERAL COURTS TO STATE PROCEDURE. REV. STAT., § 914. — In determining when under the Conformity Act the federal courts will follow the state procedure, the better course is to assume they will do so in all cases, unless the particular subject matter falls within some exception to the operation of the statute, and then to find what the exceptions are. The first limitation on the statute's operation is that imposed by the words of the statute itself. It is to apply only to civil causes, other than those in equity and admiralty,<sup>1</sup> which can be assimilated to some cause known to the practice of the state courts.<sup>2</sup> When such like cause is found the statute applies from the bringing of the writ<sup>3</sup> to the rendition of judgment,<sup>4</sup> irrespective of the fact that the cause

also *Universal Film Mfg. Co. v. Copperman*, 212 Fed. 301, 302 (S. D. N. Y., 1914); *WEIL, COPYRIGHT LAW*, 393-396, 729-736.

<sup>26</sup> *Stern v. Rosey*, 17 App. D. C. 562 (1901). Cf. *White-Smith Pub. Co. v. Apollo Co.*, *supra*. See 19 HARV. L. REV. 134. However, the present federal statute makes the unauthorized reproduction of a song by mechanical devices an infringement of copyright. See 1916 U. S. COMP. STAT. ANN., § 9517 (e).

<sup>1</sup> Proceedings in equity and admiralty causes are governed by rules promulgated by the United States Supreme Court. See REV. STAT., § 917. See *Equity Rules*, 226 U. S. 629; *Admiralty Rules*, 254 U. S. 673. A state statute allowing equitable and legal causes to be combined will not be followed. *Scott v. Neeley*, 140 U. S. 106 (1891). Nor one allowing equitable defenses in actions at law. *Scott v. Armstrong*, 146 U. S. 499, 512 (1892); *Jewett Car Co. v. Kirkpatrick Constr. Co.*, 107 Fed. 622 (D. Ind., 1901). But equitable defenses may now be used in all federal courts. JUDICIAL CODE, § 274b. See 35 HARV. L. REV. 345. Nor do federal courts follow state practice in criminal proceedings. *Bryant v. United States*, 257 Fed. 378, 388 (5th Circ., 1919). Proceedings begun by attachment, to collect penalties, and to establish a will are civil causes within this statute. *Citizens' Bk. v. Farwell*, 56 Fed. 570 (8th Circ., 1893); *Atlantic, etc. R. Co. v. United States*, 168 Fed. 175 (4th Circ., 1909); *Sawyer v. White*, 122 Fed. 223, 227 (8th Circ., 1903).

<sup>2</sup> When no such analogy can be found, as in actions to confiscate property for the violation of revenue laws, the statute does not apply. *Coffey v. United States*, 117 U. S. 233 (1886); *United States v. Fourteen Pieces of Embroidery*, 155 Fed. 651 (E. D. N. Y., 1907).

<sup>3</sup> The substance of the writ is tested by the state practice. *Brown v. Chesapeake & Ohio Canal Co.*, 4 Fed. 770 (D. Md., 1880). The form of the writ is, however, governed by federal statute. See REV. STAT., § 911.

<sup>4</sup> See cases cited, note 19, *infra*. Execution and proceedings supplemental thereto are governed by federal statutes. See REV. STAT., §§ 915, 916. *Lamaster v. Keller*, 123 U. S. 376, 389 (1887); *Kaill v. Board of Directors*, 194 Fed. 73 (5th Circ., 1912). See *Chateaugay Iron Co., Petitioner*, 128 U. S. 544, 554 (1888). These statutes give remedies similar to those existing in the states, as of the time these statutes were passed. The Conformity Act contains no such limitation.

is founded on a federal <sup>6</sup> or state <sup>6</sup> statute. Its operation is then subject only to such limitations as the courts themselves have imposed in giving it its proper construction.

The first class of limitations that the courts have imposed arises from the nature of the federal courts themselves. With the exception of the United States Supreme Court they have no existence apart from Acts of Congress.<sup>7</sup> They have only that jurisdiction which is given to them by these Acts, and those powers which arise by necessary implication from the fact of their creation.<sup>8</sup> Hence they cannot follow a state practice which would change the limits of their jurisdiction,<sup>9</sup> nor one which conflicts with a federal procedural statute.<sup>10</sup> Furthermore, the Constitution and federal substantive statutes are binding on the federal courts and they cannot conform to a state practice when the result would be to deprive a litigant of the benefit of any Constitutional guarantee <sup>11</sup> or right created by Act of Congress.<sup>12</sup>

The second class of limitations arises from the nature and purpose of the statute. Its object was to protect litigants whose legal advisers had been trained in anticipation of practice under a code of procedure

<sup>5</sup> *Atlantic, etc. R. Co. v. United States*, note 1, *supra*; *Broadmoor Land Co. v. Curr*, 142 Fed. 421 (8th Circ., 1905). See *Luxton v. North River Bridge Co.*, 147 U. S. 337 (1893).

<sup>6</sup> See *Security Trust Co. v. Black River Nat. Bk.*, note 9, *infra*.

<sup>7</sup> See CONSTITUTION OF THE UNITED STATES, Art. III, §§ 1, 2. Legislation is necessary to give effect to this article. *Mutual Ins. Co. v. Champlin*, 21 Fed. 85, 89 (S. D. N. Y., 1884); *Turner v. Bank of North America*, 4 Dall. (U. S.) 8, 10 n. (1799).

<sup>8</sup> The primary source of jurisdiction of the inferior federal courts is of course found in the Constitution, but it is conferred subject to such restrictions as Congress shall prescribe. *Bankers Trust Co. v. Texas, etc. R. Co.*, 241 U. S. 295 (1916). This cannot be altered by state statute. *Bronson v. Schulten*, 104 U. S. 410, 417 (1881).

<sup>9</sup> The jurisdiction cannot be enlarged. *Cain v. Publishing Co.*, 232 U. S. 124 (1914); *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 442 (1910); *Goldey v. Morning News*, 156 U. S. 518 (1895). Nor can a state limit the jurisdiction of the federal courts by providing that when a cause of action is founded on a state statute the remedy shall be restricted to the state courts. See *Security Trust Co. v. Black River Nat. Bk.*, 187 U. S. 211, 227 (1902). Though the federal courts are courts of limited jurisdiction they are not courts of inferior jurisdiction. *M'Cormick v. Sullivan*, 10 Wheat. (U. S.) 192, 199 (1825).

<sup>10</sup> *Mexican, etc. Ry. Co. v. Duthie*, 189 U. S. 76 (1903) (amendment); *Chappell v. United States*, 160 U. S. 499, 513 (1896) (manner of trial in condemnation proceedings); *Southern Pac. Co. v. Denton*, 146 U. S. 202, 208 (1892) (district in which actions shall be brought); *Silvas v. Arizona Copper Co.*, 213 Fed. 504 (D. Ariz., 1914) (security for costs). Expressions are to be found to the effect that the Conformity Act applies only in the absence of direct legislation by Congress on a given subject. See *Berry v. Mobile & O. R. Co.*, 228 Fed. 395, 397 (W. D. Ky., 1915). A dictum in a recent case takes a more liberal view with respect to allowing amendments, in saying that in spite of provision by Congress for amendments, if the state practice is the more liberal, by force of the Conformity Act it will be followed, so long as this action is not negated by federal statute. See *Minus v. Reid*, 275 Fed. 177, 179 (4th Circ., 1921). See *Norton v. City of Dover*, 14 Fed. 106 (D. N. H., 1882). But state statutes cannot restrict the power to grant amendments. *Lange v. Union Pac. R. Co.*, 126 Fed. 338 (8th Circ., 1903).

<sup>11</sup> *Slocum v. Ins. Co.*, 228 U. S. 364, 376 (1913).

<sup>12</sup> *Hills & Co. v. Hoover*, 220 U. S. 329 (1911). See *Luxton v. North River Bridge Co.*, note 5, *supra*, at 338. The same principle applies when to conform would deprive a party of a right guaranteed by a treaty. *Harkness v. Hyde*, 98 U. S. 476 (1878). Or where it would in effect deprive a party of a right of review. *Mexican, etc. Ry. Co. v. Pinkney*, 149 U. S. 194 (1893).

or practice act, from the pitfalls of the federal mode of procedure then in force, and to secure to all litigants a fair trial.<sup>13</sup> Once the issues in the case were fairly before the court, the object of the statute was largely attained.<sup>14</sup> In view of this the statute by its terms applies only to circuit and district courts.<sup>15</sup> It does not control the manner of obtaining a review<sup>16</sup> nor appellate proceedings.<sup>17</sup> Nor does it govern the administration of the trial by the judge, but on the contrary his common-law powers are not to be encroached upon and the trial is to be conducted as his discretion shall direct.<sup>18</sup>

In spite of the far-reaching effect of these two classes of limitations

<sup>13</sup> See *Nudd v. Burrows*, 91 U. S. 426, 441 (1875).

<sup>14</sup> This object has largely been attained by such rulings as that the federal courts must conform to the state practice as to forms of action. *Scranton v. Wheeler*, 179 U. S. 141 (1900). The single exception to this is that in federal courts a writ of *mandamus* can be brought only to aid a judgment. *Chickaming v. Carpenter*, 106 U. S. 663, 665 (1882); *Davenport v. County of Dodge*, 105 U. S. 237, 242 (1881). So too the sufficiency of the pleadings is to be tested by the state practice. *Glenn v. Sumner*, 132 U. S. 152 (1889); *United States v. Atlantic, etc. R. Co.*, 153 Fed. 918 (E. D. N. C., 1907); *aff'd.*, 168 Fed. 175 (4th Circ., 1909). But where state practice allowed an action in the nature of ejectment to be founded on a purely equitable title the federal courts did not conform. *Beatty v. Wilson*, 161 Fed. 453 (D. Kan., 1908). Nor can defenses, equitable in nature, be used in federal courts by virtue of the Conformity Act. See note 1, *supra*. The scope of the pleadings is also to be tested by the state practice. *Glenn v. Sumner, supra*; *Chemung Canal Bk. v. Lowery*, 93 U. S. 72 (1876) (Statute of Limitations taken advantage of by demurrer); *Cole v. Carson*, 153 Fed. 278 (8th Circ., 1907) (matter put in issue by general denial). Hence when a case is removed from the state to the federal courts it is not necessary to file new pleadings. See *West v. Smith*, 101 U. S. 263, 264 (1879). The manner of challenging the summons, and the jurisdiction, is not, however, governed by state practice. *Meisukas v. Greenough Coal Co.*, 244 U. S. 54, 57 (1917).

<sup>15</sup> Since the passage of the Conformity Act the circuit courts have been done away with. See JUDICIAL CODE, § 289. Their functions are now performed by the district courts. See JUDICIAL CODE, § 291.

<sup>16</sup> It would seem that unfamiliarity with federal procedure as to obtaining a review would be just as prevalent, and would prejudice a litigant as much as unfamiliarity with any other step in the proceedings. It is, however, well established that the Conformity Act does not apply here. *Fishburn v. Chicago, etc. R. Co.*, 137 U. S. 60 (1890) (bill of exceptions); *Chicago Life Ins. Co. v. Tiernan*, 263 Fed. 325, 330 (8th Circ., 1920) (motion for a new trial not a condition precedent to a review); *McBride v. Neal*, 214 Fed. 966 (7th Circ., 1914) (writ of error).

<sup>17</sup> Appellate proceedings are governed entirely by acts of Congress, the common law, and ancient English statutes. *Camp v. Gress*, 250 U. S. 308, 317 (1919); *McKeon v. Central Stamping Co.*, 264 Fed. 385 (3d Circ., 1920).

<sup>18</sup> State statutes providing that the trial judge shall not comment on the facts, that instructions must be in writing, and be taken with the jury to the jury room, or that papers read in evidence may be taken to the jury room need not be followed. *Nudd v. Burrows*, 91 U. S. 426 (1875). Nor a statute that the judge shall require the jury to make special findings. *Accident Assn. v. Barry*, 131 U. S. 100 (1889); *Indianapolis, etc. R. Co. v. Horst*, 93 U. S. 291, 299 (1876). Nor one governing the charging of the jury. *Lincoln v. Power*, 151 U. S. 436, 442 (1894). See *United States v. Oppenheim*, 228 Fed. 220, 228 (N. D. N. Y., 1915). Likewise the disposition of a case by granting a new trial is within the judge's discretion. *Newcomb v. Wood*, 97 U. S. 581, 583 (1878); *Missouri Pacific Ry. v. Chicago, etc. Ry. Co.*, 132 U. S. 101 (1889). Since these matters are in the court's discretion, and since the rulings which will be made on them will be made when both counsel are present, so that misunderstandings can at once be corrected, there is much more basis for holding that here the statute shall not apply, than there is in the case of methods of obtaining a review. See note 16, *supra*.

there is still a considerable field for the statute's application.<sup>19</sup> But even within this field the courts are not absolutely bound to follow the state practice.<sup>20</sup> They need not conform in matters of detail,<sup>21</sup> nor where to do so would tend to hamper the administration of justice.<sup>22</sup> What are minor details and what will impede the course of justice the cases do not say. The latter question is essentially one of fact and each case calling for its determination will be unique.<sup>23</sup> Furthermore, there is no way of knowing beforehand what the determination will be. It is not as though the court in deciding must choose the most expeditious rule that is known to either the state or federal practice, for if it likes

<sup>19</sup> Federal courts have conformed to state practice in the following instances. Test for the sufficiency of the writ. *Brown v. Chesapeake, etc. Co.*, note 3, *supra*. Indorsement of summons. *United States v. Rose*, 14 Fed. 681 (S. D. N. Y., 1882). Mode of service of process. *Amy v. Watertown* (No. 1), 130 U. S. 301 (1889). Validity of service. *McCullough v. United Grocers' Corp.*, 247 Fed. 880 (N. D. Ohio, 1918). Right of an assignee to sue in his own name. *Delaware County v. Diebold Safe Co.*, 133 U. S. 473, 488 (1890). *Cf. New York, etc. Co. v. City of Sullivan*, 111 Fed. 179 (D. Ind., 1901). Capacity of parties. See *Albany, etc. Co. v. Lundberg*, 121 U. S. 451, 453 (1887). Joinder of parties. *Delaware County v. Safe Co.*, *supra*. Joinder of causes of action. *Quirk v. Bank of Commerce*, 244 Fed. 682, 687 (6th Circ., 1917). Joinder of defenses. *Cole v. Carson*, note 14, *supra*. See *Southern Pac. Co. v. Denton*, note 10, *supra*. Pleadings. See note 14, *supra*. Pleadings as admissions. *Northern Pac. R. v. Paine*, 119 U. S. 561 (1887). Notice of time of trial. *Rosenbach v. Dreyfuss*, 2 Fed. 23 (S. D. N. Y., 1880). Compulsory nonsuit. *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24 (1891). Directed verdict. See *Barrett v. Virginian Ry. Co.*, 250 U. S. 473 (1919). Voluntary nonsuit. *Barrett v. Virginian Ry. Co.*, *supra* (reversing the court below and overruling several prior lower court decisions); *Alsop v. McCombs*, 253 Fed. 949 (8th Circ., 1918). Validity of the verdict. *Bond v. Dustin*, 112 U. S. 604 (1884). Form and effect of the verdict. *Glenn v. Sumner*, note 14, *supra*. Manner of entering judgment. *Sawin v. Kenny*, 93 U. S. 289 (1876). Assessment of damages after judgment by default. *Loewe v. Union Savings Bank*, 226 Fed. 294 (D. Conn., 1915). State statute that pleadings shall be liberally construed. *United States v. Parker*, 120 U. S. 89 (1887). This list is not exhaustive.

<sup>20</sup> They have refused to do so with regard to the following matters: Service of process. *Shepard v. Adams*, note 27, *infra*. Return of writ. *Mechanical Appliance Co. v. Castleman*, note 9, *supra*; *Boston, etc. R. Co. v. Gokey*, note 22, *infra*. Return day. *United States v. U. S. Fidelity, etc. Co.*, note 25, *infra*. Effect of a special appearance. *Southern Pac. Co. v. Denton*, note 10, *supra*. Method of objection to the jurisdiction. *Meisukas v. Greenough Coal Co.*, note 14, *supra*. Statutory right to change venue. *Kennon v. Gilmer*, 131 U. S. 22 (1889). Form of pleadings. *Elk Garden Co. v. Thayer Co.*, note 22, *infra*; *Hein v. Westinghouse, etc. Co.*, note 30, *infra*. Notice as to proposed amendment. *Lange v. Union Pac. R. Co.*, note 10, *supra*. Equitable defenses. See note 1, *supra*. Granting continuances. *Texas & Pac. R. Co. v. Nelson*, 50 Fed. 814 (5th Circ., 1892). Conduct of trial and motions for new trial. See note 18, *supra*. Special juries. *Chappell v. United States*, note 10, *supra*. Validity of the verdict. *City of St. Charles v. Stookey*, 154 Fed. 772, 778 (8th Circ., 1907). Judicial interpretation of the common law. *Mahr v. Union Pac. R. Co.*, note 27, *infra*; *Wall v. C. & O. Ry. Co.*, 95 Fed. 398 (7th Circ. 1899). Waiver of illegality or error in the proceedings by continuation of the proceedings. See note 23, *infra*. This enumeration is not exhaustive. It does not include matters covered by federal statutes.

<sup>21</sup> *Indianapolis, etc. R. Co. v. Horst*, note 18, *supra*, 300; *Van Doren v. Penn. R. Co.*, 93 Fed. 260 (3d Circ., 1899).

<sup>22</sup> *Boston, etc. R. Co. v. Gokey*, 210 U. S. 155 (1908); *Elk Garden Co. v. Thayer Co.*, 206 Fed. 212 (W. D. Va. 1913).

<sup>23</sup> In one class of cases do the federal courts seem definitely to refuse to follow the state practice, because according to their lights to do so would work an injustice. Where a state statute provides that whenever a party, after exception taken, does not at once seek a review of the proceedings below, he waives any matter, illegal or erroneous, which would have formed the basis of an appeal, it is disregarded

none of these it is authorized to make an entirely new rule.<sup>24</sup> The fact that the federal courts have once followed the state practice in any given matter does not mean that they must continue to do so, and if the state practice is changed it does not necessarily mean that the federal courts will change their practice to conform.<sup>25</sup> It is interesting to note on this score that practically all appellate decisions which would seem to indicate where state practice is to be followed and where it is not to be followed are decisions affirming the trial court's action.<sup>26</sup> The net result is that in this field the question of conformity is largely within the discretion of the trial judge.<sup>27</sup>

The statute has accomplished its main purpose. The general structure of the procedure of the various state courts has been made the foundation of the procedure of the federal courts sitting in these states.<sup>28</sup> But there is great uncertainty as to just when the federal courts will follow the state procedure.<sup>29</sup> This in itself is a constant source of annoyance if not of hardship. Moreover, the fact that every provision of a given state code of procedure must be followed, or if not followed its place taken by some rule of court,<sup>30</sup> means that procedure in the federal courts is subjected to the same detailed regulation as procedure in the state courts and prey to all the evils attaching to codes of procedure.<sup>31</sup> The solution is to replace the Conformity Act by a statute authorizing the Supreme Court of the United States to regulate the procedure of the federal courts in civil actions other than equity and admiralty causes, by general rules of court.<sup>32</sup>

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by the federal courts. *Harkness v. Hyde*, note 12, *supra*; *Sligo Furnace Co. v. Dalton*, 255 Fed. 532 (8th Circ., 1919); *Williamson v. Insurance Co.*, 141 Fed. 54, 59 (8th Circ., 1905).

<sup>24</sup> Federal courts are authorized to make such rules and orders as may be necessary to advance justice and prevent delay. See REV. STAT., § 918. The Conformity Act and this statute are to be construed together. *Osborn v. City of Detroit*, 28 Fed. 385 (E. D. Mich., 1886).

<sup>25</sup> *Boston, etc. R. Co. v. Gokey*, note 22, *supra*; *United States v. U. S. Fidelity, etc. Co.*, 186 Fed. 477 (3d Circ., 1911).

<sup>26</sup> See cases cited, notes 19 and 20, *supra*. It is hardly necessary to point out that the result of saying the lower court was justified because it did or did not follow the state practice, has not the same binding force as saying that the lower court was wrong and must be reversed because it did or did not follow the state practice.

<sup>27</sup> *Shepard v. Adams*, 168 U. S. 618 (1898); *Mahr v. Union Pac. R. Co.*, 140 Fed. 921 (E. D. Wash., 1905). See also cases cited, notes 19, 20, 21, and 22, *supra*. This result has been reached by emphasizing the words of the statute "as near as may be." See *Indianapolis, etc. R. Co. v. Horst*, note 18, *supra*, at 300.

<sup>28</sup> See cases cited, notes 14 and 19, *supra*.

<sup>29</sup> That there is uncertainty can readily be seen by a comparison of the cases cited in notes 19 and 20, *supra*. The courts themselves have recognized that there is no clear line of cleavage between the instances in which they conform to state practice and those in which they do not. See *De Valle Da Costa v. Southern Pac. Co.*, 167 Fed. 654, 657 (D. Mass., 1909).

<sup>30</sup> Nor need these rules be standing rules. See *Hein v. Westinghouse, etc. Co.*, 168 Fed. 766, 769 (N. D. Ill., 1909).

<sup>31</sup> See Roscoe Pound, "Regulation of Procedure by Rules of Court," 10 ILL. L. REV. 163.

<sup>32</sup> Steps have been taken to bring about such a reform. See Tentative Program and Committee Reports of the American Bar Association (Cincinnati, 1921), 167. The adoption of such a statute is adequately justified by the success of the Supreme Court "Equity Rules." See Wallace R. Lane, "Federal Equity Rules," 35 HARV. L. REV. 276.

**JUDICIAL DETERMINATION OF THE STATUS OF FOREIGN GOVERNMENTS.** — A delicate problem faces any court called upon to determine the validity of an act done under the authority of a foreign government. Three situations may arise: first, where the foreign government had been recognized by the sovereign of the forum before the act in question; secondly, where the foreign government has received recognition between the time of that act and the time of the litigation; thirdly, when at that later date there has been no recognition.

In cases where recognition antedates the act the validity of which is tested in the litigation, the court is bound to follow the determination of the political departments, to which the foreign affairs of the nation are entrusted.<sup>1</sup> The quality of the recognition, whether *de jure* or *de facto*, does not alter the problem.

The second situation presents a more difficult question. Probably the majority of the decisions treat the intervening recognition as retroactive to the time of the accession, and so resolve the second into the first situation. On this theory a recent English case<sup>2</sup> held that the recognition of the Soviet Government by the British Foreign Office in 1921 related back to the Soviet accession to power,<sup>3</sup> so as to validate the passage of title to personalty condemned<sup>4</sup> under Soviet proceedings in 1918. American courts likewise have frequently approved of the doctrine of retroactivity.<sup>5</sup> It involves, however, an undesirable fiction, which in its application may contradict not only actual historical facts, but also the evident intention of the political department. Moreover, the practical and logical difficulties which it presents are numerous. How far back recognition should relate, — whether a previous affirmative refusal to recognize should set a boundary to possible retroactivity, — and whether the political department may by express terms confine to a particular limit the retroactive force of its recognition;<sup>6</sup> — these are but a few of the problems suggested.

<sup>1</sup> *Jones v. United States*, 137 U. S. 202 (1890). See *Williams v. Suffolk Insurance Co.*, 13 Pet. (U. S.) 415 (1839); *Foster v. Neilson*, 2 Pet. (U. S.) 253, 307 (1829); *Garcia v. Lee*, 12 Pet. (U. S.) 511 (1838); *O'Neill v. Central Leather Co.*, 87 N. J. L. 552, 94 Atl. 789 (1919).

<sup>2</sup> *Aksionairnoye, etc. A. M. Luther v. Sagor & Co.*, [1921] 3 K. B. 532. For the facts of this case see *RECENT CASES*, *infra*, p. 619.

<sup>3</sup> This was in December, 1917, when the provincial government, which had been recognized by the United States by the Act of Ambassador Francis, March 22 of that year, was supplanted. See *New York Times Current Hist. Mag.*, VI, 293.

<sup>4</sup> If done as a governmental act, condemnation of personal property is valid in the absence of constitutional protection. By a military conqueror it would be invalid under Art. 46, Hague Peace Conference of 1907. See II SCOTT, *THE HAGUE PEACE CONFERENCE*, 397-398.

<sup>5</sup> *Oetjen v. Central Leather Co.*, 246 U. S. 297 (1917); *Underhill v. Hernandez*, 168 U. S. 250 (1895); *Ricaud v. American Metal Co., Ltd.*, 246 U. S. 304 (1917). See *Williams v. Bruffy*, 96 U. S. 176, 186 (1877); *Murray v. Vanderbilt*, 39 Barb. (N. Y.) 140, 146 (1863); *State of Yucatan v. Argumedo*, 92 Misc. 574, 157 N. Y. Supp. 219 (1915). But see *Kennett v. Chambers*, 14 How. (U. S.) 38 (1852), where the court refused to treat the recognition of Texas in March, 1837, as retroactive to September, 1836. See also *United States v. Trumbull*, 48 Fed. 99 (S. D. Cal., 1891).

<sup>6</sup> In *Luther v. Sagor & Co.*, *supra*, the court construed a statement of the foreign office that the Soviet Government was recognized "as from Mar. 16" to mean "as on Mar. 16." "As on Mar. 16" was then construed to mean "as on Mar. 16 and

Courts that reject the retroactive theory in the second situation are faced with the identical problem which all courts meet where the facts arise under the third. Three solutions are then available. First, until an affirmative recognition is accorded by the political department, the prior status may be deemed to continue.<sup>7</sup> This fiction, too, frequently mocks the truth. Recognition being a concession, not a right,<sup>8</sup> it is clear that silence by the executive does not necessarily connote that a new government<sup>9</sup> does not *de facto* exist. Considerations of policy,<sup>10</sup> or interests of diplomacy, may restrain a political expression of recognition long after a government is in actual *de facto* control. This alternative, moreover, in jurisdictions where in the second situation the retroactive theory is accepted, results in an arbitrary distinction. In a suit by X brought before any recognition, the governmental act of the foreign *de facto* authority would be declared a nullity, while in a suit by Y, brought after recognition, the same act would be declared valid. Again, the logical extension of this doctrine involves the unfortunate result that where a *de facto* government<sup>11</sup> fails, without having been recognized as such, all of its acts are void.<sup>12</sup> Thus to hold that a *de facto* authority, in complete control of the government, must maintain its position till recognition in order to validate its governmental acts,<sup>13</sup> offends both reason and justice.

A second and more commendable practice is that of allowing the court to investigate the situation as a matter of fact, and independently to decide the status in question.<sup>14</sup> Where the political department has

prior," thus relating it back to the time of the original accession of the Soviet officials. It seems not unreasonable that the Secretary was attempting to limit the period within which retroactivity, if intended at all, was to apply.

<sup>7</sup> Marshall, J., in *Rose v. Himely*, 4 Cranch (U. S.) 241, 272. Story, J., in *Gelston v. Hoyt*, 3 Wheat. (U. S.) 246, 324 (1818). *Accord*: *Kennett v. Chambers*, 14 How. (U. S.) 38 (1852); *Williams v. Suffolk Insurance Co.*, 13 Pet. (U. S.) 415 (1839); *Dimond v. Petit*, 2 La. Ann. 537 (1847); *Clark v. United States*, Fed. Cas. No. 2838 (D. Pa., 1811); *The Hornet*, Fed. Cas. No. 6705 (D. N. C., 1870). See *United States v. Hutchings*, 2 Wheel. Cr. C. (N. Y.) 543 (1817); *Neuva Anna*, 6 Wheat. (U. S.) 193 (1821); *United States v. Pico*, 23 How. (U. S.) 321 (1859).

<sup>8</sup> See MOORE, *DIGEST OF INTERNATIONAL LAW*, § 27. But see HALL, *INTERNATIONAL LAW*, 7 ed., 88, where it is said that recognition cannot be withheld when earned. Yet the United States in the case of Huerta in 1913, and perhaps with reference to Soviet Russia to-day, clearly takes the position that where a government is in control, and able and willing to assume its foreign obligations, recognition may be withheld if the moral character of the government is questionable. Where the moral force operated the other way, we have gone to the extreme of recognizing a government which had no geographic locations, and no *de facto* existence, as in the recognition of the Czecho-Slovak Nation, Sept. 2, 1918. See 12 AM. POL. SC. REV. 715-718.

<sup>9</sup> The distinction between the recognition of a new government and the recognition of a new state is pointed out by MOORE, *op. cit.*, § 78. See on this point, 5 AM. J. INT. LAW, 66-83.

<sup>10</sup> Thus the United States never recognized Huerta, in Mexico. See note 8, *supra*.

<sup>11</sup> Well defined in *Thorington v. Smith*, 8 Wall. (U. S.) 1, 9 (1868), as a government of paramount force.

<sup>12</sup> See language to this effect in *Williams v. Bruffy*, 96 U. S. 176 (1877). But *contra*, *United States v. Rice*, 4 Wheat. (U. S.) 246 (1819).

<sup>13</sup> Seward expressed the opinion, in a letter to the Mexican Minister Romero Aug. 9, 1865, that temporary *de facto* power was enough to validate a governmental act. See DIR. COR. 1865, III, 486-488, quoted in part in MOORE, *op. cit.*, I, 238.

<sup>14</sup> *Divina Pastora*, 4 Wheat. (U. S.) 52 (1819); *The Josepha Segunda*, 5 Wheat. (U. S.) 238 (1820). In 1821, however, the United States Supreme Court repudiated

been absolutely silent this approach has perhaps its greatest justification. But a distinction must here be observed between cases where the issue turns upon the *recognition* and those where it turns upon the *existence* of the *de facto* government. In the former, political consequences may be involved and the jurisdiction is therefore a dangerous one for the court to exercise. In the latter the court can function with greater safety, though with less facility, because of the greater difficulty of proof of the actual facts. The risk of an inaccurate finding, however, is one which the litigants have invited, and if the burden of proof is one which they are unable to sustain, they cannot complain.

The third and it seems the most sound approach to this problem is supported by very little authority. In *United States v. Trumbull*,<sup>15</sup> the court spoke through Mr. Justice Rose: "It is beyond question that the status of the people composing the Congressional party at the time of the commission of the alleged offense, is to be regarded by the court as *it was then regarded* by the political or executive department of the United States." And in 1918 the English Chancery Division actually did send to the political department for a precise statement concerning the status of the government in question at the time of the act under consideration.<sup>16</sup> This approach alone seems free from objection. Nor is it coercive on the political department, especially since qualified recognitions<sup>17</sup> are established by international custom. Moreover, it is applicable alike to all situations. It assures uniformity and consistency, and abolishes fictions. Even where there has never been recognition and the issue is the existence of the *de facto* governments, in which case a political expression would of course be only evidence, and not binding — it would be a preferable practice to that of permitting the court to proceed on evidence offered by the litigants. The government can much more conveniently and accurately, through its consular and diplomatic records, determine the real situation. Where there has been recognition, requesting a political expression of its character and extent avoids the friction<sup>18</sup> likely to follow a judicial determination. Had the English Court of Appeals in the present case accepted the precedent of Chancery in this respect, it would have avoided the result now achieved, of holding<sup>19</sup> that recognition from the Foreign Office in 1921 related back so as to constitute a political recognition

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this practice. See *La Conception*, 6 Wheat. (U. S.) 235 (1821), overruling 2 Wheel. Cr. C. (N. Y.) 597 (1819). A more recent expression seems to modify this view. See *Ricaud v. American Metal Co. Ltd.*, 246 U. S. 304 (1917). See also *Lincoln v. United States*, 197 U. S. 419 (1905).

<sup>15</sup> 48 Fed. 99, 104 (S. D. Cal., 1891).

<sup>16</sup> *In re Suarez*, [1918] 1 Ch. 176.

<sup>17</sup> So-called recognition *sub modo*. HALL, INTERNATIONAL LAW, 83. MOORE, DIGEST OF INTERNATIONAL LAW, § 27.

<sup>18</sup> The status of a foreign government is primarily a political question. MOORE, *op. cit.*, § 50. HALL, *op. cit.*, 83, *ff.* See 62 SOL. J. & W. REP. 359, and 14 AM. J. INT. LAW, 523 (1920). See judicial expressions in *United States v. Palmer*, 3 Wheat. (U. S.) 616, 634 (1818); *Luther v. Borden*, 7 How. (U. S.) 1, 42, 43, 57 (1849); *United States v. Trumbull*, 48 Fed. 99 (S. D. Cal., 1891); *United States v. Hutchings*, 2 Wheel. Cr. C. (N. Y.) 543 (1817); *The Three Friends*, 116 U. S. 1, 63 (1897).

<sup>19</sup> The question of recognition should never have been raised in the case, but the court treated it as the essential element. If the Soviet was *de facto* the government of Russia, title to the property condemned would have passed by the subsequent



of the Soviet Government in 1918, although the Prime Minister<sup>20</sup> in 1919 had said: "The Bolshevik government has committed crimes against the allied subjects, and has made it impossible to recognize it even as a civilized government."

THE POWER OF A COURT OF EQUITY TO ORDER A NONRESIDENT DEFENDANT TO DO A POSITIVE ACT IN ANOTHER STATE. — The power of a court of equity acting *in personam* to order a positive act in another state has generally been denied<sup>1</sup> on two grounds: interference with the sovereignty of the other state<sup>2</sup> and inability to enforce the execution of its decree.<sup>3</sup> Interference with the sovereignty of the other state, however, is a circumstance appealing to the discretion of the chancellor rather than a bar to the jurisdiction, and although in a particular case it may be so great as to be ground for denying relief it should not be used as a solving phrase.<sup>4</sup> States do not exercise a "visitorial jurisdiction" over every private act affecting property within their territory.<sup>5</sup> Moreover, there is a strong social interest in this country where business has so little regard for state lines<sup>6</sup> not to make such state lines impassable barriers to the specific performance of an obligation to deliver property beyond the state border.<sup>7</sup> No court will willfully make a decree

sale whether or not England had recognized the Soviet Government politically. This distinction is generally overlooked. See *Pelzer v. United Dredging Co.*, reported N. Y. L. J., Feb. 9, 1922, p. 1659.

<sup>20</sup> Lloyd George, in the House of Commons, April 16, 1919.

<sup>1</sup> The effect of the general statement is somewhat limited by the fact that cases ordering positive acts in another state do occur in the books. Consolidated Rendering Co. v. Vermont, 207 U. S. 541 (1908) (production of books before the grand jury); Vineyard Land Co. v. Twin Falls Co., 245 Fed. 9 (9th Cir., 1917) (protection of local property); *Kempson v. Kempson*, 63 N. J. Eq. 783, 52 Atl. 360, 625 (1902) (vacating a decree of a court in another state); *Langford v. Langford*, 5 L. J. Ch. [N. S.] 60 (1835) (receiver of Irish rents). But cf. *Port Royal Ry. Co. v. Hammond*, 58 Ga. 523 (1877). See Joseph H. Beale, "The Jurisdiction of Courts over Foreigners," 26 HARV. L. REV. 289, 292.

<sup>2</sup> The courts have stopped only at direct interference; indirect interference of all sorts is tolerated. *Massie v. Watts*, 6 Cranch (U. S.) 148 (1810) (specific performance: land in another state); *Gardner v. Ogden*, 22 N. Y. 327 (1860) (constructive trust: land in another state); *Alexander v. Tolleston Club*, 110 Ill. 65 (1884) (tort in another state). Cf. *Mississippi R. Co. v. Ward*, 2 Black (U. S.) 485 (1862) (no abatement of a nuisance in another state). See further KERR, INJUNCTIONS, § 5 ed., 12.

<sup>3</sup> See 17 HARV. L. REV. 572.

<sup>4</sup> But see Joseph H. Beale, *supra*, at 292.

<sup>5</sup> A deed to land in another state executed under duress of the local court is valid at the *situs*. *Gilliland v. Inabnit*, 92 Iowa, 46, 60 N. W. 211 (1894).

<sup>6</sup> See *Nichols & Shepard Co. v. Marshall*, 208 Iowa, 518, 520, 79 N. W. 282 (1899).

<sup>7</sup> Other grounds tentatively suggested in support of the power of equity to order a positive act in another state are consent implied from considerations of mutual benefit, the fact of federal union, the relinquishment of many of the prerogatives of sovereignty by the states, and their community of interests. See 21 HARV. L. REV. 354, 355. The relinquishment of prerogatives to the federal government and the fact of federal union, however, would not extend the power of a sister state.

It has been stated as a matter of fact that the modern tendency is to attach less weight to interference with the sovereignty of another state. See 30 YALE L. J. 865. But it would seem that the courts are reluctant to interfere with property in a foreign country where there is no business justification for so doing. *Matthaei v. Galitzin*, L. R. 18 Eq. 346 (1873). See further, Joseph H. Beale, *supra*, at 292.

in known violation of the laws of another state. In other cases, it is submitted, the interests of the defendant are sufficiently protected by making the prohibition of the other state a defense to any proceedings to enforce or to punish for failure to obey the decree.<sup>8</sup> Such a rule would reduce interference with the sovereignty of the other state to a minimum and is an adequate safeguard to interstate relations.<sup>9</sup>

The second objection: inability to enforce the decree, gives greater pause. But here again although there may be insuperable difficulties to the enforcement of a decree calling for *certain* acts in another state it does not follow that a court of equity acting *in personam* can never effectively enforce a decree calling for an act in another state.<sup>10</sup> As against a defendant domiciled at the forum, personal jurisdiction may be obtained by constructive service<sup>11</sup> and — if the act abroad is performable by an agent<sup>12</sup> — the usual means of enforcement are available. The difficulties of enforcement are increased in the case of a nonresident defendant, but the matter is one of degree.<sup>13</sup> Once the defendant has been personally served within the territory, no matter how short his stay,<sup>14</sup> he is bound by all subsequent orders in the cause without further personal service.<sup>15</sup> His local property may be sequestered.<sup>16</sup> He might be forced to give a bond for performance.<sup>17</sup> A writ similar in nature to that of *ne exeat* might be provided by statute<sup>18</sup> against

<sup>8</sup> Impossibility of performance is a defense to contempt process. See RAPALJE, CONTEMPT, § 137. In case of doubt the court may require the plaintiff to execute a counterbond in favor of the defendant.

<sup>9</sup> The usual argument in support of the jurisdiction of a court of equity to grant specific performance of a contract to convey foreign land is that the deed is executed at the forum and that there is no act interfering with the foreign sovereign since whatever legal consequences attach to the deed do so by the law of the *situs*. See Joseph H. Beale, *supra*, at 293-294.

<sup>10</sup> The defendant may be forced to do all that he can legally do by the law of the *situs* to give effect to the decree. Phelps v. McDonald, 99 U. S. 298, 308 (1878).

<sup>11</sup> Kempson v. Kempson, 63 N. J. Eq. 783, 52 Atl. 360, 625 (1902).

<sup>12</sup> So far as is known, the courts uniformly refuse to issue a decree which will require the defendant to act abroad in person. See Waterhouse v. Stansfield, 10 Hare, 254 (1852). But see 30 YALE L. J. 865, suggesting that the defendant in such case might be forced to give a bond conditioned on the performance of the decree.

<sup>13</sup> Dunn v. M'Millen, 1 Bibb. (Ky.) 409 (1809); Ward v. Arredondo, Hopkins Ch. (N. Y.) 213 (1824); Cleveland v. Burrill, 25 Barb. (N. Y.) 532 (1857). *Contra*, Wicks v. Caruthers, 13 Lea (Tenn.) 353 (1884).

As a practical matter, unless the defendant was domiciled at the forum at the date of the decree it would seem immaterial — so far as enforcement goes — whether he was a nonresident from the beginning. Michigan Trust Co. v. Ferry, 228 U. S. 346 (1912) (money decree against an administrator who changed his domicile before the decree was rendered.) A distinction may be taken between a decree for a money payment and one for some other act, since the former may be sued on in an action of debt in another state. Sistare v. Sistare, 218 U. S. 1 (1909). But see Walter Wheeler Cook, "The Powers of Courts of Equity," 15 COL. L. REV. 228, 243. See Joseph H. Beale, *supra*, 193, 283.

<sup>14</sup> Darrah v. Watson, 36 Iowa, 116 (1873); Peabody v. Hamilton, 106 Mass. 217 (1870).

<sup>15</sup> Michigan Trust Co. v. Ferry, 228 U. S. 346 (1912); Dunn v. M'Millen, 1 Bibb. (Ky.) 409 (1809); Cleveland v. Burrill, 25 Barb. (N. Y.) 532 (1857); Matteson v. Scofield, 27 Wis. 671 (1871).

<sup>16</sup> Sequestration is available when the defendant cannot be found or is recalcitrant. See HUSTON, ENFORCEMENT OF DECREES IN EQUITY, p. 81.

<sup>17</sup> See 30 YALE L. J. 865.

<sup>18</sup> It might be questioned whether such a statute would be unconstitutional, as

his leaving the jurisdiction, and forfeiture of the equitable bail would not prevent his being punished for contempt if subsequently caught within the territory.<sup>19</sup> But neither his failure to perform<sup>20</sup> nor lack of actual power in the court to enforce the decree at the moment of its rendition<sup>21</sup> can affect its validity. Within the territory it remains a binding obligation and under the full faith and credit clause it may be set up as record evidence of the equities in any subsequent litigation in another state.<sup>22</sup>

A recent New York case,<sup>23</sup> in granting specific performance of a contract under aggravating circumstances, ordered the defendant, a resident of California who had been personally served with process in New York, to ship a thoroughbred stallion jointly owned by him and the plaintiff from California to the plaintiff's stock farm in Kentucky. To the objection that the plaintiff in the first instance should have applied to the court which could give practical effect to its decree,<sup>24</sup> it may be answered that as the New York court, after service of process, surrendered control over the defendant only out of regard for the "decencies of civilization,"<sup>25</sup> so the defendant through corresponding decency should obey its decree without further coercion. The decree calling for a single definite act, the New York court could easily ascertain whether it had been obeyed. No hardship in procuring evidence presented itself. Further, if the obligation was to *deliver* the stallion in Kentucky,<sup>26</sup> a

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violating the privileges and immunities of the citizen; but the writ of *ne exeat* was known long before the adoption of the Constitution and is a reasonable method of enforcing a decree. *Goodwin v. Clarke*, 2 Dickens Eng. Ch. Rep. 497 (1774). New Jersey without the aid of special statute has extended the use of the writ to secure restraint on an habitual drunkard: *In re Kearney*, 21 N. J. L. J. 25 (1897); and to secure the custody of children: *Palmer v. Palmer*, 84 N. J. Eq. 550, 95 Atl. 241 (1915).

<sup>19</sup> The equitable bail is to secure the payment of the debt (or performance of the obligation). See 1 WHITEHOUSE, EQUITY PRACTICE, 1915 ed., § 433. The commitment for contempt is to vindicate the authority of the court. See *Powell v. State*, 48 Ala. 154, 156 (1872).

<sup>20</sup> *Burnley v. Stevenson*, 24 Ohio St. 474 (1875).

<sup>21</sup> It is submitted that the requirement of our law at the present day is potential rather than actual power of enforcement. *Michigan Trust Co. v. Ferry*, 228 U. S. 346 (1912). See 27 YALE L. J. 946, 948.

<sup>22</sup> The principle of *res judicata* has the same application in equity as at law. See 2 BLACK, JUDGMENTS, 2 ed., § 518. It is immaterial whether the second suit be in equity or at law. See 1 FREEMAN, JUDGMENTS, 4 ed., § 428.

Courts of other states have enforced the decree as a cause of action within their own jurisdiction. *Roblin v. Long*, 60 Howard Pr. (N. Y.) 200 (1880); *Mallette v. Scheerer*, 164 Wis. 415, 160 N. W. 182 (1916); *Matson v. Matson*, 186 Iowa, 607, 173 N. W. 127 (1919). *Contra*, *Bullock v. Bullock*, 52 N. J. Eq. 561, 30 Atl. 676 (1894); *Fall v. Fall*, 75 Neb. 120, 113 N. W. 175 (1907), *aff'd* 215 U. S. 1 (1909). But see *Walter Wheeler Cook*, *supra*, 15 COL. L. REV. 228, 243.

As a defense: *Burnley v. Stevenson*, 24 Ohio St. 474 (1875); *Dunlap v. Byers*, 110 Mich. 109, 67 N. W. 1067 (1896).

A debt arising from an equitable decree is enforceable in another state by an action at law. *Sistare v. Sistare*, 218 U. S. 1 (1910).

<sup>23</sup> *Madden v. Rosseter*, 114 Misc. (N. Y.) 416, 187 N. Y. Supp. 462, *aff'd* 187 N. Y. Supp. 943 (App. Div.), 1921. For the facts of this case see RECENT CASES, *infra*, p. 617.

<sup>24</sup> *Kimball v. St. Louis R. Co.*, 157 Mass. 7, 31 N. E. 697 (1892). See DICKY, CONFLICT OF LAWS, 2 ed., pp. 41-42.

<sup>25</sup> *Michigan Trust Co. v. Ferry*, *supra*, at 353, per Mr. Justice Holmes.

<sup>26</sup> The exact nature of the defendant's obligation does not clearly appear on the facts.

decree of the California court or of the Kentucky court would be just as objectionable as that of the New York court since either, to compel the defendant to do his full duty, would have to order an act in another state. It would seem, then, that inasmuch as the legal effect of the New York decree was primarily to establish a personal obligation<sup>27</sup> on the defendant there was nothing to be gained by refusing the plaintiff relief with the defendant properly before the court.

It is impossible to catalogue the cases in which relief should be granted and those in which it should be denied. Each case should be decided on its own facts in the light of all the circumstances.<sup>28</sup> The rights of third parties beyond the boundaries of the state should be given special consideration.<sup>29</sup> The local court, however, is not bound to give the same remedy as that which would be granted by the other state,<sup>30</sup> and relief need not necessarily be refused because of the possibility of a divergence of state law.<sup>31</sup> Assuming that an equitable decree is a final adjustment of the rights of the parties, possessing some of the elements of a judgment at law and not a mere process of execution,<sup>32</sup> contrary state policy<sup>33</sup> or mistake of foreign law<sup>34</sup> is no bar to full faith and credit in the United States.<sup>35</sup> The plaintiff should certainly be forced to show an extreme case, but when he has done so, it should affirmatively appear that the decree would interfere with the sovereignty of the other state or in and of itself be impossible to enforce before equitable relief should be denied him.<sup>36</sup>

## RECENT CASES

ADMIRALTY — JURISDICTION — STATE PROCEEDINGS *IN REM* AGAINST FOREIGN VESSELS. — The plaintiff, at work on a dock, was injured when a

<sup>27</sup> See William Barbour, "The Extra-Territorial Effect of the Equitable Decree," 17 MICH. L. REV. 527, 548-550.

<sup>28</sup> "The development of equity in England was obtained by a method of seeking results in concrete causes." See Roscoe Pound, "Mechanical Jurisprudence," 8 COL. L. REV. 605, 611.

<sup>29</sup> *Harris v. Pullman*, 84 Ill. 20 (1876). See the explanation of the decision in *Fall v. Fall*, *supra*, by Mr. Justice Holmes in *Fall v. Eastin*, 215 U. S. 1, 15 (1909).

<sup>30</sup> See 25 HARV. L. REV. 653.

<sup>31</sup> But equity in its discretion may refuse to issue a decree which will leave the party in peril of a conflicting decree in another state. *Harris v. Pullman*, *supra*, at 27.

<sup>32</sup> See Walter Wheeler Cook, *supra*, 15 COL. L. REV. 228, 243; W. N. Hohfeld, "The Relations Between Law and Equity," 11 MICH. L. REV. 537, 551; William Barbour, *supra*, 17 MICH. L. REV. 527. See 26 YALE L. J. 331. See HUSTON, ENFORCEMENT OF DECREES IN EQUITY, pp. 151-153. Cf. 25 HARV. L. REV. 653. See also the cases cited under note 22, *supra*, especially *Matson v. Matson* and *Bullock v. Bullock*.

<sup>33</sup> *Kenney v. Supreme Lodge*, 252 U. S. 411 (1920).

<sup>34</sup> *Fauntleroy v. Lum*, 210 U. S. 230 (1908).

<sup>35</sup> See 22 HARV. L. REV. 51.

<sup>36</sup> A New York receiver was also appointed with power to proceed to California to get the stallion. It would seem that such appointment has no effect *in rem*, but the query has been raised as to the substantial difference between the act of the defendant under duress of the court and the decree of the court itself. See *Fall v. Eastin*, 215 U. S. 1, 10 (1909). See also Walter Wheeler Cook, *supra*, at 120. Such a question, however, is beyond the scope of the present note.

As to the effect of the appointment of a receiver over property in another state, see 1 CLARK, RECEIVERS, §§ 57, 483.

defective pulley used on *The Bee*, a foreign vessel, allowed some cement sacks to fall. A local statute provides for a lien for all injuries caused by vessels navigating the waters of the state. (2 OLSON, 1920 OREG. LAWS, §§ 10281-10288.) The plaintiff instituted proceedings *in rem* under the statute. There were no maritime liens on the vessel. Upon the intervention of the owners as claimants, the lower court rendered a personal judgment. *Held*, that the case be remanded for enforcement of the lien *in rem*. *Cordery v. The Bee*, 201 Pac. 202 (Oreg.).

Where a maritime cause of action is involved, a state statute creating a lien enforceable *in rem* in the state courts is unconstitutional. *The Hine v. Trevor*, 4 Wall. (U. S.) 555. But, since the test of admiralty tort jurisdiction is locality, the tort in the principal case was not maritime. *The Plymouth*, 3 Wall. (U. S.) 20; *Keator v. Rock Plaster Mfg. Co.*, 256 Fed. 574 (S. D. N. Y.). In such cases a statutory proceeding *in rem* in a state court against a domestic vessel is valid. *The Winnebago*, 205 U. S. 354; *Stapp v. Clyde*, 43 Minn. 192, 45 N. W. 430. The principal case rightly goes a step further and holds constitutional such a proceeding against a foreign vessel. See *Knapp & Co. v. McCaffrey*, 177 U. S. 638, 643, 647; *The Robert W. Parsons*, 191 U. S. 17, 25. There are two conceivable constitutional objections to the validity of the statute: (1) that it interferes with the Federal control of interstate or foreign commerce; (2) that it interferes with Federal admiralty powers. But these objections apply as well where a state lien is enforced against domestic vessels engaged in interstate commerce. And in such a case the objections have not been upheld. *The Winnebago*, *supra*. The interference with Federal admiralty power is more arguable where there are maritime liens as well, but the plaintiff cannot assert the constitutional rights of a class to which he does not belong when there is no objection on his own account. *New York ex rel. Hatch v. Reardon*, 204 U. S. 152; *The Winnebago*, *supra*.

ADMIRALTY — PRACTICE — APPLICATION OF EQUITABLE PRINCIPLES — EFFECT OF MISCONDUCT. — Through fraud the libellant obtained a contract to make repairs on a vessel at their reasonable value. In a libel *in rem* to recover for these repairs, he wilfully included several items for work not actually performed. *Held*, that the libellant recover the reasonable value of services rendered. *Anderson v. S. S. Kalfarli*, N. Y. L. J., Dec. 24, 1921 (C. C. A., 2d Circ.).

A court of admiralty has not equitable jurisdiction. *Andrews v. Essex Fire & Marine Ins. Co.*, 3 Mason (U. S.), 6 (Circ. Ct., 1st Circ.); *The Eclipse*, 135 U. S. 599. But it is not bound by strict rules, and to those cases coming within its jurisdiction it applies equitable principles. *The Juliana*, 2 Dods. 504; *Higgins v. Anglo-Algerian S. S. Co., Ltd.*, 248 Fed. 386 (2d. Circ.). This case raises the question how far admiralty should deny recovery on account of misconduct. In the case of seamen, misconduct may result in a partial or total forfeiture of wages. *Macomber v. Thompson*, 1 Sumner (U. S.), 384 (Circ. Ct., 1st Circ.). To extend this principle to the case of a repairman, denying recovery for the reasonable value of the repairs, would, it seems, result in an unwarranted penalty. The interests of navigation, which justify such a forfeiture for misconduct of seamen, do not require that all maritime services be subject to like forfeitures. Thus in the case of salvage contracts obtained through inequitable means, the courts generally allow recovery for ordinary salvage. *Brooks v. S. S. Adirondack*, 2 Fed. 387 (S. D. N. Y.); *The Don Carlos*, 47 Fed. 746 (N. D. Cal.). But see *The No. Carolina*, 15 Pet. (U. S.) 40. Cf. *The Ann C. Pratt*, 18 How. (U. S.) 63. Conceding the libellant's right to recover, there seems no sound reason for compelling him to resort to a court of law, as is done when the right is to nominal, or small substantial, damages only. See *Barnett v. Luther*, 1 Curtis (U. S.), 434 (Circ. Ct., 1st. Circ.); *Ely v.*

*Murray & Tregurtha Co.*, 200 Fed. 368 (1st. Circ.). Such a course would differ in its effect from the refusal of equity to give relief in its concurrent jurisdiction, since here the libellant by pursuing his remedy *in personam* at law would achieve substantially the same result as he is seeking in admiralty. The recovery allowed in a court of law would be measured by the substantive law of admiralty. *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372; *Berg v. Phila. & R. Ry.*, 266 Fed. 591 (E. D. Pa.). See 33 HARV. L. REV. 300.

**CONSTITUTIONAL LAW — MAKING AND CHANGING CONSTITUTIONS — EFFECT OF ACQUIESCENCE ON IRREGULARLY ADOPTED AMENDMENT.** — The Constitution of Alabama provides that the legislature shall appoint a day for special elections at which proposed constitutional amendments are to be submitted. (ALA. CONST., § 284.) In the case of the "Soldiers' and Sailors' Poll Tax Exemption Amendment" the legislature delegated this power to the Governor. The voters accepted the amendment and it was recognized by the governmental departments of the state, including the Supreme Court. (*Cornelius v. Pruet*, 204 Ala. 189, 85 So. 430.) *Quo warranto* proceedings were brought against the defendant, a jury commissioner, on the ground that the amendment had not been properly adopted, and that, not having paid a poll tax, he was not a qualified elector and hence ineligible to hold his office under the constitution. (ALA. CONST., § 178.) The defendant's demurrer was overruled. *Held*, that the judgment be affirmed. *Hooper v. State*, 89 So. 593 (Ala.).

For a discussion of the principles involved, see NOTES, *supra*, p. 593.

**CRIMINAL LAW — FORMER JEOPARDY — SEPARATE CONVICTIONS FOR THE ROBBERY OF TWO PERSONS ON ONE OCCASION.** — The defendant on the same occasion robbed A and B, and was convicted of the robbery of A. On an indictment for the robbery of B the defendant pleaded former jeopardy. *Held*, that a judgment overruling the plea be affirmed. *Thompson v. State*, 234 S. W. 400 (Tex.).

Where two distinct acts result in as many crimes, even though in the same transaction, prosecution for one will be no bar to prosecution for the other. *Mann v. Comm.*, 118 Ky. 67, 80 S. W. 438; *Ashton v. State*, 31 Tex. Cr. R. 482, 21 S. W. 48. *Contra*, *Dean v. State*, 9 Ga. App. 571, 71 S. E. 932. Moreover, one may by the same act commit two distinct offenses and be prosecuted separately for each. *State v. Inness*, 53 Me. 536. See WHARTON, CRIMINAL PLEADING & PRACTICE, §§ 468-471. The validity of the plea of former jeopardy depends, not upon whether the defendant has once before been in jeopardy for the same act, but upon whether he has been in jeopardy for the same offense. See *Gavieres v. United States*, 220 U. S. 338, 342; *Morey v. Comm.*, 108 Mass. 433, 434. In larceny cases the authorities are in conflict. One line of authority holds that a defendant can only once be put in jeopardy for the taking, on one occasion, of the property of several persons. *State v. Sampson*, 157 Iowa, 257, 138 N. W. 473. See *Hoiles v. United States*, 3 McAr. (D. C.) 370. But see *Comm. v. Sullivan*, 104 Mass. 552. But this anomalous rule is limited to larceny. Whether, in the principal case, there were two acts or one act, the defendant clearly committed two separate offenses. The decision is correct. *Keeton v. Comm.*, 92 Ky. 522, 18 S. W. 359; *State v. Bynum*, 117 N. C. 749, 23 S. E. 218. See also *In re Allison*, 13 Colo. 525, 22 Pac. 820.

**CUSTOMS AND USAGES — SALVAGE — USAGE OF RENDERING SALVAGE SERVICES GRATUITOUSLY.** — By a long established usage, fishing vessels on the coast of British Columbia rendered aid to each other gratuitously. The plaintiff performed salvage services for the defendant without actual knowledge of the custom. *Held*, that the defendant is not liable for salvage. *The "Freiya" v. The "R. S."*, 59 D. L. R. 330.

A usage is an established mode of dealing, which may determine the meaning to be imputed to acts or words. *Miller v. Wiggins*, 227 Pa. St. 564, 76 Atl. 711; *Byrd v. Beall*, 150 Ala. 122, 43 So. 749. The only possible function of the usage in the principal case would be to explain the terms of a consensual relationship, as the parties should have understood them. But since the right of a salvor to compensation is not based on consent, the usage is immaterial in so far as it shows a lack of consent to pay for salvage. See 33 HARV. L. REV. 453. Nor is it competent, in the absence of consideration, to prove an implied contract of the salvor not to claim compensation. The court is really changing the rule of law allowing recovery for salvage service. Even where parties contract subject to a usage, it will not be given effect if unreasonable or against public policy. *Minneapolis Sash & Door Co. v. Metropolitan Bank*, 76 Minn. 136, 78 N. W. 980; *Dickinson v. Gay*, 7 Allen (Mass.), 29. See 7 VIN. ABR. 180. Because it furthers a social interest in the conservation of wealth, salvage service enjoys great favor in the law. See BENEDICT, ADMIRALTY, 4 ed., § 224. To adopt a usage which removes compensation as an incentive to such service is undesirable.

**DAMAGES — EXCESSIVE DAMAGES — COMPULSORY REMITTITUR.** — In an action under a death statute, the jury awarded the plaintiff \$5000 damages for the loss of his eleven-year-old child. The upper court finds \$2500 the highest amount that could be reasonably awarded. *Held*, that the judgment be reduced to \$2500, and affirmed. *Interurban Railway Co. v. Trainer*, 233 S. W. 816 (Ark.).

The usual practice where excessive damages have been awarded is to affirm the judgment, conditioned upon the plaintiff agreeing to a specified *remititur*. *Finch v. No. Pacific R. R. Co.*, 47 Minn. 36, 49 N. W. 329; *No. Chicago St. R. R. Co. v. Wrixon*, 150 Ill. 532, 37 N. E. 895. But see *Watt v. Watt*, [1905] A. C. 115. Cf. *Lionell, Barber & Co. v. Deutsche Bank, London Agency*, [1919] A. C. 304. And see *Beach v. Bird & Wells Lumber Co.*, 135 Wis. 550, 116 N. W. 245. See Austin W. Scott, "Progress of the Law, 1918-1919 — Civil Procedure," 33 HARV. L. REV. 236, 248. If the plaintiff is allowed the greatest amount which the jury could reasonably have given, and if there is no evidence that the size of the verdict was due to prejudice, neither party has any valid objection. The jury has found that the defendant is liable in at least that sum, and the court has found that the plaintiff is entitled to no more. Granting the validity of any *remititur*, there seems to be no reason why the court should not, as in the principal case, compel it, whether the plaintiff agrees or not. To permit the plaintiff to force a new trial on the chance of getting more than he is, *ex hypothesi*, entitled to, can serve no just purpose. Yet only a few courts have hitherto adopted compulsory *remititur*. *Rice v. Crescent City R. R. Co.*, 51 La. Ann. 108, 24 So. 791; *Wichita & Colorado Ry. Co. v. Gibbs*, 47 Kan. 274, 27 Pac. 991. And the United States Supreme Court has held in a tort action that it violates the constitutional guaranty of trial by jury in Federal courts. *Kennon v. Gilmer*, 131 U. S. 22.

**DAMAGES — MEASURE OF DAMAGES — IMPAIRED PURCHASING POWER OF MONEY.** — In an action for damages for personal injuries, the jury were instructed that they might consider the impaired purchasing power of the dollar in assessing damages. The defendant excepted. *Held*, that the exception be overruled. *Halloran v. New England Telephone & Telegraph Co.*, 115 Atl. 143 (Vt.).

Damages for personal injuries commonly include at least three elements, *viz.*, compensation for medical expenses, for physical pain and mental suffering, and for loss of earnings. The first occasions no difficulty in computation. The second is an expression of the value which the jurors attach to an

intangible injury. This expression must necessarily be in terms of money, but since money has only a relative value, it is proper to take the general price level into account in making the award. See *Hurst v. C. B. & Q. R. Co.*, 280 Mo. 566, 219 S. W. 566; *Noyes v. Des Moines Club*, 186 Iowa, 378, 170 N. W. 461. To be accurate, it seems that it is the purchasing power at the time the pain occurred which should be considered, for damages should be computed as of the time of the loss. Cf. 34 HARV. L. REV. 422. But see *Rigley v. Prior* 233 S. W. 828 (Mo.). Similarly, where the element under consideration is loss of earnings, damages should be computed as of the time of the incapacity; but here it is not the purchasing power of the dollar, but the current standard of wages, which should govern. *Canfield v. C. R. I. & P. Ry. Co.*, 142 Iowa, 658, 121 N. W. 186. Cf. *McNichol v. P. Burns & Co., Ltd.*, [1919] 3 W. W. Rep. 621; *Tankersley v. Lincoln T. Co.*, 104 Neb. 24, 175 N. W. 602; *Roeder v. Erie R. Co.*, 164 N. Y. Supp. 167 (Sup. Ct.). But see *Hurst v. C. B. & Q. R. Co.*, *supra*; *L. & N. R. Co. v. Williams*, 183 Ala. 138, 62 So. 679. The instruction in the principal case is open to criticism for failing to point out this distinction; but since the verdict was for a lump sum, and since in the matter of damages jurors are chancellors, it is hard to say that the error was prejudicial.

**EASEMENTS — REMEDY OF GRANTEE OF EASEMENT AGAINST OWNER OF SERVIENT TENEMENT WHO FAILS TO PAY TAXES.** — The defendant's land was subject to an easement of passage in favor of the plaintiff's adjoining land. The servient tenement having been sold for delinquent taxes, the plaintiff seeks an order that the defendant pay the taxes and redeem the land. The defendant had not covenanted to pay taxes. Held, that the order be denied. *Campbell, Wilson & Horne, Ltd. v. Great West Saddlery Co., Ltd.*, 59 D. L. R. 322 (Alta.).

If the plaintiff's easement is not cut off by the tax sale it is evident that he needs no equitable relief. Such would be the case if the servient tenement was assessed at its value subject to the easement. *Jackson v. Smith*, 153 App. Div. 724, 138 N. Y. Supp. 654, aff'd, 213 N. Y. 630; *Tax Lien Co. v. Schultze*, 213 N. Y. 9, 106 N. E. 751. See also *Hall v. McCaughey*, 51 Pa. St. 43; *Tabb v. Comm.*, 98 Va. 47, 34 S. E. 946. However, if the land was assessed at its fee simple value, without reference to the particular interests therein, the land itself must respond for the taxes. If all the proceedings are regular, the tax deed passes a title free from all incumbrances whatsoever. *Hanson v. Carr*, 66 Wash. 81, 118 Pac. 927. See *Hill v. Williams*, 104 Md. 595, 65 Atl. 413. Even under such circumstances, there would seem to be no basis for equitable relief. Non-performance of an affirmative statutory duty affords no cause of action to an individual incidentally harmed. See *Cowley v. Newmarket Local Board*, [1892] A. C. 345; *City of Rochester v. Campbell*, 123 N. Y. 405, 25 N. E. 937. See also *Durnherr v. Rau*, 135 N. Y. 219, 32 N. E. 49. It should be noted that the plaintiff is not without means of protecting his interest. He may himself pay the taxes. See *Bennett v. Hunter*, 9 Wall. (U. S.) 326; BLACK, TAX TITLES, 2 ed., § 161. He may then bring an action against the delinquent for money paid to his use. *Graham v. Dunigan*, 2 Bosw. (N. Y.) 516 (Sup. Ct.). See KEENER, QUASI-CONTRACTS, 1 ed., 388-391. Furthermore, if there is an express covenant by the grantor of the easement to pay the taxes for its protection, it should be enforced in equity, since a resort to the legal remedy above would involve hardship to the covenantee. Cf. *Reilly v. Roberts*, 34 N. J. Eq. 299.

**EQUITY — JURISDICTION OVER NONRESIDENTS — POWER OF EQUITY TO ORDER A NONRESIDENT DEFENDANT TO DO A POSITIVE ACT IN ANOTHER STATE.** — The plaintiff, a resident of New York, and the defendant, a resident of



California, were joint owners of a thoroughbred stallion. The defendant had the possession and use of the stallion in California during the seasons of 1919 and 1920 under an agreement whereby the plaintiff was to have him for use in Kentucky during the seasons of 1921 and 1922. To have become acclimated and fit for the season of 1921 the stallion should have been shipped to Kentucky by September, 1920, but the defendant refused to ship him. At the opening of the 1921 season the plaintiff sued in New York, praying a mandatory injunction ordering the defendant to ship the stallion to Kentucky, and the appointment of a receiver with power to proceed to California to get the stallion. The defendant was personally served with process in New York and appeared by attorney. *Held*, that the prayer be granted. *Madden v. Rosseter*, 114 Misc. 416, 187 N. Y. Supp. 462, *aff'd*, 187 N. Y. Supp. 943 (App. Div.).

For a discussion of the principles involved, see NOTES, *supra*, p. 610.

**EXTRADITION — RIGHT TO TRY MAN MISTAKENLY SEIZED BY ARMY ON BANDIT HUNT.** — A troop of cavalry under orders from the War Department crossed the Mexican border on a "hot trail" after bandits. They seized the defendant, mistaking him for a bandit, and brought him back to the United States. It appeared that the procedure was not within any rights conferred by the existing treaty with Mexico providing for the extradition of fugitives from justice. The mistake discovered, the defendant was released by the army but was immediately seized, by virtue of a prior arrangement, by Texas rangers, and was indicted for a murder previously committed in Texas. His plea to the jurisdiction was overruled. He was convicted, and appealed. *Held*, that the conviction be reversed. *Dominguez v. State*, 234 S. W. 79 (Tex. Cr. App.).

Apart from treaty, the obligation of one nation to another to surrender a fugitive from justice is an imperfect one, resting on comity. See WHEATON, *INTERNATIONAL LAW*, Dana's ed., § 115. If surrendered, the fugitive may be tried only for the specific offense he was surrendered to answer for, the limitation being implied as a condition imposed by the surrendering sovereign. See *United States v. Rauscher*, 119 U. S. 407, 416. International good faith requires the recognition of the limitation. *Ex Parte Brown*, 148 Fed. 68 (2d Circ.); *Ex Parte Coy*, 32 Fed. 911 (5th Circ.). But where the seizure is not made under any privilege granted by the foreign sovereign there is no such limitation; and the fugitive may be tried for any and all offenses. *Ker v. Illinois*, 119 U. S. 436. In the absence of proof to the contrary, the interest in maintaining international good will should lead the court to assume, as was done in the principal case, that a seizure ordered by the government was authorized by the foreign sovereign, and to respect the limitation which would be imposed if it were. It follows that an actual bandit, seized by the expedition, could not have been tried for another offense. In this case there is a further difficulty, that the defendant, not being a bandit, was not within the express terms of the assumed authority. But since his capture was in the course of a *bona fide* attempt to execute the authority, it seems that neither Mexico's right nor his should be abridged by the mistake.

**FEDERAL COURTS — RELATION TO STATE COURTS — WHETHER REVIEW SHOULD BE HAD BY WRIT OF ERROR OR BY CERTIORARI — VALIDITY OF STATE STATUTE "DRAWN IN QUESTION."** — A Kentucky statute required foreign corporations to comply with certain formalities before doing business within the state. (1915 KY. STATS., § 571.) This statute had always been construed by the Kentucky courts as applying only to intrastate commerce. Without complying with the statute, the plaintiff, a foreign corporation, ordered wheat from the defendant to be delivered in Kentucky on board freight cars. The Kentucky Court of Appeals admitted that if this constituted interstate commerce the statute could not constitutionally be applied; but held that it

constituted intrastate commerce, and denied the plaintiff recovery on the contract because the statute had not been complied with. The plaintiff, contending that it was engaged in interstate commerce, took the case to the United States Supreme Court on writ of error. "A final judgment . . . in the highest court of a State . . . where is drawn in question the validity of a statute of . . . any State, on the ground of . . . being repugnant to the Constitution . . . of the United States, and the decision is in favor of . . . validity, may be re-examined . . . in the Supreme Court upon a writ of error" (which must be granted as of right); whereas "it shall be competent for the Supreme Court, by certiorari" (the granting of which is within the discretion of the Supreme Court) " . . . to require that there be certified to it for review . . . any cause . . . where any title, right, privilege, or immunity is claimed under the Constitution." (39 STAT. AT L. 726, amending JUDICIAL CODE, § 237; BARNES' FED. CODE, § 1002.) Held, that the case is properly before the court on writ of error, *Dahke-Walker Milling Co. v. Bondurant*, U. S. Sup. Ct., Oct. Term, 1921, No. 30.

A decision involving an official's authority may determine its validity or may determine simply its nature or extent. See *United States v. Lynch*, 137 U. S. 280, 285; *South Carolina v. Seymour*, 153 U. S. 353, 360; *Champion Lumber Co. v. Fisher*, 227 U. S. 445, 451-452. Cf. *Ireland v. Woods*, 246 U. S. 323, 328-330. Congress, in amending § 237 of the Judicial Code, providing for review by the Supreme Court on constitutional grounds, evidently had in mind some such classification of state decisions upholding the application of state statutes. See 33 HARV. L. REV. 102. But cases involving the constitutionality of a state statute cannot be so classified. In passing on the constitutionality of a state statute the Supreme Court is bound to accept the construction put upon it by the state court. The validity of a statute is therefore "drawn in question" whenever the state court has in effect, consciously or unconsciously, upheld the statute as applied to the facts in the case. See *Bridge Proprietors v. Hoboken Co.*, 1 Wall. (U. S.) 116, 144-145; *McCullough v. Virginia*, 172 U. S. 102, 116-117; *Kenney v. Supreme Lodge*, 252 U. S. 411, 416. For a court to declare a statute unconstitutional means simply that if the statute be applied to this particular state of facts, it will operate in such a way as to contravene the terms of the Constitution; therefore in this case the court must disregard the statute. It results inevitably that whenever a state statute is applied to a new set of facts, it may be unconstitutional as applied to those facts, no matter how many times theretofore it has been declared valid. See *General Oil Co. v. Crain*, 209 U. S. 211, 227-228; *International Text Book Co. v. Pigg*, 217 U. S. 91; *New Orleans & Northeastern R. R. Co. v. Scarlet*, 249 U. S. 528. The conclusion of the majority seems unescapable. See p. 2, opinion of the court per Holmes, J., *Eureka Pipe Line Co. v. Hallanan*, U. S. Sup. Ct., Oct. Term, 1921, No. 255. But see *Philadelphia & Reading Coal and Iron Co. v. Gilbert*, 245 U. S. 162; *Dana v. Dana*, 250 U. S. 220. And cf. *Clayton v. Utah Territory*, 132 U. S. 632, 638; *McLean v. Denver & Rio Grande R. R. Co.*, 203 U. S. 38, 47-48.

**INTERNATIONAL LAW — RETROACTIVE EFFECT OF RECOGNITION OF FOREIGN GOVERNMENTS.** — In 1917 the Soviet Government supplanted the Provisional Government in Russia. In 1918, the Soviet authorities condemned certain personal property belonging to the plaintiffs, who were Russian citizens. A Soviet emissary sold the property to the defendants in England. In 1921 the English Foreign Office recognized the Soviet Government as the *de facto* government of Russia. Held, that this recognition related back to validate the seizure. *Aksionairnoye etc. A. M. Luther v. Sagor & Co.*, [1921] 3 K. B. 532 (C. A.).

For a discussion of the principles involved, see NOTES, *supra*, p. 606.

**INTERSTATE COMMERCE — WHAT CONSTITUTES INTERSTATE COMMERCE — TAXATION — TAX ON TRANSPORTATION OF OIL IN PIPE LINES WITHIN STATE.** — A West Virginia statute provides for a tax on all oil transported in pipe lines. (1919 W. VA. ACTS, EXTR. SESSION, c. 5.) The plaintiff's pipe line system consists of the West Virginia portion of a trunk line running from Ohio through West Virginia into Pennsylvania, through which there flows a constant stream of oil, and a network of feeders from West Virginia wells. For oil "gathered" the producer receives a "credit balance" slip. The company must at all times have in its pipes sufficient oil to meet its "credit balances." (1913 W. VA. CODE, § 3564.) The oil is piped to trunk line junction points. The producer pays, under a state tariff, a charge for "gathering" and transporting to the junctions, and a daily storage charge. On sale of the oil, the producer gives the company a "delivery order" if the sale is intrastate, a "tender of shipment" if interstate. The oil delivered is not that which the producer turned over to the company, but any oil of the same grade. The company holds the producers' oil at the junction points only until the trunk line is running oil of the same grade, when it is allowed to flow into the stream whether or not shipment orders have been received. "Delivery" and "shipment" orders are filled by diverting part of the stream. Of six million barrels gathered in West Virginia, one and one quarter millions were delivered in West Virginia, the remainder in Pennsylvania. The state seeks to tax the transportation to the junction points of all oil produced in West Virginia. *Held*, that the tax is unconstitutional as levied on the transportation of oil which ultimately left the state. *The Eureka Pipe Line Co. v. Hallanan, State Tax Commissioner*, U. S. Sup. Ct., Oct. Term, 1921, No. 255.

Whether commerce is interstate or intrastate is a practical question to be determined by the facts of the particular case. See *Chicago, M. & St. P. Ry. v. Iowa*, 233 U. S. 334, 343; *La. R. R. Comm. v. Tex. & Pac. Ry.*, 229 U. S. 336, 341. In the principal case the inquiry must be whether the transportation to the junction points and the transportation beyond were separable. No oil when shipped had a predestination to give the shipment character. It might be delayed at the junction; or it might flow continuously to some point on the trunk line, either within or without the state. In this state of facts the decision of the majority, that the character of the commerce is to be determined by the course which the oil in fact followed, is reasonable. But it is not unreasonable to hold with the minority that the transportation to the junctions was, as a practical matter, separable and intrastate. Neither decision is logically necessary; neither decision is necessary as a matter of practical judgment. The balance being so nearly even, a desire to adjust the power of the state to tax with the Federal power over interstate commerce so as not unduly to restrict either, might well have influenced the court, and led to a contrary result.

**LANDLORD AND TENANT — ASSIGNMENT AND SUBLETTING — LIABILITY FOR FAILURE OF LESSOR'S TITLE DISCOVERED AFTER AGREEMENT TO ASSIGN.** — The defendant corporation employed the plaintiff to sell certain of its leases. The plaintiff found a purchaser, to whom the defendant contracted to convey. The contract was cancelled because of a failure of title in the defendant's lessors. It was urged as one ground of defense that no covenants for title were implied in the contract to convey. *Held*, that judgment be entered for the defendant. *Miles v. United Oil Co.*, 234 S. W. 209 (Ky.).

If the contract with the prospective purchaser bound the defendant to make out a good title to him the plaintiff may recover his commission, as he has done the acts required, and the failure of the transaction is solely through the breach of contract of the defendant. *Tanenbaum v. Boehm*, 126 App. Div. 731, 111 N. Y. Supp. 185; *Wheelock v. Bornstein*, 214 Mass. 595, 101 N. E.

1086. After an executed conveyance of a fee without covenants, no action ordinarily lies against the vendor if it transpires that he had no title. *Earle v. De Witt*, 6 All. (Mass.) 520; *Thorildsen v. Carpenter*, 120 Mich. 419, 79 N. W. 636. But if the agreement is still executory the purchaser cannot be forced to take the vendor's defective title. *Vought v. Williams*, 120 N. Y. 253, 24 N. E. 195; *Smith v. Hunter*, 241 Ill. 514, 89 N. E. 686. And he may bring an action against the vendor for damages for breach of contract. *Vaughn v. Butterfield*, 85 Ark. 289, 107 S. W. 993; *Fleckten v. Spicer*, 63 Minn. 454, 65 N. W. 926. In the case of a contract to sell a lease the assignee will be injured if either the assignor's or the lessor's title is defective. Accordingly it has been held that the prospective assignee need not accept an assignment if the lessor's title is bad. *Purvis v. Rayer*, 9 Price, 488; *Souter v. Drake*, 5 B. & Ad. 992. And it follows as before that a right to damages against the assignor should be allowed. The court in the principal case admits that the transaction here is only an executory agreement. But it then decides the case as if the sale were executed, with the result that the ground of its decision, that no covenants will be implied in an assignment, has no application to the facts.

LANDLORD AND TENANT — CONDITIONS AND COVENANTS IN LEASES — EFFECT OF RESTRICTION AGAINST ASSIGNMENT ON COMPULSORY LIQUIDATOR. — The liquidator in the compulsory winding up of a corporation sought a declaration that he might assign a lease which contained a covenant against assignment without the lessor's consent. From an order granting this relief, the lessor appealed. *Held*, that the appeal be allowed. *In re Farrow's Bank, Ltd.*, [1921] 2 Ch. 164 (C. A.).

Although such restrictions as the covenant in the principal case imposes are valid, a change of tenant is not regarded as a breach in several instances. If the change is by operation of law it is valid; as when the personal representative of a deceased succeeds to the term. *Charles v. Byrd*, 29 S. C. 544, 8 S. E. 1. See 1 WILLIAMS, EXECUTORS, 11 ed., 702. An execution sale, also, is held not to violate the covenant, as the transfer is by the sheriff, not by the lessee. *Doe v. Carter*, 8 T. R. 57; *Farnum v. Hefner*, 79 Cal. 575, 21 Pac. 955. And it is held that a trustee in bankruptcy may assign. *Gaslay v. Williams*, 210 U. S. 41. *Cf. Doe v. Clarke*, 8 East, 185; *In re George's Bros.*, 245 Fed. 129 (N. D. Ohio). The reasons given are that, not being an assignee, the trustee is not bound by the covenant; or that such a transfer is necessary to protect the rights of the creditors. See *Doe v. Bevan*, 3 M. & S. 353, 360; *Gaslay v. Williams*, *supra*, at 47. These reasons seem inconclusive; and as the assignment by the trustee really violates the intent of the parties, the bankruptcy cases seem wrong. Their doctrine should certainly not be extended. Under the statute in the principal case the liquidator does not get title and the court distinguishes the bankruptcy cases on this ground. The distinction, though fine, is a justifiable means of avoiding an extension of the doctrine. Where the liquidator does get title, the bankruptcy cases are followed. *Liquidation of Citizens Savings & Trust Co.*, 171 Wis. 601, 177 N. W. 905.

LANDLORD AND TENANT — CONDITIONS AND COVENANTS IN LEASES — "RENEWAL" CONSTRUED TO MEAN EXTENSION. — The plaintiff leased to the defendant for five years, with an option to "renew" for two further periods of five years each at specified rents. Notice of the election to exercise the option was not expressly required. The defendant remained on the premises for nearly nine years without ever having given such notice, always paying the stipulated rent. The plaintiff then gave notice to vacate, and on the defendant's refusal to do so instituted forcible detainer proceedings. These proceedings were dismissed. *Held*, that the judgment be affirmed. *Klein v. Auto Delivery Co.*, 234 S. W. 213 (Ky.).

The only substantial difference between renewals and extensions is in the method of their initiation. The former require the execution of a new lease. *Thiebaud v. First National Bank*, 42 Ind. 212. See 2 UNDERHILL, LANDLORD AND TENANT, § 803. Merely holding over will effect an extension. *Callahan Co. v. Michael*, 45 Ind. App. 215, 90 N. E. 642. See *Andrews v. Marshall Co.*, 118 Iowa, 595, 597, 92 N. W. 706, 707. In the absence of express stipulation for a new lease, the court must construe the old lease to determine which of these situations the parties had in mind. *Orton v. Noonan*, 27 Wis. 272. "Renew" and "extend" are used interchangeably by many business men; it is not, therefore, obligatory to give them their technical meaning. *Insurance Bldg. Co. v. National Bank*, 71 Mo. 58. Cf. *Harding v. Seeley*, 148 Pa. St. 20, 23 Atl. 1118. Courts are undoubtedly influenced by the fact that the execution of a new lease is expensive, and the only purpose that it can serve is to give notice that the option is to be exercised. Since this purpose can be accomplished by providing in the lease for such notice, there is a tendency to hold that an extension was intended, unless a contrary intent clearly appears. The mere use of the word "renew" is not enough. See UNDERHILL, *supra*.

LITERARY PROPERTY—RIGHTS OF ASSIGNEE—INFRINGEMENT OF COMMON-LAW RIGHT TO THE FIRST PUBLICATION.—The composer of a song sold all his rights therein to the plaintiff. He thereafter copyrighted the song, sold copies in conjunction with another defendant, and licensed other defendants to reproduce the song upon phonograph records. The plaintiff sues to enjoin all the defendants, and for an accounting. The defendants demur on the ground that the complaint does not state a cause of action. *Held*, that the demurrers be overruled. *Kortlander v. Bradford*, 190 N. Y. Supp. 311 (Sup. Ct.).

For a discussion of the principles involved, see NOTES, *supra*, p. 599.

PARTNERSHIP—DUTIES OF PARTNERS *INTER SE*—SECRET AGREEMENT FOR FUTURE PARTNERSHIP WITH LESSOR OF FIRM PREMISES.—A bill in equity alleged that the plaintiffs and the defendant as partners had operated a profitable billiard parlor on leased premises; that shortly before the expiration of the lease, there being no option to renew, the defendant secretly persuaded the lessor not to renew to the firm, but to agree to run the business in partnership with the defendant; and that the plaintiffs were induced by the defendant to dissolve the partnership and sell the business and effects to the lessor at less than their worth, with no allowance for good will. The plaintiffs prayed an accounting and a declaration that they were entitled to their share of the defendant's subsequent profits. A demurrer was sustained below. *Held*, that the decision be affirmed. *Stewart v. Ulrich*, 201 Pac. 16 (Wash.).

In dealing with each other, partners must act in the utmost good faith. See *Blisset v. Daniel*, 10 Ha. 493, 522, 536; *Holmes v. Darling*, 213 Mass. 303, 305, 100 N. E. 611, 612; *Hollowell v. Satterfield*, 185 Ky. 397, 400, 401, 215 S. W. 63, 65; LINDLEY, PARTNERSHIP, 8 ed., 364; BURDICK, PARTNERSHIP, 3 ed., 320. If during the continuance of the firm the defendant had secretly secured for himself a renewal of the firm lease, he would hold it in constructive trust for the firm, even though it was to begin after the firm's dissolution. *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Mitchell v. Reed*, 61 N. Y. 123. Cf. *Struthers v. Pearce*, 51 N. Y. 357; *Knaapp v. Reed*, 88 Neb. 754, 130 N. W. 430. It makes no difference that the lessor would not have renewed to the firm or to the other partners. See *Featherstonhaugh v. Fenwick*, *supra*, at 301, 312; *Mitchell v. Reed*, *supra*, at 139. Instead of a renewal, the defendant secured an interest in the premises equivalent in substance to a renewal, by virtue of the lessor's agreement to form a partnership. Even if, as the court says, this case does not fall exactly within the category of the renewal cases, it is still true that the

defendant secured for himself the benefit of a contract which should have inured to the firm; and he should account therefor. *Miller v. O'Boyle*, 89 Fed. 140 (Circ. Ct., W. D. Pa.); *Williamson v. Monroe*, 101 Fed. 322 (Circ. Ct., W. D. Ark.); *Holmes v. Darling*, 213 Mass. 303, 100 N. E. 611. Cf. as to joint adventures, *May v. Hellrick Bros. Co.*, 181 App. Div. 3, 167 N. Y. Supp. 966; *Stem v. Warren*, 185 App. Div. 823, 174 N. Y. Supp. 30. See *Mitchell v. Reed*, *supra*, at 126, 137; LINDLEY, *op. cit.*, 366. The account should include the good will of the business. Cf. *Donleavy v. Johnston*, 24 Cal. App. 319, 141 Pac. 229. It should include the difference between the price actually paid for the partnership chattels, and their fair value; for a partner may not purchase firm personalty without making a full disclosure. *Jones v. Dexter*, 130 Mass. 380. Moreover, since a full disclosure was not made, the adjustment of accounts between the partners cannot be considered final. *Krebs v. Blankenship*, 73 W. Va. 539, 80 S. E. 948. Cf. *Stem v. Warren*, *supra*; *Jones v. Waring*, 200 Pac. 908 (Oreg.). So the recovery should include a share of the defendant's profits. *Filbrun v. Ivers*, 92 Mo. 388, 4 S. W. 674. But see 33 HARV. L. REV. 1070, 1075.

**PUBLIC SERVICE COMPANIES — RIGHTS AND DUTIES — DISCRIMINATION BY TERMINAL COMPANY BETWEEN TRANSFER COMPANIES.** — A railroad commission, seeking mandamus to compel the performance of its order, alleged: that the defendant terminal company checked baggage on claim checks issued by one transfer company, but required identification of baggage by passengers employing other companies; that the commission had found this practice an unreasonable discrimination against the latter passengers; that it had ordered the defendant to issue triplicate checks to all licensed transfer agents in the city, and to check baggage on receipt of stubs. It did not allege that the defendant had corporate power to instal the required checking system. *Held*, that the writ be quashed. *State v. Jacksonville Terminal Co.*, 89 So. 641 (Fla.).

It would seem that power to instal the checking system might fairly be implied from the defendant's charter as a terminal company. *Jackson Lumber Co. v. Trammell*, 199 Ala. 536, 74 So. 469; *Jacksonville, etc. Ry. Co. v. Hooper*, 160 U. S. 514. See 1 MORAWETZ, PRIVATE CORPORATIONS, 2 ed., §§ 320, 362, 364, 365, 367a. The defendant would probably, by reason of its economic situation, be subject even at common law to the duties of a business "affected with a public interest." Cf. *Watts v. Boston & Lowell R. R. Corp.*, 106 Mass. 466; *Inter Ocean Publishing Co. v. Associated Press*, 184 Ill. 438, 56 N. E. 822. Certainly the legislature may, as it has done, subject it to such duties, including the duty not to discriminate unfairly among those whom it serves. See 1920 FLA. REV. GEN. STAT., §§ 4616, 4617, 4618; *State v. Jacksonville Terminal Co.*, 41 Fla. 377, 27 So. 225. It may be argued that a *bona fide* refusal to exchange its receipts for the receipts of any transfer company except those it has reason to trust should not be regarded as unfair discrimination; that it is an incidental discrimination, designed to improve service, and is no more objectionable than the practice of excluding certain hack companies, for instance, from the defendant's premises. Cf. *Clisbie v. Chicago, R. I. & G. Ry. Co.*, 230 S. W. 235 (Tex. Civ. App.); *Thompson's Express & Storage Co. v. Mount*, 111 Atl. 173 (N. J.); *Missouri Pacific R. R. Co. v. Kohler*, 107 Kan. 673, 193 Pac. 323. Cf. 12 HARV. L. REV. 280. Probably, however, the purpose of the discrimination is less protection than monopoly. The commission found it unfair. The court seems to have denied this finding the consideration to which it is entitled. See 1920 FLA. REV. GEN. STAT., § 4618; *State v. Florida East Coast Ry. Co.*, 67 Fla. 83, 64 So. 443.

**PUBLIC SERVICE COMPANIES — RIGHTS AND DUTIES — STRIKE AS AN EXCUSE FOR FAILURE TO FURNISH SERVICES.** — A statute imposes upon electric

light companies the duty of furnishing power upon proper application, and provides a penalty for failure to comply, with a proviso that the penalty shall not be imposed "when in the opinion of the court the default was caused by inevitable accident or *force majeure*." The defendant's employees refused to connect the complainant's building because it was wired by non-union men. It was found that if the defendant had discharged the men thus refusing, all of his employees would have gone on strike; and it would have been difficult or impossible to replace them. The defendant was convicted on information under the statute. *Held*, that the conviction be sustained. *Hackney Borough Council v. Dore*, 152 L. T. 383 (K. B.).

No clear principle has yet been enunciated for determining what will excuse the performance of a public utility's common-law or statutory duty to furnish services. It is clear that Acts of God, or *vis major*, will excuse. *Gray v. Wabash R. Co.*, 119 Mo. App. 144, 95 S. W. 983. The principal case may be taken to mean that, under the English statutes, *vis major* alone will excuse, and that a strike of this sort is not *vis major*. But whether the American cases at common law apply similar rules is far from clear; principles have not been stated with care. Strikes conducted by means of force and violence are held to excuse. *Pittsburgh, etc. R. Co. v. Hollowell*, 65 Ind. 188; *Geismer v. Lake Shore R. Co.*, 102 N. Y. 563; *Galveston, etc. R. Co. v. Karrer*, 109 S. W. 440 (Tex. Civ. App.). But a peaceful strike for higher wages is no excuse. *People v. N. Y. Central R. Co.*, 28 Hun (N. Y.), 543. One court has held a strike an excuse without considering its nature. *Murphy Hdw. Co. v. Southern R. Co.*, 150 N. C. 703, 64 S. E. 873. See *Southern R. Co. v. Atlanta Sand Co.*, 135 Ga. 35, 54, 68 S. E. 807, 816. A strike boycotting cars of a connecting carrier — a case closely analogous to the principal case — was held an excuse. *Chicago, B. & Q. R. Co. v. Burlington, etc. R. Co.*, 34 Fed. 481 (Circ. Ct., S. D. Ia.). It seems impossible to reconcile all these decisions. It may be suggested, however, that the line be drawn between legal and illegal strikes. A strike like that in the principal case would, in most jurisdictions, be held illegal. *Duplex Printing Co. v. Deering*, 254 U. S. 443; *Burnham v. Dowd*, 217 Mass. 351, 104 N. E. 841; *Purvis v. United Brotherhood*, 214 Pa. St. 348, 63 Atl. 585. *Contra, Parkinson v. Building Trades Council*, 154 Cal. 581, 98 Pac. 1027. See *Bossert v. Dhwy*, 221 N. Y. 342, 117 N. E. 582. For England, see TRADE DISPUTES ACT, 1906, 6 EDW. 7, c. 47. Any such suggestion, however, but illustrates the futility of leaving such complicated matters of large public concern to the courts. Such delicately balanced questions are primarily subjects for administrative determination. See 35 HARV. L. REV. 450.

**SUBROGATION — EFFECT OF SECOND MORTGAGE ON THE RIGHTS OF A PARTY SUBROGATED TO THE SECURITY OF THE FIRST MORTGAGEE.** — To secure a debt, D, holding an unincumbered fee in Blackacre, executed a first mortgage upon it in favor of C, who had the mortgage duly recorded. In the jurisdiction, it gave C a legal lien on the property. D then misapplied money belonging to S in partially paying the debt, C receiving it without notice of the wrong. This payment was not recorded. Later, D executed a second mortgage on Blackacre to P, who paid value and had no knowledge of the mortgage to C. D died, and in administration proceedings against his estate, after the remainder of C's claim had been fully satisfied, S seeks to come in ahead of P against the security, claiming subrogation to the rights of C under the first mortgage. *Held*, that S recover. *McCullough v. Elliott*, [1921] 3 W. W. Rep. 361.

For a discussion of the principles involved, see NOTES, *supra*, p. 596.

**TRADE-MARKS AND TRADE NAMES — PROTECTION APART FROM STATUTE — USE OF TRADE-MARK ON GENUINE GOODS.** — The plaintiff purchased the American business of a French firm, which sold, under trade-marks registered in the

United States, face powder manufactured by it in France. The plaintiff imported this firm's powder in bulk, repacked it, and sold it under the trade-marks used by the French company. The defendant imported the same face powder in the original trade-marked boxes and resold it in competition with the plaintiff. In a suit to enjoin the defendant from selling these goods under the registered trade-marks, the district court granted a motion for a preliminary injunction. *Held*, that the order be reversed. *A. Bourjois & Co., Inc. v. Katzel*, 275 Fed. 539 (2d Circ.).

The function of a trade-mark is to denote the origin and genuineness of an article with which it has become associated. See *President Suspender Co. v. MacWilliam*, 238 Fed. 159, 161 (2d Circ.). See SEBASTIAN, TRADE-MARKS, 5 ed., 2, 14. It thus serves the double purpose of protecting the owner in his business, and safeguarding the public from deception. The majority of the court in this case conclude that the latter is the primary purpose, and that there is no infringement as long as the original article is being sold. *Apollinaris v. Scherer*, 27 Fed. 18 (Circ. Ct., S. D. N. Y.); *Russia Cement Co. v. Frauehar*, 133 Fed. 518 (2d Circ.); *Gretsch Mfg. Co. v. Schoening*, 238 Fed. 780 (2d Circ.). The dissenting judge regards the former as the primary purpose, and concludes that even a sale of the genuine goods may be an infringement. The majority view seems the sounder. Admittedly, the manufacturer of these goods has the exclusive right to use this trade-mark. The decision in the principal case does not deprive him of the good will which his advertising and the merits of his product have secured. It only recognizes that there can be no grant of a territorial monopoly in the resale of such goods under the trade-mark. See *Apollinaris v. Scherer*, *supra*, at 21; *Coca-Cola Co. v. Bennett*, 225 Fed. 429, 432 (D. Kan.). See SEBASTIAN, *op. cit.*, 13. Such a monopoly would run counter to the social interest in freedom of competition — the more so since trade-mark rights may be perpetual. It is unfortunate that the plaintiff in this case has paid for something which the law does not secure; but that cannot affect the decision.

**WILLS — ALTERATIONS AND MODIFICATIONS — MODIFICATION OF LEGACIES BY CHANGE OF BENEFICIARIES IN TRUST DEED.** — The testator made a trust deed of part of his property, reserving the income to himself for life, with gifts over to named beneficiaries. He reserved a power to revoke or change any trust therein declared. On the same day he made his will, the residuary clause of which gave property to the trustee under the trust deed "to be held . . . in the same manner as though [it] . . . had been deposited by me as a part of said trust estate." The testator later made several changes in the trust deed, and then died. *Held*, that the residuary clause is void. *Atwood v. Rhode Island Hospital Trust Co.*, 275 Fed. 513 (1st. Circ.).

It is well settled that a testator may not reserve a power to modify his will by merely giving directions at some future time. *Hartwell v. Martin*, 71 N. J. Eq. 157, 63 Atl. 754. But if the beneficiaries are to be ascertained by some act that has an immediate legal effect and therefore is not purely testamentary, the disposition is good. A gift to those who shall be my partners at my death is valid. *Stubbs v. Sargon*, 3 Myl. & Cr. 507. So is a gift to those who may be farming my farm and taking care of me at my death. *Reinheimer's Estate*, 265 Pa. St. 185, 108 Atl. 412; *Dennis v. Holsapple*, 148 Ind. 297, 47 N. E. 631. And the testator may provide that advances of money noted in the regular course of business shall cut down legacies. *Langdon v. Astor's Executors*, 16 N. Y. 9; *Moore's Case*, 61 N. J. Eq. 616, 47 Atl. 731. The principal case seems within the principle of these decisions. If naming beneficiaries in the trust deed had no present legal effect, it is hard to see why that deed is not invalid as an improperly attested testamentary instrument. But the validity of the trust deed is conceded by the court. Evidently the court fails to recognize the inconsistency of its position.



**WILLS — REVOCATION — DUPLICATE WILLS — LOSS OF ONE OF TWO DUPLICATES IN POSSESSION OF TESTATOR.** — The testator executed his will in duplicate, and took possession of both duplicates. Upon his death, one was found in his safe-deposit box. The other could not be found. *Held*, that the will be admitted to probate. *Matter of Shields*, 190 N. Y. Supp. 562 (Surr. Ct.).

Each duplicate is the last will of the testator. See *Odenwaelder v. Schorr*, 8 Mo. App. 458, 464. The will may be revoked by act to one of the duplicates, with an intent to revoke. Such intent has been inferred from the cancellation of one duplicate, though the testator had both in his possession. *Pemberton v. Pemberton*, 13 Ves. 302. See 1 JARMAN, WILLS, 6 Am. ed., \*123. But see *Roberts v. Round*, 3 Hagg. Ecc. 548. The difficulty in the principal case is to determine whether the missing duplicate was destroyed with such intent. If the testator retain but one duplicate, the fact that it cannot be found at his death raises a presumption that he destroyed it *animo revocandi*. *Richards v. Mumford*, 2 Phillim. 23; *Colvin v. Fraser*, 2 Hagg. Ecc. 266; *Matter of Schofield's Will*, 72 Misc. 281, 129 N. Y. Supp. 190. Cf. *Managle v. Parker*, 75 N. H. 139, 71 Atl. 637. Can a revocation be inferred when, as in the principal case, both duplicates have been retained, and one is missing? The disappearance of a will loses much of its significance when an equally valid duplicate remains intact in the testator's possession. Little is to be gained by saying that a presumption of revocation arises from the fact that one will is missing, and is rebutted by the fact that the other has been preserved. It is better simply to draw an inference from all the facts; and in the principal case it may fairly be inferred that there was no revocation.

## BOOK REVIEWS

**WAR GOVERNMENT OF THE BRITISH DOMINIONS.** By Arthur Berriedale Keith. Being part of the Economic and Social History of the World War, British Series, published by the Carnegie Endowment for International Peace, Division of Economics and History. Oxford: Clarendon Press. 1921. pp. xvi, 354, (5).

The British Empire has always belied its name. "This realm of England is an Empire," declared a statute of Henry VIII with the Cæsarian flourish he loved; and if there was incongruity in adopting the term for an assertion of exclusive jurisdiction over his exiguous territory, there is no less in employing it to describe the congeries of free communities which form the Britannic Commonwealth to-day. The subjects of his successors made it most nearly applicable to reality when they had, as Seeley said, "conquered and peopled half the world in a fit of absence of mind"; but they carried with them their share of a tradition of free government that raised problems the solutions of which no Roman precedents could supply. The last hundred years witnessed the progress of Canada, Australia, New Zealand, and South Africa, by similar stages, to internal self-government, and the period since the outbreak of world war has seen them accorded a status of partnership with the United Kingdom and international recognition.

It is with the activities of their governments during the latter period, and the relations of those governments with that of the United Kingdom, that Mr. Keith's book deals. It gives a well-proportioned and lucid statement of complicated facts; his description of political operations and results is almost always exact, though a few *nuances* would doubtless have been different had it been possible for him to be closely in touch with local conditions so widely dispersed; but there are more serious objections to some of his statements and

inferences, which arise chiefly from a terminology that should be discarded because it describes a theory that is obsolete. It is sufficiently difficult to understand the Britannic political system with its legal dogmas controlled by established or developing conventions, and the difficulty is enhanced when terms are employed that obscure its realities.

Mr. Keith knows the details and admits the results of a steady course of development, which has been remarkable in the past few years only because it has been more rapid and possibly more obvious than before. He asserts the unfettered right of the nations of the Commonwealth to govern themselves; he recognizes that they "have come to claim and be accorded equal status within the Empire"; and he sees that the unity of the five partners is one "which depends ultimately on sentiment," or, as Mr. Meighen said last summer in England, on "common traditions, undivided allegiance, mutual loyalty." But he appears to be timid about the implications of all this, and seems to feel that unity threatened by the present results of a development which has been its real security. An "Imperial Parliament," whose "legislation can apply to a Dominion only with the full assent of that Dominion," and an "Imperial Government," which "so completely [respected] local autonomy . . . that no interference was attempted by [it], even in regard to the military expeditions conducted by the Dominions and their occupation of enemy territory," are organs whose titles seem to want a good deal of explanation; and a confused use of the term "the Crown" to designate the King in his legal and constitutional position and relation to the whole Commonwealth and the governments and parliaments of the five self-governing partners, is an offence which should not have been repeated since Maitland discussed it.

"The Parliament of the United Kingdom (*sic*) was possessed of full sovereign authority of legislation, while the Dominion Parliaments had only a derivative authority granted by the Imperial Parliament," says Mr. Keith. "*The Canadian people*," said Sir Robert Borden in his Marfleet lectures, "accomplished Confederation by means of a statute enacted *at their instance* by the Parliament of the United Kingdom." The absence from that statute of any provision for its change by the Parliament of Canada is doubtless an inconvenient anomaly; but as it is one which can be rectified whenever the Canadian people desire to have a statute of the Parliament of the United Kingdom passed for the purpose, it scarcely justifies Mr. Keith's statement that "the problem of Imperial legislation presents itself with special acuteness in the case of Canada." For, as Sir Robert Borden said, "necessary amendments have been effected by that Parliament upon joint resolution of the Senate and Commons of Canada and no such amendment has been refused." "Thus," he added, "the legal powers of the Parliament of the United Kingdom have been utilized as a convenient means of effecting constitutional amendments." "The statutory translation of a parliamentary address from a self-governing Dominion, praying for a modification of its charter, is," as Mr. Meighen told the benchers of Gray's Inn, "but a circuitous method of legislation" — and he was not talking of Imperial legislation — "which, with our contempt for anomaly, we adopt until we find a better." That the Parliament of Canada would be unlikely to adopt a joint resolution for such an address against the views of the members from one of the Provinces which entered the union by virtue of what has sometimes been called a treaty, does not affect the essential truth of the last two statements. The territorial limitation on the legislative jurisdiction of the Dominion Parliaments is another anomaly, which is in process of being removed. Sir Robert Borden says the last word on this subject: "the Parliament of the United Kingdom has ceased to be an Imperial Parliament in any real sense so far as the Dominions are concerned. Its legal power is subject to the limitations of constitutional right." Surely it is the real sense of an intricate political system which is sought; and if, in order to preserve

the legal forms of a system encrusted with historical but generally harmless anomalies, the Parliament of the United Kingdom is constitutionally used as the primary legal organ for the establishment of law which will affect all His Majesty's subjects when the different Parliaments which are constitutionally entitled to legislate for them adopt it, or as an exalted registry office where legal validity is given to the constitutional expression of the political will of the electorate of another parliament of the Commonwealth, these things should be brought to light and not hidden under anomalous terms.

If the Parliament of the United Kingdom has ceased to be termed properly an "Imperial Parliament," the Government responsible to it is only less properly termed "Imperial." "By 1914," says Mr. Keith, "the rule had been effectively established that in all matters of internal government, the Dominions must be allowed the decision of the action to be taken, however much their policy might diverge from that which was adopted by the Imperial Government for the United Kingdom." The government of the United Kingdom has statutory power to disallow Acts of the Canadian Parliament; but, as Sir Robert Borden said, "the power of disallowance has not been exercised by the British Government for more than fifty years, and while it still has a legal existence it may be regarded as constitutionally dead"; it "is controlled and over-ridden by constitutional right." More difficult problems arise respecting the foreign relations of the Commonwealth, and their solutions lie not so much in abolishing or circumventing anomalies, as in overcoming mechanical obstacles. For historical reasons, which distance, and the consequent difficulty of periodic, not to speak of continuous conference, and even of frequent and full communication, involve, the conduct of the day to day relations of the whole Commonwealth with foreign states has been largely in the hands of the Government of the United Kingdom. At international conferences the Dominions are individually represented by plenipotentiaries appointed by the King on the advice of their own governments; and the negotiation of matters which concern that Dominion individually and the United States is conducted by Canada directly with the American Government, through the British Ambassador at Washington, or, by virtue of a treaty which provides for the investigation and arbitration of certain such matters, through a Commission, one half the members of which are appointed by the American Government and the other half by the King on the advice of the Canadian Government. The action of the King, as head of the Commonwealth, in respect of the external relations of the Dominions, is now taken on the constitutional advice of his Dominion Ministers. Because they reside in their respective Dominions, he is not immediately accessible to them, and, as such advice must reach him by some channel of communication, it is transmitted through a British Minister. But it is obviously confusing to say, as Mr. Keith does, that the action taken on such advice is taken on the advice of the British Minister who is made the channel of communication. If Mr. Keith means to imply that, on a matter concerning a Dominion only, the advice of the British Minister may over-ride that of the Dominion Ministers, something more may be endangered than the formal unity for which he is concerned. Fortunately no British Minister is likely to misapprehend his duty in such cases; if he requires guidance he will find a sound principle in the statement of Mr. Keith that "the functions of the Imperial Government and the Secretary of State for Foreign Affairs must, as regards communications from the Dominions to foreign powers or the League [of Nations], be *ministerial*, and the requests of the Dominions complied with without reserve." (As a matter of fact, communications to and from the League pass directly between it and the Dominion Governments.) A more serious question arises when the advice of a Dominion Ministry has reference to a matter which concerns, perhaps vitally concerns, all the partners of the Commonwealth. "It is obvious," as Mr. Keith says,

"that if Imperial unity is not to disappear, each Dominion must keep the Imperial Government and other Governments informed of its views," and that "it would be at least convenient if no action on any issue were taken, whether by the Imperial Government or a Dominion Government, before opportunity for objections or suggestions had been afforded." Periodic conferences are held, and communication of views is as full and frequent as distance will permit; but the increased and increasing intimacy and interdependency of international relationships, and the wider reaction and repercussion of events throughout the Commonwealth, make the most intimate consultation, which ought to take place before constitutional advice is tendered, increasingly essential to agreement. Surely, however, it is too facile to dispose of what Lord Milner called "one of the most complicated tasks which statesmanship has ever had to face," by saying that "the precise manner in which such consultation is arranged is only of secondary importance."

'The Crown' is a useful enough term to denote the head of the Commonwealth in his legal and constitutional position and relation to the other organs of government, but it should not be employed to give a specious definiteness to loose thought. Constitutionally the King is ubiquitous, but personally he cannot be; so, while he fulfills his functions in the United Kingdom in person, in the Dominions he must act by deputy. He may be said to have still another personality if he fulfills a function for the whole Commonwealth; but in all cases the function is that of 'the Crown,'—the King, acting (in person or by deputy) on the appropriate ministerial advice. The King is King of Canada, Australia, New Zealand, and South Africa, just as he is King of the United Kingdom, and the powers and functions of 'the Crown' subsist in each and all. A sentence of Sir Robert Borden's, which Mr. Keith quotes, puts the matter succinctly: "There is but one Crown, acting in each Dominion and in every Province and State upon the advice of Ministers responsible to the people and invested with their mandate." Therefore, though it is "the fact," as Mr. Keith says, "that the Crown possesses war prerogatives which extend . . . over all the Dominions and had not been delegated to Dominion Governments in the period before the war," there is more to be said for their exercise "on the advice of the Dominion ministry," where it affected the lives or property of His Majesty's subjects resident in a Dominion, than that their exercise "on the advice of the Imperial Government . . . would have resulted in undesirable friction with Ministries." The question of the exercise of one of these prerogatives arose during the war, and the Ministers of the Crown in the United Kingdom advanced the view that it could be exercised on their advice. The Ministers of the Crown in Canada, while informing their fellows in the United Kingdom that "it is needless to observe that any representations which [the latter] may submit as to the necessity or advisability [of exercising such prerogatives] will receive prompt and sympathetic consideration," formally made the constitutional position clear: "the question to be determined is not one of legal power but of constitutional right. This distinction is well recognized in the conventions which control the exercise of legislative powers. . . . The exercise of His Majesty's prerogative with respect to Canada must be governed by like considerations. . . . When the prerogative of the Crown is to be exercised . . . in respect to all matters which involve a contribution by citizens domiciled in [a Dominion], this prerogative must be exercised upon the advice of [the Dominion] Ministers and not upon the advice of the Government of the United Kingdom." 'The Crown' and its prerogatives subsist throughout the Commonwealth, in each Dominion as well as in the United Kingdom, and it acts, and they are exercised, upon the advice of Ministers responsible to the Parliament which represents the people who are affected thereby; it is neither the jewelled object lying in the Tower, nor a mysterious power over-riding the constitutional

authorities of the different parts of the Commonwealth, but a compendious term for a member of the constitutional machinery of each part, and of the embryonic but still amorphous contrivance by which the whole acts in unison, as well as a symbol of the historical traditions and constitutional unity of the peoples of the Britannic Commonwealth; whose Empire is no alien rule but their own self-government.<sup>1</sup>

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A NEW CONSTITUTION FOR A NEW AMERICA. By William MacDonald. New York: B. W. Huebsch. 1921. pp. 260.

One who has spent some years in close communion with the Commerce Clause and the Fourteenth Amendment naturally feels apprehension in opening a book that boldly calls itself *A New Constitution for a New America*. It brings an empty feeling in the pit of the brain to think that some second growth of Founding Fathers may in a moment devitalize a considerable body of knowledge laboriously acquired and by a stroke of the pen reduce one from a lawyer to an historian. Yet if the public good requires it, the true patriot will not shrink from the ordeal. Mr. MacDonald's apocalypse must be viewed with unclouded eyes, however much it hurts. Even before the sedative delights of normalcy have fully restored to us our Old America, we will turn our gaze on a New America if Mr. MacDonald insists. Happily, however, he refrains from charting this New America except as it is to be created by his New Constitution. Thus our peace is not invaded in any such disturbing way as Cole and Tawney and Hobson and the Webbs ravish the quiet of Englishmen. If a New America is in time created by Mr. MacDonald, it will come *molliter* and indirectly through the ministrations of the paper changes that he proposes. Even these, when analyzed, are to the constitutional lawyer less drastic than the author's ominous title would lead him to fear.

To the practical politician, however, the new proposals are by no means negligible. Mr. MacDonald courageously disqualifies himself from becoming a public school-teacher in the state of New York so long as Chapter 666 of the Laws of 1921 continues to withhold a certificate from "any person who, while a citizen of the United States, has advocated, either by word of mouth or in writing, a form of government other than the government of the United States or of this state" (EDUCATION LAW, § 555 a). For Mr. MacDonald would have us abandon presidential government for cabinet government. The greater part of his study is devoted to the disadvantages of the former and to specification of the changes necessary to bring us the blessings of the latter. The president is to be so shorn of powers that invariably he can be no more than an amiable figurehead. Senators and representatives are to be elected for concurrent terms, some member of one house or the other is to lead them and to be replaced by a rival when he loses their confidence. The two chambers are to have co-ordinate authority, but what happens when they disagree is not considered. Thus the people are to rule as never before. Perhaps it is with thoughts of happy Britain that the author says: "Only by such changes can the nation rid itself of the one-man power which has become its bane, and recover the control of the government for the people themselves."

One who fears that full popular control may threaten the ancient liberties of minorities which our present Constitution guarantees will be glad to note that Mr. MacDonald does not ask us to give up the Fifth or the Fourteenth Amendment and that he declares explicitly that the Supreme Court should retain its present power to declare legislation unconstitutional. He would even increase these constitutional liberties by new clauses to remedy judicial mis-

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<sup>1</sup> The author of the foregoing review prefers to have his name withheld. — En.

takes that have come to his attention. If, however, the judges of the Supreme Court give us more liberty than is good for us, they are to be removed by the two houses of Congress. By this preservation of judicial review, the constitutional lawyer retains his function and most of his hard-won knowledge and insight. The federal system is to be altered somewhat and the powers of the nation increased at the expense of those of the states. This will make obsolete a little of our learning about the commerce clause, but it will raise new problems on which we can bring to bear most of our familiarity with the work of the Supreme Court in the past. Whatever anxiety Mr. MacDonald's book may bring to those who are adept in manipulating our present political devices, the constitutional lawyer may face its proposals with confidence that they hardly scratch the fundamentals that are dear and familiar to him.

THOMAS REED POWELL.

INTERNATIONAL LAW. By L. Oppenheim. Vol. II. — War and Neutrality. Third edition by Ronald F. Roxburgh. London: Longmans, Green & Co. 1921. pp. xlv, 671.

The second edition of this volume appeared in 1912. Since that date the law of war and neutrality has been subjected to strains so numerous and so severe that to prepare a new edition was obviously a task demanding great care. The author collected much new material; but he died in 1919, leaving the new edition far from being ready for the press. The editor has not asked sympathy for the heaviness of the burden cast upon him; but clearly it has been unusually difficult to determine what to omit and what to add and how to present the divergent doctrines urged in the World War.

As the time has not yet come for philosophical treatment of the recent and exciting events with which the new matter of this volume necessarily deals, the reader's estimate of the new text will depend largely upon the reader's own nationality. Doubtless the fairness of intent found in the earlier editions is found here also. Yet an American cannot avoid seeing, and saying, that those questions regarding neutral rights and liabilities which arose while the United States was still a neutral are not discussed precisely as they would be discussed by an American.

For example, although throughout the volume it is conscientiously stated that the Declaration of London, of 1909, concerning the rules of naval war, has never been ratified, and although in numerous places (pp. 132, 397-398, 534, 551, 556, 559, 561, 563, 574-575) it is explained that in the early months of the World War some countries, including England, announced a determination to embrace some of the provisions of the Declaration of London and to disregard others, and that later those countries changed their policy by disregarding all new provisions of the Declaration and by professing to act in accordance with pre-existing doctrines — as indeed was clearly their right — nevertheless the volume fails to discuss the view that it is improper to embrace part of a compromise settlement and repudiate the remainder, and especially improper when, as in the Declaration of London, there is an express provision that "the provisions of the present Declaration must be treated as a whole and cannot be separated."

Again, although there is mention of the protest made by the United States against the British order in council of March 11, 1915, and the French decree of March 13, 1915, prohibiting ocean commerce with Germany, and although the explanation given is that by failing to prevent German submarine practices the United States had acquiesced in such practices and must acquiesce in the results of reprisal (pp. 426-427), nevertheless it is not stated — doubtless because in England it was hardly realized — that the whole duty of a neutral country is to use due diligence, and that the United States had protested

against the submarine practices and had done as much as could be done without resorting to war.

Further, although the conversion of merchant-men into men-of-war on the high seas is accurately said (p. 113) to have been an open question when the World War broke out, and although it is said that "Great Britain, which belonged to the party denying a right to convert on the high seas, at once made it known that if German vessels, after leaving American ports, were converted into men-of-war on the high seas, it would hold the United States Government responsible for resulting damage," nevertheless the volume fails to realize that a scientific reader, or at least an American reader, would wish to know of the American protest, which insisted both that most of the Powers then allied with Great Britain held an opposite view regarding conversion on the high seas and that at any rate the utmost requirement from a neutral government would be due diligence.

To multiply such examples would give an impression that the volume is unfair. That would be a grave injustice, as is shown by many passages: for example, by the full statement of the controversy regarding long-distance blockade (pp. 540-544), and by the discussion of contraband (pp. 549-563).

Like its predecessors, this edition abounds in citations. To the learning found in treatises and in periodicals, as distinguished from decided cases, there is no more useful key.

E. W.

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WAR AND TREATY LEGISLATION AFFECTING BRITISH PROPERTY IN GERMANY AND AUSTRIA AND ENEMY PROPERTY IN THE UNITED KINGDOM. By J. W. Scobell Armstrong. London: Hutchinson & Co. 1921. pp. xx, 489.

"The intention of this work is to provide a handbook and a fingerpost for the guidance of those who are led either by necessity or inclination to thread the maze of War and Treaty Legislation." This purpose, as stated in the preface, has been admirably executed. Such a handbook has been much needed in England, and lawyers outside of England who have to deal with the English legislation should find it helpful. The English legislation is embodied in so many Acts, Proclamations, Orders in Council, and executive and administrative constructions, that the task of digging it out has been very difficult. But the English lawyer has had to deal with the legislation in the "ex-enemy" countries, too, and translations of the important texts of this foreign legislation have been included here.

Parts I and II deal with the treatment of British property, rights and interests in Germany and Austria during the war, the reproduction of the texts being preceded by a narrative summary in each case. Part III deals in the same way with the treatment of enemy property, rights and interests in Great Britain during the war. Little attempt is made to express any comparative judgment of the legislation in various countries, though the author states that "the steps which eventually led to the extension of hostilities into every channel of commerce and finance were initiated by the Allied Powers." It would be interesting to have a comparative evaluation of this legislation and a treatise on the departures which it marks from pre-war custom and practice. The performance of that task has been rendered much more simple by the present volume.

Part IV deals with the economic clauses of the Treaties of Peace, and the legislation in England, Germany, and Austria in execution of them. This part of the book should prove serviceable to American counsellors in administering those parts of the Treaty of Versailles of which the benefits are to come to the United States by the Treaty of Berlin.

M. O. H.

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## LANDLORD AND TENANT

### I

IN *Bergeron v. Forest*,<sup>1</sup> the Massachusetts law as to the liability of a landlord for injuries received by a tenant through the defective and dangerous condition of the interior of the premises, is stated as follows:

"The defendant as landlord cannot be held liable unless he has undertaken to make repairs and has made them negligently. (1) If he does this by virtue of some contract with the tenant, whereby during the tenancy either repairs or changes are made in the demised premises, the right of recovery is not limited to the tenant personally but includes all persons who within the contemplation of the parties were to use the premises under the hiring. *Feeley v. Doyle*, 222 Mass. 155, 157. (2) But if the landlord does this gratuitously, he is liable only to the tenant or person with whom he makes the gratuitous undertaking. *Thomas v. Lane*, 221 Mass. 447. *Gill v. Middleton*, 105 Mass. 477. In the first class of cases, that is to say, where the landlord makes repairs under contract, he is liable for ordinary negligence. *Galvin v. Beals*, 187 Mass. 250. In the second class of cases, that is to say, where the landlord makes repairs gratuitously, he is liable only for gross negligence, *Massaletti v. Fitzroy*, 228 Mass. 487, 509;<sup>2</sup> . . . By way of precaution it may be

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<sup>1</sup> 233 Mass. 392, 398 124 N. E. 74 (1919).

<sup>2</sup> "Except in those instances where death is caused by such act of negligence, when, liability for death being wholly statutory, under the terms of R. I. c. 171, § 2, as amended by St. 1907, c. 375, a landlord, as well as others, causing the death of a human being by negligence, is subject to the penalty there provided for ordinary negligence. *Brown v. Thayer*, 212 Mass. 392, 397, 398. *Flynn v. Lewis*, 231 Mass. 550. But the class of persons for whose death a landlord may be subject to a penalty is not enlarged beyond the class to whom he is liable for gross negligence in causing conscious suffering, because, as is pointed out in the full discussion in *Thomas v. Lane*,



added that, if the landlord does an act of gratuitous repair which creates a situation inherently dangerous, such as the presence of explosives without notice and such like conditions, there may be liability under the principle elucidated with full review of decisions in *Thornhill v. Carpenter-Morton Co.*, 220 Mass. 593."<sup>3</sup>

In *Thomas v. Lane*, cited by the Chief Justice, the celebrated case of *Winterbottom v. Wright* is construed as holding that one, other than a landlord, who for a consideration and in the course of his trade contracts to make repairs upon a building or chattel, and who makes such repairs negligently, is liable only to him with whom he has contracted, and that case, as so construed, is stated to be the law of Massachusetts.

The effect of the law so announced, applied to facts which might readily arise, is to say the least startling. A builder and contractor owns a shop which he lets to a tenant; the tenant complains that the floor of the shop has fallen into a dangerous state of disrepair. If the landlord, without more, as a mere favor to a desirable tenant, undertakes to do the work and does it with merely ordinary negligence, he is liable to no one. If, on the other hand, the repairs are done with gross negligence, whether by himself or by his servants or perhaps even by an independent contractor carefully selected by him, he is liable to the tenant and perhaps also to the wife of the tenant if she accompanies her husband in his visit to the landlord and joins in the complaint and is present when he promises to make the repairs.<sup>4</sup>

If, however, the tenant goes beyond mere complaint and threatens to exercise a right given him in his lease to terminate his tenancy, or, his lease being about to expire, warns the landlord that he will

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221 Mass. 447, with ample citation of authorities, there is no duty arising out of a gratuitous undertaking of repairs by a landlord to anybody except to the person or persons with whom the gratuitous undertaking was directly made. There can be no negligence unless there is a duty. Negligence consists in doing or omitting to do an act in violation of a legal duty or obligation due to the person sustaining injury. *Minor v. Sharon*, 112 Mass. 477, 487. *Lebourdais v. Vitrified Wheel Co.*, 194 Mass. 341. *Bernabeo v. Kaulback*, 226 Mass. 128, 131. *Mammott v. Worcester Consolidated Street Railway*, 228 Mass. 282, 284. *Savings Bank v. Ward*, 100 U. S. 195, 202, 205."

<sup>3</sup> Rugg, C. J., at p. 398, 399.

<sup>4</sup> It would seem also that a similar liability should exist to any other member of the household, or to any other person interested in the safety of the shop, such as a habitual customer who accompanied the tenant and was present when the promise was given.

not renew it unless the repairs are made,<sup>5</sup> the landlord's liability is enlarged both in the character of the negligence for which he is liable and in the persons to whom he is liable. He is liable if the repairs are made with ordinary negligence and he is liable not only to the tenant and to his household but also to "all persons who within the contemplation of the landlord and the tenant were to use the premises under the lease"; in other words, to all those whom the tenant chooses to permit or invites to enter, unless the lease contains a provision that he must exclude certain classes of persons or may not put the demised property to certain uses which involve their admission.

But if the landlord is not frightened by the threat or does not care whether the tenant terminates his lease or not, and the tenant thereupon employs him as builder and contractor to do the work as any other builder and contractor would, agreeing to pay for it, the landlord, as contractor, no matter whether he was guilty of ordinary or gross negligence in making the repairs, is answerable only to the tenant, after the tenant has accepted the repairs as complete. And this is so, though the danger negligently created could not have been discovered after the work was done by anything short of tearing the whole job to pieces. Yet the repairs would in each case have been done by the builder's regular force of workmen under his own direction or the direction of his regular foreman.<sup>6</sup>

It may well be that the fact that the repairs are made for a valuable consideration may properly increase the degree of care required or even the amount of skill which must be exercised by him who undertakes the work, though where the person gratuitously

<sup>5</sup> If the tenant has no right to terminate the lease, a promise to repair made to prevent him from carrying out a threat to do so is held to be without consideration. *Hart v. Coleman*, 192 Ala. 447, 68 So. 315 (1915).

<sup>6</sup> Indeed, it is possible to suggest a case in which it might be doubtful in which capacity he acted. Suppose in the case given above, the landlord refuses to make the repairs at his own expense, the tenant refuses to pay the ordinary rates charged by contractors and persists in his threat to vacate the premises. The builder-landlord suggests and the tenant accepts as a compromise, the proposition that the builder-landlord will make the repairs at cost. In such case, what is his position? Does he act as builder, liable only to the tenant, or does he act as landlord, liable also to the tenant's family and his business and social guests?

Probably he would be held to act as landlord, since the only benefit which he receives other than that of finding work for his force, (though if business is slack even contractors find it worth while to take contracts very close to cost,) is the retention of a tenant.

undertaking such repairs is himself a man whose business requires him to possess special skill, there is less reason to excuse unskilfulness even in a gratuitous undertaking.

But there is no principle general either to the law of contracts or of torts which justifies extending the liability of a landlord making repairs for a benefit moving to him as such, to persons to whom he would not be liable if he made the same repairs gratuitously, and to whom a contractor or even he himself, if acting as contractor, would not be liable, if he had undertaken the work for reward in the course of his business as contractor.

If the obligation to exercise care in making repairs arises out of the undertaking, and is the creature exclusively of the consensual act of giving the promise, while there may be a doubt as to the propriety of regarding such an undertaking, if gratuitous, as *in pari materia* with the true contract, such an undertaking, for a consideration, has far more if not all of the attributes of a perfect contract. Therefore, it seems clearly erroneous to apply to the former that fundamental principle of the law of contracts, which restricts liability to those party to the consideration, while refusing to apply it to the latter.

And since the landlord as such owes no duty to keep the interior of the demised premises in a condition safe for use and therefore the landlord's undertaking, whether gratuitous or for hire, does not define a previously existing relational obligation, it seems equally erroneous to impose on him, if he undertakes the repairs, a wider liability than is imposed upon any other person who improperly performs a similar undertaking for a consideration other than a benefit as landlord.

If the liability for negligent repairs gratuitously undertaken by a landlord is not based upon his failure to confer the benefit which a perfect performance would give, but upon his misfeasance, it is not in its essence a Contract but a Tort liability. As such its extent should be determined by the principles general to that part of the law which deals with the liabilities of those who by their actions create a risk of harm to others which results in injury. And it should be immaterial that the improper repairs are done under a gratuitous undertaking, rather than for hire or for a benefit accruing to the actor as landlord, or even that they are done without any understanding with the tenant at all. It should extend

to all persons whom the landlord ought to contemplate as apt to be exposed to whatever risk a lack of care on his part would create, unless there is some limitation recognized by Tort law confining the liability within narrower bounds.

In a number, indeed, a majority, of jurisdictions the liability of a contractor who as such contracts to do construction or repair work upon another's property, or of a manufacturer making an article for sale, is restricted to the owner of the property with whom the contract is made or the person to whom the article is sold as the first step in its distribution.

But there is no intimation in any of the cases cited by the Massachusetts Supreme Judicial Court of any reason why this limitation should not include landlords, or why, if landlords are to be excluded, their liability should depend upon the work being done for the purpose of gaining an advantage as landlord.

*Bergeron v. Forest* leaves the Massachusetts law on this subject in such a confused and uncertain state as to require an examination of the cases preceding it.

## II

Prior to 1870, the Massachusetts decisions as to the liability of a landlord for injuries caused by the defective condition of his premises while in the occupation of a tenant followed the generally accepted doctrines on the subject.

The landlord is under no duty to turn over to the tenant the premises in a condition fit for safe occupation and use. He is, therefore, not liable to a tenant or a person entering in the right of the tenant who while upon the premises is injured by a dangerous defect therein,<sup>7</sup> unless the landlord knew of the defect and

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<sup>7</sup> Unless the premises are leased for immediate use in their existing condition, for a purpose which involves the lessee inviting the public thereto, *Oxford v. Leathe*, 165 Mass. 254, 43 N. E. 92 (1896). A "rink and seats" leased for four nights to one Gleason who owned a troupe of trained horses, under an arrangement by which the lessor was to retain control of the box office till his nightly rent was collected. "The short and interrupted character of the occupation allowed to Gleason made it obvious that the safety of the building must be left mainly to the defendant" per Holmes, J.

See accord: *Camp v. Wood*, 76 N. Y. 92 (1879); and *Fox v. Buffalo Park*, 21 App. Div. 321, 47 N. Y. Supp. 788 (1897). And see *Barrett v. Lake Ontario Co.*, 174 N. Y. 310, 66 N. E. 968, (1903); *Albert v. State, use of Ryan*, 66 Md. 325, 7 Atl. 697 (1887); *Joyce v. Martin*, 15 R. I. 588, 10 Atl. 620 (1887); and *Kane v. Lauer*, 52 Pa. Sup. 467 (1913); in which the premises were let for a considerable term (in *Kane v. Lauer*, for

concealed it from the tenant or failed to disclose it to him, it being unlikely to be discovered by the tenant by any inspection which he was bound to make.<sup>8</sup>

Since the landlord is under no duty to repair defects existing prior to the lease, *a fortiori*, he is under no duty to repair dilapidations which occur during the tenancy even though called to his attention by the tenant.

A covenant to repair is held to create a purely contractual obligation, there being no pre-existing common law duty which it defines. And a separate agreement made upon sufficient consideration after the premises have been turned over to the tenant clearly should have no greater effect. Only the tenant can recover for the landlord's breach of such a covenant or agreement and the tenant's recovery is limited to the cost to which he is put in making the repairs which the landlord should have made and to the loss of the use of the premises, if the landlord's breach has made them unfit for use.<sup>9</sup>

A distinction is drawn between such covenants and covenants to make such repairs as are necessary to prevent the premises from becoming a nuisance in the strict sense of that term, that is, of falling into a condition likely to do harm to persons and property outside the boundaries of the premises. The landlord is liable under such covenants for any injury to persons or property sustained outside of the premises,<sup>10</sup> the person injured having his election to sue either the landlord or the tenant.<sup>11</sup>

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two years). The fact that the lease is for the specific purpose of throwing it open to the public is, in some of the cases, held to make its condition, rendering it dangerous to the public using it, "a nuisance," so as to make the landlord liable on the principle laid down in *Rosewell v. Prior*, 2 Salkeld, 460 (1701). It is hard to see any logical distinction between such cases and the lease of a shop or even a dwelling. The probability of injury and not the number of persons imperilled should control. There is much force in what Wilkes, J., says in *Willcox v. Hines*, 100 Tenn. 538, 558, 46 S. W. 297 (1898): "The obligation not to expose the individual to danger is the same as not to expose the public to danger."

<sup>8</sup> *Minor v. Sharon*, 112 Mass. 477 (1873); *Cowen v. Sunderland*, 145 Mass. 363, 14 N. E. 117 (1887).

<sup>9</sup> *Tuttle v. Gilbert Mfg. Co.*, 145 Mass. 169, 13 N. E. 465 (1887).

<sup>10</sup> *City of Lowell v. Spaulding*, 58 Mass. (4 Cush.) 277 (1849), in which Shaw, C. J.,

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<sup>11</sup> The marginal note to *Payne v. Rogers*, 2 H. Bl. 350 (1794), is as follows: "If an owner of a house is bound to repair it, he, and not the occupier, is liable . . . for an injury sustained by want of repair," and 18 HALSBURY, LAWS OF ENGLAND, 504, cites

In 1870 it was held in *Gill v. Middleton*<sup>12</sup> that a landlord was liable for injuries which the wife of his tenant received through the

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says that this is "to avoid circuity of action," citing *Payne v. Rogers*, 2 H. Bl. 349 (1794).

It is very doubtful whether this is the true reason or indeed a tenable reason for holding a landlord liable because of his covenant to repair the exterior of leased premises. It implies that such a covenant binds the landlord to indemnify the tenant for any damages which he may have to pay to a stranger because of the bad repair of the premises which he occupies. It does not explain why such a covenant should have such an effect, while a covenant to repair the interior of the premises is construed to bind

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*Payne v. Rogers* as authority for its statement that the liability is shifted to the landlord. On the other hand, Lord Denman says in *Russell v. Shenton*, 3 A. & E. (N. S.) 449, 459 (1842), "that the language of the Court" (in *Payne v. Rogers*) "is not very clear; but, if the marginal note may be taken to be a fair representation of the effect of the decision, it will be hard to reconcile with *Cheetham v. Hampson*, 4 T. R. 318 (1791)." It is submitted that the language of none of the judges, taken in connection with the actual question before them, required so broad a statement. Buller, J., says, 2 H. Bl. 351: "I agree that the tenant as occupier is *prima facie* liable to the public, whatever private agreement there may be between him and the landlord. But if he can show that the landlord is to repair, then the landlord is liable." The action was against the landlord and not the tenant, and it is giving too much weight to the words "*prima facie*" to hold that Justice Buller meant thereby that the tenant was liable only until he could transfer his liability to the landlord by showing that the latter had covenanted to repair, without regard to the fact that he expressly states that this "*prima facie*" liability exists "whatever the private agreement may be between him and his landlord." And Justice Heath's reason, that "if we hold the tenant liable, then we encourage circuity of action, as the tenant would have his remedy over against the landlord," while it may be a good or a bad reason for holding the landlord directly liable, would be at least as valid if he had said "if we hold the tenant *solely* liable," which after all was the only way in which the liability of the tenant was involved in the question before him. At all events American courts, while accepting *Payne v. Rogers* as authority for what it actually decided, have not followed the marginal note. Chief Justice Shaw says, in *Lowell v. Spaulding*, 4 Cush. (Mass.) 277, 279 (1849): "By common law, the occupier and not the landlord is bound, as between himself and the public, so far to keep the buildings in repair that they may be safe for the public. If, indeed, there is an express agreement between landlord and tenant, that the former shall keep the premises in repair, . . . the party injured by the defect and want of repair, may have his action *in the first instance*, against the landlord," that is, may sue him directly and need not sue the tenant primarily liable, leaving him to recover over from the landlord on their agreement; and see to the same effect *Scholfeld, J.*, in *Gridley v. Bloomington*, 68 Ill. 47 (1873). *Rogers, J.*, in *Bears v. Ambler*, 9 Pa. 193 (1848) is even more explicit. He says, "a tenant or occupier is always liable for an injury caused by his neglect, irrespective of any contract between him and the landlord" (note the similarity to Justice Buller's statement in *Payne v. Rogers*); "the tenant always is, the landlord may be, liable for an injury sustained by a third party."

<sup>12</sup> 105 Mass. 477, 478, 479 (1870).

collapse of the floor of an outbuilding which a landlord had undertaken to repair and which after negligently making some repairs, he had assured her he had made safe for her to use.

The Court, speaking through Justice Ames, said:

"In the ordinary contract between landlord and tenant, there is no implied warranty on the part of the former that the demised premises

the landlord no further than to reimburse the tenant for the cost, to which he is put in making for himself those repairs which the landlord, in breach of his covenant, has failed to make.

Nor is there any general principle of law against circuity of action which universally permits a direct recovery, whenever the person responsible at common law for an injury to another has a right to indemnity from some third person. Suppose that a vendor warrants tools or machinery as fit for a particular use, for which they are in fact unfit, and the purchaser, relying on the warranty, supplies them to his servant without inspecting them and so makes himself liable for an injury caused thereby. The vendor is liable to indemnify the purchaser for the damages which his servant recovers. But no one has ever suggested that to avoid circuity of action the servant might recover directly against the warranting vendor, still less that his only right of action is against the warrantor, as the marginal note to *Payne v. Rogers* states the effect of the landlord's covenant to be.

A better reason would seem to be that given by *McIlvaine, J.*, in *Cheadle v. Burdick*, 26 Ohio St. 393, at p. 396 (1875), that the landlord, "having thus reserved the control [of the premises] to the extent necessary for making repairs, his duty to the public in relation to the property is not affected by the lease," and by *Collins, M. R.*, in *Cavalier v. Pope*, L. R. [1905] 2 K. B. 757, 762, and *May v. Ennis*, 78 App. Div. 552, 79 N. Y. Supp. 896 (1903).

This would make the obligation sound in tort and thus prevent the anomaly of a contract creating an obligation toward those not party to it. And it would explain the difference in effect given to a covenant to make repairs necessary for the safety of the public and a covenant to make such repairs as are necessary only for the safety of those who enter the premises in the course of the occupier's use of them.

Those who enter the premises must look to him, who permits his entry, to make them safe or to disclose any defect which renders them unsafe for his use, and the law does not require the owner to contemplate the probability, however great it may actually be, that the tenant will use or permit others to use property which he knows the owner has, in breach of his covenant, failed to repair. Mere power to enter and perform his contract is therefore not enough to cast on him any duty to make the premises safe for use. But the owner has, as such, a duty to maintain his property in such a condition that it shall not be dangerous to the public, whether as travelers on a highway upon which it abuts, or as owners of adjacent property, or as persons upon such property in the owner's right quite independent of his or the occupier's consent. His duty may be suspended, when in a legally permissible way, as by leasing the premises, he parts with his right to enter it and so loses his power to perform his duty to maintain it in safe condition; but when by a covenant to repair he retains the right of entry and the power for performance, the reason for the suspension of his duty fails. This is similar to the difference in the liability which a landlord incurs to the public and those injured while within premises which he leases in a patently ruinous condition, both external and internal.

are in tenantable condition. He is under no obligation to make repairs, unless such a stipulation makes a part of the original contract: and any promise to do so, founded merely on the relation of the parties, and not one of the conditions of the lease, would be without consideration, and for that reason would create no liability. But although a gratuitous executory contract of that kind would not be binding upon him, he would place himself in a very different position if he should see fit to treat it as binding, and actually enter upon its fulfilment. He is at liberty to repudiate or to perform it, at his option; but if his choice should be to perform it, he comes under some degree of liability as to the manner of its performance.<sup>13</sup> It is well settled, that, for an injury occasioned by want of due care and skill in doing what one has promised to do, an action may be maintained against him in favor of the party relying on such promise and injured by the breach of it, although there was no consideration for the promise.<sup>14</sup>

In this case, the landlord was told that the building was in an unsafe condition; and what he undertook to do, at the request of his tenant,<sup>15</sup>

<sup>13</sup> At first glance the opinion might be taken to indicate that the right to refuse to carry out a gratuitous promise is lost by embarking on its performance, or at the least that care must be exercised so that even a partial performance may be well done as far as it goes.

But this part of the opinion must be taken in connection with the emphasis later put on the defendant's assurance that the premises had been made safe. The gist of the defendant's wrong is the misleading quality of his conduct and words. Clearly he might, after starting to repair, have changed his mind and abandoned the work so long as he had done nothing to mislead the tenant into believing that he had completed it. The tenant had no right to demand that he should carry out his gratuitous undertaking, and he had certainly no right to complain that he had been given half a loaf rather than no bread. He would not have been harmed but benefited by so much as the landlord had chosen to do, though less than what he had promised. So, too, if the landlord had told the tenant exactly what he had done and what material he had used and the tenant had chosen to consider that they had made the outbuilding safe, any injury he sustained by using it would have been ascribed to his own bad judgment, for he certainly is not entitled to demand better judgment from his landlord than he exercises for his own protection. See *Marston v. Frisbie*, 168 App. Div. 666, 154 N. Y. Supp. 367 (1915); *Rhoades v. Seidel*, 139 Mich. 608, 102 N. W. 1025 (1905); and *Sheridan v. Krupp*, 141 Pa. 564, 21 Atl. 670 (1891).

The landlord was held bound to take care to do the work well because he had taken over the control of this work, involving as it did the safety of the tenant and of those who might use the premises in his right, into his own exclusive charge and custody with full knowledge that the tenant must rely on his care and skill for his own protection and that of his invitees and licensees.

<sup>14</sup> Citing *Benden v. Manning*, 2 N. H. 289 (1820); *Thorne v. Deas*, 4 Johns. (N. Y.) 84 (1809); *Elsee v. Gatward*, 5 T. R. 143 (1793); *Shiells v. Blackburne*, 1 H. Bl. 158 (1789); *Balfe v. West*, 22 Eng. Law & Eq. 506 (1853).

<sup>15</sup> The report states that at the trial these facts (*inter alia*) appeared: "The out-



was to make it safe. He not only assumed to do the work, but he notified the tenant when it was done, and invited him to make use of the building, assuring him that it was perfectly safe. Under these circumstances, it was correctly ruled by the presiding judge, that if on trial it proved to be unsafe, by reason of the want of ordinary care and skill on the part of the defendant in the workmanship or in the selection of the materials used,<sup>16</sup> he might be held responsible in damages."

The opinion of Justice Ames is in some respects rather vague and it is difficult to reconcile the facts as stated by him with those appearing at the trial. But it is clear that it put the defendant's

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building" was out of repair and the plaintiffs (the action was brought by the tenant and his wife for injuries to the latter, her husband being joined for conformity) "requested the landlord to put it in repair. He said he would do so. After finishing them" (the repairs) "he told Mrs. Gill" (the wife of the tenant) "that he had made it safe so she need not fear to use it."

<sup>16</sup> The defendant had testified at the trial that he had made such repairs as he thought needful to render the outbuilding safe. The trial judge refused to instruct the jury as requested by the defendant, (1) that he was not liable if he had made such repairs as he thought sufficient to make the premises safe and (2) that he was not liable unless he knew or believed that the repairs which he made were insufficient and that the premises were still unsafe and dangerous. The judge instructed the jury that the defendant was liable for want of ordinary care and skill in workmanship or selection of materials. The Supreme Judicial Court held this instruction proper, rejecting the argument that "the defendant could only be held responsible for bad faith or gross negligence." Anything approaching a full discussion of the existence of "gross negligence" as distinct from "ordinary negligence" and the precise standard of proper performance of a gratuitous undertaking, whether to make repairs, to perform other services or to keep as bailee the chattels of a bailor, would require a separate article. The first question in its essence appears to be one of terminology, since the same result is reached by holding that in one situation a man is liable for ordinary negligence and in another is liable only if guilty of gross negligence and by holding that a man is in all situations bound to use a degree of care varying with the circumstances. But where, as in Massachusetts, the legislature has used the term "gross negligence" in its statutes, it may be necessary to treat it as distinct from ordinary negligence. It is enough to say that until 1917 the landlord gratuitously making repairs was held responsible for ordinary care and in *Buldra v. Hemin*, 212 Mass. 275, 98 N. E. 863 (1912) the landlord was held answerable for the merely operative negligence of an independent contractor, — a gas fitter, — sent to cap pipes on which fixtures had not yet been installed.

But in *West v. Poor*, 196 Mass. 183, 81 N. E. 960 (1907), it was held that the liability of a man who invites another to ride *gratis* in his carriage is no greater than that of a gratuitous bailee, who in Massachusetts is held to be liable only for gross negligence, and in *Massaletti v. Fitzroy*, 228 Mass. 487, 118 N. E. 168 (1917) in an opinion in which the whole question of gross negligence is discussed at great length, the court, regarding all gratuitous undertakings as governed by the same principle as gratuitous bailments, expressed its disapproval of that part of *Gill v. Middleton* which held the landlord liable for "ordinary negligence" in making gratuitous repairs.

liability upon general principles assumed to apply to the misfeasance of any gratuitous undertaking and not upon any peculiar and exceptional obligation which a landlord assumes by attempting to perform a gratuitous undertaking to make repairs for a tenant.

It is equally clear that it emphasizes the fact that the person injured was misled into using the outbuilding both by the fact that the landlord had gone through the form of making repairs and by his express assurance that it was perfectly safe.

There is nothing to indicate that he, and still less that the trial judge whose instruction he approved, regarded the undertaking as made with the female plaintiff or that either of them regarded this matter, or the fact that the promise, if made only to the tenant, was given in her presence as controlling, and from the fact that the assurance, which was actually given to the tenant's wife, was said to have been given to the tenant, it would seem that the tenant's family was considered substantially identified with the tenant in so far as their occupation of the demised premises was concerned.

In none of the many cases which cited, followed or distinguished *Gill v. Middleton* during the forty-five years between 1870 and 1915, was there any intimation that the liability of a landlord gratuitously making repairs was restricted to the tenant or to those persons of his family who were present when the promise was made and to that extent co-promisees.

In *Riley v. Lissner*<sup>17</sup> Justice Holmes cites *Gill v. Middleton* as authority, for permitting the wife of the tenant to recover, though

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<sup>17</sup> 160 Mass. 330, 35 N. E. 1130 (1894). The landlord's negligence consisted in a failure properly to replace the cover of a cesspool, which he had gratuitously cleaned, and so to restore the premises to their previously safe condition. Thus it created a new defect and did not merely fail to remove an old one. But this was properly assumed to be immaterial. In the very recent case of *Harvey v. Crane*, 131 N. E. 168 (Mass., 1921) the court treats a very similar case as one of negligence in performing a gratuitous undertaking and in order to hold the defendant landlord liable to his tenant finds him guilty of gross negligence in failing to close a trap-door, into which the plaintiff fell, while returning home at night and entering the room without striking a light.

The language of the court in describing this operative forgetfulness, which threatened no harm except under the rather unusual circumstance which actually occurred, lends point to Baron Rolfe's statement that "it" (gross negligence) "is the same thing" (as negligence) "with the addition of a vituperative epithet," *Wilson v. Brett*, 11 M. & W. 113, 115 (1843).

there is not a fact reported which gives the slightest indication that she was present when the landlord undertook to clean the cesspool whose badly replaced lid caused her injury, or that she had received any direct assurance from him or his workmen that the premises had been restored to their original safe condition; or indeed that she had received any assurance that the work had been well done other than that which might be implied from the fact that the workmen had left the job as finished.

In *Shute v. Bills*,<sup>18</sup> the person injured was the daughter of the tenant. There was nothing to indicate that she had been present when the landlord undertook the repairs whose improper performance caused her injury or that she had received any express assurance from the landlord or his workmen that the premises had been made safe for her to use; yet the court held that the trial judge had erred in directing a verdict for the defendant because there was evidence from which the jury might have found that the injury was due to the negligent manner in which the repairs were made. There was, it is true, some evidence that at the time when the tenant was negotiating the lease, the landlord's agent had promised to make any repairs that were needed in reason. Though this fact is stated in the opinion, the court places no emphasis on it nor does it place the daughter's right to recover on the ground that the work was done in performance of an undertaking made as inducement to the tenant to sign the lease.

This restriction of liability appears first in *Thomas v. Lane*,<sup>19</sup> in which it was held that if "a landlord gratuitously or for hire undertakes to make repairs upon demised premises he is under no greater liability in case the repairs are negligently made than a third person<sup>20</sup> would have been if a third person had undertaken

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<sup>18</sup> 191 Mass. 433, 78 N. E. 96 (1906). In *Galvin v. Beals*, 187 Mass. 250, 72 N. E. 969 (1905), the facts were held not to bring the case within *Gill v. Middleton* because there was no evidence to show "that the (landlord's) alleged agent undertook to do anything about the railing (whose fall caused the plaintiff's injury) or that he did anything about it. The plaintiff complained of certain defects, and these he remedied." The case holds that the mere fact that the landlord did repair work on a particular part of the premises is not sufficient to justify the tenant in assuming that he had discovered and remedied defects of which she had not complained and which he had therefore never undertaken to repair.

<sup>19</sup> 221 Mass. 447, 450, 109 N. E. 363 (1915).

<sup>20</sup> 221 Mass. 447, 450, 109 N. E. 363 (1915). "Upon the question whether a third party under these circumstances is liable to any one but the other party to the con-

to make the same repairs either gratuitously or for hire and had done them negligently," and therefore the defendant was not liable to a social guest of the tenant injured by the giving way of a railing on the front steps of the demised premises which the defendant had, on the complaint of the tenant's wife, gratuitously and negligently repaired.

So far from recognizing any difference in the extent of the respective liability of persons undertaking repairs, gratuitously or for hire, as landlord or in any other capacity, the court restricts the defendant's liability to his tenant, not because he had undertaken the repairs as a favor to his tenant rather than to induce him not to throw over his lease, not because he was a landlord rather than a contractor who for hire, or as a favor to a friend, had made similar repairs, but because the liability for the imperfect performance of any undertaking is restricted to those party to it.<sup>21</sup> And it is significant that all the cases cited in support of

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tract, *Winterbottom v. Wright*, 10 M. & W. 109, is the leading case" and "has been cited with approval in *Albro v. Jaquith*, 4 Gray 99, 102, *Davidson v. Nichols*, 11 Allen 514, 520, *Osborne v. Morgan*, 130 Mass. 102, 104, and is the law of the Commonwealth. See *Lebourdais v. Vitrified Wheel Co.*, 194 Mass. 341." Many cases from other jurisdictions are cited in a footnote but in all but one, *Curtin v. Somerset*, 140 Pa. 70, 21 Atl. 244 (1891), in which the defendant was a contractor for the construction of a hotel, the defendant was a manufacturer the use of whose negligently made product had injured some one other than his immediate vendee.

<sup>21</sup> Loring, J., held, 221 Mass. 447, 451 (1915), that *Gill v. Middleton* "must be taken to be an authority depending upon the special circumstances of that case." He quotes its facts as stated in the report, *inter alia*, that "the plaintiffs requested the defendant to put it in repair. He said he would do so." And he then says: "It appears, therefore, that in that case the undertaking of the landlord to put the privy in repair was an undertaking not with the tenant alone but an undertaking with the tenant and his wife; and further that the defendant landlord recognized that his undertaking was an undertaking with the wife as well as with the tenant by giving her the assurance ('after finishing them') that he had made it safe, so that she need not fear to use it."

Apparently he regards the landlord's obligation to exercise care in making such repairs as he chose to make as arising out of the promise and so, in analogy to contractual obligations, confined to those to whom the promisor understands that he is giving the promise. It is submitted that the obligation does not arise out of the promise but out of the misfeasance in the attempt to perform it. See as to this p. 651, *infra*. . . It would attach if the work was done without any definite antecedent promise, as in *Gregor v. Cady*, 82 Me. 131, 19 Atl. 108 (1889), or even if the landlord had planned it as an agreeable surprise to an absent tenant, who had not known of it till the work was completed.

It is curious that the same Justice, who had only a short time before gone out of his way in *Miles v. Janvrin*, 196 Mass. 431, 82 N. E. 708 (1907), see note 25, *infra*, to

this general principle are cases where the undertaking was for hire or where goods had been manufactured and sold. Not one is a case of services gratuitously undertaken or of chattels gratuitously given or lent.

Yet within four months the same court, speaking through the same justice, held in *Feeley v. Doyle*,<sup>22</sup> that a landlord who had let an ice-cream parlor was liable to a customer of his tenant who, while sitting at a table therein, was injured by the collapse of a pillar, which, as part of alterations desired by the tenant, had been substituted for an unsightly chimney.

It was held that the case did not come within *Thomas v. Lane* because that case was one where repairs had been made gratuitously by a landlord upon the tenant's request while in the pending case the repairs were made<sup>23</sup> under an arrangement by which the

find a very doubtful theory by which to extend an obviously contractual obligation so as to give a remedy for its breach to those not party to it, should have regarded a purely tort obligation as based on an unenforceable agreement, and so restricted its obligation as though it were a true contract.

But apart from this, the determination of the persons to whom the defendant intended to bind himself or to whom he understood that he was bound must often be left to conjecture or vague inferences, such as that which Loring, J. draws from the fact that the landlord assured the plaintiff that the privy had been made safe, an assurance which he might as well have given to any person likely to use the privy whom he had met as he was leaving the premises "after finishing" the repairs. There is no such sure and certain test available, as in contracts founded on consideration, which only he who furnishes the consideration, can enforce or rely upon.

<sup>22</sup> 222 Mass. 155, 157, 109 N. E. 902 (1915).

<sup>23</sup> The facts are not stated with absolute fullness. It is said that "the defendant's agent had the work done." Whether this means that the agent employed workmen to do the work under his own direction or that, as agent, his business was so large that he maintained a staff competent to undertake these rather elaborate alterations, or on the other hand, that he employed an independent contractor to do the work, is left to conjecture. But the inherent probabilities seem almost conclusive in favor of the latter supposition, as the normal and usual way in which such alterations are made by any but the most exceptional of agents.

If this is so, the defendant's liability like that of the landlord in *Bulger v. Henin*, *supra*, n. 16, who gratuitously undertook to have gas pipes capped, goes far beyond the normal concept of ordinary negligence, which standing by itself implies personal neglect or the neglect of some servant or other person, for whose conduct there is a general vicarious liability placed by law upon the defendant.

There being no statement that the work was done by an independent contractor, there is, of course, nothing to intimate that the agent was negligent in employing an incompetent contractor or in failing to discover the dangerous condition of the pillar before accepting the work as completed to his satisfaction. The court, therefore

rent would not be raised, as the landlord had threatened, if the tenant would bear the cost of the alterations which he required to make the parlor more attractive. This was held to warrant the jury in finding that the repairs were made by the defendant and were made by her in order to induce the tenant to continue his tenancy.<sup>24</sup> The court, therefore, held the case to be one "where during the tenancy a change is made in the demised premises by a landlord as one of the terms by which the lease is to be continued in effect. Under these circumstances, the right of recovery is not limited to the tenant but includes all persons who within the contemplation of the landlord and the tenant were to use the premises under the lease. In the case of an 'ice-cream parlor,' that includes persons who enter the premises to buy ice-cream."<sup>25</sup>

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seems to impose upon the landlord the exceptional obligation to answer for the operative negligence of an independent contractor.

<sup>24</sup> The distinction seems a fine one between alterations made to induce a tenant to continue his tenancy and repairs undertaken to keep a good tenant satisfied. Indeed, from what one knows of human nature, it may be suspected that repairs are rarely made by landlords without some motive of self-interest. It is obvious that, to preserve his property from falling into ruin, even the most hardhearted landlord of premises rented to a poor tenant may agree to make and pay for repairs, which by the terms of the lease the tenant ought to make. But it is not strange that this distinction should be drawn. It is similar to the distinction drawn between services rendered under promise of a legacy and services rendered in the hope of obtaining one by ingratiating oneself with a well-to-do friend or relative.

<sup>25</sup> The court then says: "In other words, the case is governed by *Domenicis v. Fleisher*, 195 Mass. 281, not by *Thomas v. Lane*." By this, the court must mean that the landlord's liability is as extensive as in that of *Domenicis v. Fleisher*. That case had nothing whatever to do with the misrepair of the interior of the demised premises but was a case in which a landlord had failed to maintain in safe condition a stairway which was the common approach for a number of separate tenants, — the right to use the common stairway being as it were, appurtenant to the lease of each tenant, but the control and possession of the stairway being retained by the landlord and not included in the lease of any of the tenants.

There appears in *Miles v. Janvrin*, *supra*, n. 21, the same curious tendency to justify any extension of a landlord's liability under an agreement with his tenant so as to include the personal injuries caused by its breach not only to him but to all others coming upon the premises in his right, by torturing the landlord's position into some fanciful analogy to that dealt with in *Domenicis v. Fleisher*. Loring, J., held that while the breach of "an agreement to make specific repairs" or even "an agreement to keep the premises in repair generally during the term of the lease" does not make the landlord liable for personal injuries caused even to the tenant by its breach, yet if the landlord agreed "to maintain the premises in a safe condition for his (the tenant's) use," "the premises to be kept in repair are to remain in the control of the landlord, ... with nothing but a right in the tenant to use them." The result being, "that, so far

At first glance it might appear that the court is distinguishing the case from *Thomas v. Lane* upon the ground that the work undertaken was alteration rather than repair, and that its misperformance created a new danger and did not merely prevent the removal of a pre-existing one. Whether there be or be not any valid distinction between a new defect and a failure to remove a pre-existing one, the court's use of the words "repairs" and "change" as apparently interchangeable terms, indicates that it did not intend to distinguish the case from *Thomas v. Lane* upon this ground but solely upon the ground that the rule in *Thomas v. Lane* was applicable only to cases where the landlord had done work upon the demised premises gratuitously.<sup>28</sup>

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as their safety is concerned, the landlord's relation to the premises to be kept in repair is the same as that of a landlord in case of common passageways in a tenement house" as to which, he says, see *Domenicis v. Fleisher*; "the only difference being that in a case like the case at bar the tenant has an exclusive use, while in case of common passageways in a tenement house the use which the several tenants have is not exclusive." But this difference does not seem so immaterial to Lord Atkinson, who, in *Cavalier v. Pope*, L. R. [1906] A. C. 428, cited by Loring, J., says, at p. 433: "In *Miller v. Hancock*, L. R. [1893], 2 Q. B. 177" (the leading English case similar to *Domenicis v. Fleisher*) "the landlord was held liable because control was retained by him; but the power of control necessary to raise the duty ... " (to maintain common passageways, &c. in good repair) "implies something more than the right or liability to repair the premises. It implies the power and the right to admit people to the premises and to exclude people from them."

Nor does Justice Loring even suggest any reason why the agreement to make the premises safe for use should, while the agreement to repair generally should not, so transfer this control to the landlord, as to relieve the tenant of any duty to provide for the "safety" of those "claiming in his right."

The part of the premises which the landlord was to repair was the outer stairway, any need for repair to which was practically as easy for the landlord to discover as for the tenant and it is possible that Justice Loring had in mind that in such case it might be proper to permit the tenant to entrust the whole matter of its condition to the exclusive charge of the landlord, but, if it is proper for a tenant to trust not only his own safety but that of his family and guests to his landlord's agreement to repair, it is difficult to see why a tenant may not equally trust the safety of his family and guests to the care and skill of a landlord who, however gratuitously, has actually repaired his premises. And if the landlord by accepting this confidence puts himself under a legal duty to all those whose safety is thus entrusted to him, it is difficult to see why the confidence which the tenant reposes in the propriety of repairs made by a landlord does not put him under an equal obligation to those whose safety as obviously depends on his care in making them.

<sup>28</sup> If there is any importance in this difference, it lies in the fact that the misperformance of the undertaking created a new danger which did not previously exist, while in the case of the imperfect performance of repairs, there is no new danger created except in so far as reliance upon the fact that the landlord has gone through the form of

## III

It seems clear that the court in *Gill v. Middleton* applied the principle, which it deduced from the cases it cited, to an injury materially differing, both in nature and in the manner in which it was brought about, from the injuries for which recovery was allowed in any of those cases.

In all of them the plaintiff complained of a direct injury to his proprietary or pecuniary interests. The defendant's carelessness, unskilfulness, or disregard of the terms of his undertaking spoiled or destroyed personal property which the plaintiff had entrusted to him or put the plaintiff to an unexpected and unauthorized expense.<sup>27</sup>

In *Gill v. Middleton* the plaintiff was permitted to recover for injury to her person, indirectly resulting from the defendant's negligence. The physical condition of the premises was not changed for the worse, no new defect was created. Even the tenant could not have maintained an action for injury to his leasehold interest in the

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making the repairs misleads the tenant into using the premises which he had before refrained from using because of its danger, or in using it without those precautions which had previously enabled him to escape injury.

The case has one factor in common with *Thomas v. Lane*. There is nothing to indicate that any direct assurance had been given by the landlord to the person injured that the work had been properly done so as to make it safe for him to accept the tenant's invitation to use the premises whether as business invitee or social guest, or even to suggest that the customer or the tenant's friend had known that any work had been done by the landlord; therefore there was no room to find that they had been personally misled by whatever assurance of safety might be implied from the fact that the landlord had left the job as finished. In both the plaintiff is injured not by his own reliance upon the landlord's exercise of care in carrying out his undertaking but by the tenant's reliance upon the landlord's performance as sufficient to justify him in holding out the premises as a safe place to which to invite his customers or friends.

<sup>27</sup> In *Benden v. Manning*, the defendant, a tailor, had ruined cloth which the plaintiff had given him to make up into a coat; in *Shiells v. Blackburne*, the defendant had volunteered to enter the plaintiff's goods at the custom house for exportation and entered them wrongly so that they were seized; in *Wilson v. Brett*, 11 M. & W. 113 (1843) not cited, the defendant who gratuitously rode the defendant's horse to show him to a prospective purchaser, rode him so carelessly and unskilfully as to let him down and injure him; in *Elsee v. Gatward*, the defendant by using new material instead of old as he had agreed, greatly increased the expense of the work which he had undertaken, while in *Thorne v. Deas* and *Balfe v. West*, recovery was denied because the defendant had not embarked on the performance of his gratuitous undertaking.



property. The plaintiff's injury was caused by using the imperfectly repaired outbuilding in reliance upon the defendant's assurance of safety, implied from his having made the repairs and left the job as finished and upon his express statement that it was perfectly safe.

But it is submitted that this extension of the liability for misfeasance of a gratuitous undertaking to such an injury was sound and proper.

The liability for negligence in performing a gratuitous undertaking is not contractual or even consensual but is essentially a Tort liability. The duty to use care, if indeed the duty recognized in *Gill v. Middleton* can be properly so stated, in performing a gratuitous undertaking of this sort does not arise out of the promise. It could do so only as an artificially implied term of the undertaking<sup>28</sup> and it would surely be an extraordinary anomaly to hold that a gratuitous promise creates no obligation to perform it, that the promisor may perform it or not as he pleases and that the promisee has no right to demand its performance or to rely upon its being performed, and yet to hold that a term artificially implied therein does create a legally binding obligation which the promisor must perform to escape liability and upon the proper performance of which the promisee is legally entitled to rely.

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<sup>28</sup> Indeed, strictly speaking, *Gill v. Middleton* does not recognize a duty to use care in the performance of a gratuitous undertaking of this or any other sort. If it did so, it would follow that having once embarked upon the performance the promisor would be liable if the repairs were imperfectly made. The facts do not require so broad a duty to support them. It is confidently submitted that no matter how badly the landlord had made the repairs, if their insufficiency was known to the tenant, he could not recover because the landlord's carelessness or unskilfulness had prevented him from removing a defect which harmed him only in that it interfered with his full use of the premises. In such case, the gist of this complaint would be that the landlord's negligence had prevented him from obtaining the full benefit which his landlord's promise and his attempt to perform it had led him to expect that he would receive. His position would not be legally changed for the worse. The important thing, therefore, was not the mere breach of a duty to take care, but the misleading quality of the landlord's conduct in apparently making the repairs.

An exact statement of the "duty" would be somewhat as follows: It is the duty of one choosing to perform a gratuitous undertaking to take care lest he should mislead his promisee into the belief that the work has been well done and the premises made safe for use. While it may not require a very great stretch of the imagination to imply a term in a voluntary undertaking that if it be done at all it shall be well done, yet it is certainly going very far to imply a term that the landlord will take such care in making the repairs as is necessary to prevent the tenant from being misled into using it in the belief that the repairs have been properly made.

The liability for misfeasance<sup>29</sup> in the performance of work done for another was recognized before the action of assumpsit had been devised to give binding force to executory contracts not under seal.<sup>30</sup> It is based upon one of the most fundamental principles of Tort law. No man is bound to aid or benefit another, in the absence of some peculiar relationship or an express agreement given upon a sufficient consideration. Therefore mere inaction cannot create liability, but liability for the consequence of action is a very different matter. If a man chooses to act, he must so act as not to create an undue risk of injury to others. If he consciously interjects himself into the affairs of others, he must take care that his interference shall not unduly endanger them, and while he is not bound to protect or benefit his neighbor, he must not so act as to change his position for the worse. The person voluntarily and gratuitously making repairs upon another's premises, whether as landlord or in any other capacity, whether the premises are occupied by his tenant or by an owner, is therefore bound to take reasonable care therein, so that his act may not endanger those whom he should expect to use the premises, and if he creates a danger and that danger results in injury, he is liable therefor.

While in *Gill v. Middleton* the landlord's carelessness in making the repairs did not change the physical condition of the premises for the worse and therefore did not injure the proprietary interests of the tenant as holder of the lease, it does not follow that it did not change the position of the tenant, and those using the premises in his right, for the worse.

Even were the physical condition of the premises substantially better than before, the landlord by going through the form of making repairs, which have been entrusted to his exclusive charge and control, has changed the defective condition of the premises, which, while known to exist, was a mere impediment to their full

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<sup>29</sup> The very term "misfeasance" so commonly used both in the cases cited in *Gill v. Middleton* and in the majority of those which deal with gratuitous undertakings, including undertakings to repair, is a strong indication that such negligent misperformance is a tort.

Even where a "misfeasance" occurs in the course of the performance of a binding contract the liability sounds essentially in tort if the harm resulting is something other than the failure of the promisee to obtain the benefit bargained for.

<sup>30</sup> Y. B. 22 Ass. pl. 41 (1347), Y. B. 11 H. IV, 33, pl. 60 (1409), Y. B. 3 H. VI, 36 pl. 33 (1424), Y. B. 20 H. VI, 34 pl. 4 (1441).

use and enjoyment, into a serious danger to all who might rightfully use them.<sup>21</sup>

But a defect in the interior of premises is not actively harmful but requires some act of the user to make its injurious potentialities effective. And the primary duty of seeing to it that property, real or personal, is fit for a particular use rests on him, who puts it to that use. And the tendency to hold that there is no duty to render it impossible for another to harm himself or others by his positive misconduct is particularly marked where one turns over his property to another for use. Therefore the crux of the landlord's liability is the issue whether the tenant in using, or permitting others to use, the premises as safe, is, as between himself and his landlord, guilty of a wrongful misuse of the property, the risk of which he and he alone should bear. And this depends upon whether the tenant not only does rely, but is legally entitled to rely on his trust in the landlord's skill and care as a sufficient assurance that he has made whatever repairs he has chosen to make, with sufficient competence to warrant the tenant, without more, in using the premises as safe.<sup>22</sup>

There is no question that tenants do in fact so regard the making of repairs, and that landlords do realize this and therefore realize that the safety of the tenant, and those whose use of the premises in his right is involved in his tenancy, does in fact depend on his making the repairs at least as well as they appear to have been made. But there still remains the question whether the tenant is

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<sup>21</sup> It is necessary to bear in mind the distinction between active and passive dangers. The first include all those acts or conditions which of themselves set in motion injurious consequences which require no assistance to work harm. Knowledge of their existence at most may enable those threatened by them to escape, by positive action taken to remove themselves from their reach. The latter include conditions which require some active dealing with them to make them harmful. The reckless driving of an automobile through city streets creates of itself a danger, a risk to the public entitled to travel upon them. An automobile, no matter how defective the steering gear may be, is harmless until some one drives it. So a ruinous stairway or floor in leased premises can do harm only to those who use it. Until used it is as harmless as though in perfect condition. Danger or risk in such an inactive condition is a compound of two factors, each as essential as the other, the defect and the use of the premises; and the user's ignorance of its existence becomes an essential factor in determining whether he who is responsible for the defect is bound to foresee the use, and so to realize that he has created a danger or risk.

<sup>22</sup> As to this, see *Holmes, J., in Riley v. Lissner*, 160 Mass. 330, 35 N. E. 1180 (1894), *supra*, n. 17.

legally entitled so to rely on his landlord — whether the landlord is legally bound to foresee that the premises will be used as safe in reliance on his competence.

It seems clear that the tenant has no right to rely on the repairs being properly made unless they have been entrusted to the landlord's exclusive charge and control. If the tenant is present while the work is being done and so knows how it is done or if the landlord tells him exactly what he has done, the tenant has no right to trust blindly to the landlord's judgment<sup>33</sup> — except perhaps where the work is such that it requires special training and experience adequately to determine its sufficiency.<sup>34</sup> So too if the imperfection of the repairs is obvious to the mere use of the senses, — if, as one might say, it leaps to the eye. On the other hand, where the repairs are of such a character that a structure must be torn up to ascertain whether they are properly done, the tenant must trust, and the landlord must realize that he must trust, exclusively to the care and skill of his benefactor. The tenant cannot be expected to make the premises unusable to see if they are fit for use. Nor can he be required to give up his ordinary affairs so as to stay continuously on the spot to supervise the job.

But when the actual character of the repairs could be ascertained by such an inspection as a tenant should make before leasing or an occupier is required to make before throwing his premises open to business invitees, the danger can hardly be said to be "latent," as that term is used in dealing with the duty of a vendor, lessor or donor of property, in those cases which hold such persons liable for a failure to disclose "latent" dangers known to them.

Yet in no case is recovery denied because the true character of the repairs could have been discovered by such an inspection. Not only throughout such cases but throughout all the cases, where one person, however gratuitously, assumes full charge of the property, person or interests of another, the trust reposed is held to be sufficient to justify an expectation that it will not be abused and that a service however gratuitously done will be done with reason-

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<sup>33</sup> *Marston v. Frisbie*, 168 App. Div. 666, 154 N. Y. Supp. 367 (1915); *Rhoades v. Seidel*, 139 Mich. 608, 102 N. W. 1025 (1905); *Brown v. Keay*, 9 Sc. L. T. R., 442 (1902); and see also *Sheridan v. Krupp*, 141 Pa. 564, 21 Atl. 670 (1891); and *Callahan v. Loughran*, 102 Cal. 476, 36 Pac. 835 (1894), *infra*, n. 54.

<sup>34</sup> See *Devlin v. Smith*, 89 N. Y. 470 (1882).

able care and skill.<sup>85</sup> Nor can the landlord say "while as a man I knew that my tenants would rely on my having made the repairs carefully, yet since I was not legally bound to make them at all, he has no legal right to expect anything of me." The tenant does not rely upon the landlord because he has promised to make the repairs; he relies on him as a man, and as such bound to exercise reasonable care and skill in performing an act, obligatory or voluntary, upon which he knows that the safety of others depends.

It may be suggested that this factor of trust reposed and accepted is sufficient to distinguish such cases from those in which the parties deal at arm's length, as do vendor and vendee and lessor and lessee, where the duty of full disclosure is imposed only when the power of self protection is substantially absent. And it is noteworthy that in those relations which contain any tincture of confidence, such as that between an occupier of land and his invitees and licensees, the occupier is generally held bound to disclose defects if they are not obvious to the senses of his guest.

The liability for the negligent performance of a gratuitous undertaking, such as that of a landlord making repairs upon his premises let to a tenant, being a Tort liability, its existence and extent should be determined by general principles of Tort law. Therefore, it should extend to all those whose safety the landlord ought to realize may depend exclusively upon the care and skill with which he makes them.

But the problem is complicated by the fact that the liability now under discussion is, at least on the surface, closely analogous to two liabilities enforced by actions of Tort which are either universally or generally limited to those with whom the defendant directly deals; (1) the liability for misrepresentation as enforced in the action of deceit, and (2) the liability of a manufacturer of a dangerously defective product.

(1) If, as has been stated, a landlord's liability for negligence which renders repairs, gratuitously undertaken, inefficient to remove a pre-existing defect, rests upon the deceptive appearance of safety which his act of making the repairs gives to the premises, his conduct may well be regarded as an implied misrepresentation of their true condition. And as such, it may appear that its exist-

<sup>85</sup> See Holmes, J., in *Riley v. Lissner*, *supra*, n. 17, and Norton, J., in *Finer v. Nichols*, 175 Mo. App. 525, 157 S. W. 1023 (1913).

ence and extent should be determined by the principles and limitations applied in the action of deceit since that is *par excellence* the appropriate action to enforce liability based on misrepresentation.<sup>36</sup>

But it does not follow that the action to enforce the landlord's liability should be treated as a mere species of the action of deceit. There are many liabilities enforced in actions of tort which, as much as that of the landlord, are based on the deceptive appearance of the safety of property which the defendant has turned over by sale, lease, or gift to another for his use or has permitted another to use or has entrusted to another to be dealt with in some particular way, without disclosing a defect which made it dangerous for such use or dealing. None of these have ever been regarded as falling within the scope of the action of deceit or subject to its peculiar limitations.

No one is liable in an action of deceit for mere failure to disclose a fact, no matter how essential, unless the parties stand to one another in some peculiar relation which requires the exercise of the utmost good faith.<sup>37</sup> But one who sells, leases, or gives property to another for his use is liable for any injury which that other sustains in his person or property by his use of it, if the vendor, lessor, or donor knew that it was so latently defective as to make its use dangerous.<sup>38</sup> And this liability is not restricted to the person to

<sup>36</sup> See *Malone v. Laskey*, L. R. [1907], 2 K. B., 141, *infra* n. 59.

<sup>37</sup> See *Cairns, L. C. in Peek v. Gurney*, L. R. 6 H. L. 377 (1873).

<sup>38</sup> *Vendor of real estate, Palmore v. Norriss, Tasker & Co.*, 182 Pa. 82, 37 Atl. 995 (1897). Manufacturer putting his product on the market, *Huset v. Case Mach. Co.*, 120 Fed., 865 (1903) and cases cited therein, *Waters-Pierce Co. v. Deselms*, 212 U. S. 159 (1909). Shopkeeper, *Clarke v. Army & Navy Stores*, L. R. [1903], 1 K. B. 155. Lessor, *Cowen v. Sunderland*, 145 Mass. 363, 14 N. E. 117 (1887); and see cases cited in *McKenzie v. Cheetham*, 83 Me. 543, 22 Atl. 469 (1891). Donor or gratuitous lenders, *MacCarthy v. Young*, 6 H. & N. 329 (1861); *Blakemore v. Bristol & Exeter Ry.*, 8 E. & B. 1035 (1858); *Gagnon v. Dana*, 69 N. H. 264, 39 Atl. 982 (1897). In *Clarke v. Army & Navy Stores*, the vendor was held bound to disclose its knowledge that other cans of the same lot had exploded. In *Shubert v. Clark Co.*, 49 Minn. 331, 51 N. W. 1103 (1892), a manufacturer was held liable to an employee of a subvendee, under whom one of its ladders broke, because when it shipped the ladder it knew that it came from stock, part of which was made of defective timber, though it did not know that this particular ladder was so made, and in *French v. Vining*, 102 Mass. 132 (1869), a vendor was held liable for not disclosing that a part of his hay was bad and unfit for fodder, though he had tried to remove the bad from the good before selling and honestly thought he had succeeded.

This cannot be explained on the ground that the relation of vendor and vendee

whom the property is sold, leased or given. It extends to all whom such person permits to use it in his right or to whom he in turn sells, leases or gives it.<sup>39</sup>

Indeed, if the defect be one which makes its use dangerous to persons other than those who are themselves using it, the liability includes such others, if injured by its use.

But the liability in deceit is limited to the very person to whom the false statement is made for the purpose of inducing him to act in reliance upon its truth and who acts upon it in the very manner intended.<sup>40</sup>

It is submitted that the principles of the action of deceit should not be extended beyond its own particular field, determined by its history and purpose. Originally it lay only between parties to a contract, induced by the false statement. The plaintiff's injury was pecuniary or proprietary, the loss of some benefit which he had been led to expect from his bargain or some unexpected ex-

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is one which requires the exercise of the utmost good faith. On the contrary it is the typical relation in which the parties deal at arms length.

<sup>39</sup> Lessors of real estate, *McKenzie v. Cheetham*, *supra*, n. 35; Vendors. *Lewis v. Terry*, 111 Cal. 39, 43 Pac. 398 (1896); *Skinn v. Reutter*, 135 Mich. 57, 97 N. W. 152 (1903); *Wellington v. Downer Co.*, 104 Mass. 64 (1870). In some cases it is held that the vendor is liable, if the article is sold for resale without some label or other mark to show its dangerous character, even though the immediate vendee actually knows its true character, *Clement v. Crosby & Co.*, 148 Mich. 293, 111 N. W. 745 (1907); particularly where a statute prohibits its sale unless properly labelled, *Stowell v. Standard Oil Co.*, 139 Mich. 18, 102 N. W. 227 (1905); and see *Waters-Pierce Co. v. Deselms*, 212 U. S. 159, 179 (1910). In *Bryson v. Hines*, 268 Fed. 290 (1920), a contractor who had constructed a spur track to a training camp under a contract with the United States, so negligently as to make its use dangerous, was liable to an enlisted man who was injured while being carried over it, though its bad condition was known not only to the government officials but to the plaintiff as well.

<sup>40</sup> Prospectuses put out to sell securities. *Peek v. Gurney*, L. R. 6 H. L. 377 (1873); and *Cheney v. Dickinson*, 172 Fed. 109 (1909); with which compare *Andrews v. Mockford*, L. R. [1896] 1 Q. B. 372, and *Greene v. Mercantile Trust Co.*, 60 Misc. 189, 111 N. Y. Supp. 802 (1908). Statements made to induce purchase of property: *Wells v. Cook*, 16 Ohio St. 67 (1865); *Thorp v. Smith*, 18 Wash. 277, 51 Pac. 381 (1897); *Marshall v. Hubbard*, 117 U. S. 415 (1886); *Hunnewell v. Duxbury*, 154 Mass. 286, 28 N. E. 267 (1891); *Webb v. Rockefeller*, 195 Mo. 57, 93 S. W. 772 (1905), 6 L. R. A. (N. S.) 872, with valuable note. *Hindman v. First National Bank*, 112 Fed. 931 (1902); *Ashuelot Bank v. Albee*, 63 N. H. 152 (1884); *contra*, *Warfield v. Clark*, 118 Ia. 69, 91 N. W. 833 (1902); *McBryan v. Universal Elevator Co.*, 130 Mich. 111, 89 N. W. 683 (1902), reports required from corporations. So no action of deceit will lie upon false statements made to a mercantile agency in reply to their inquiries and not made for the purpose of securing credit, *Macullar v. McKinley*, 99 N. Y. 353, 2 N. E. 9 (1885).

pense or loss incurred in performing it. In these respects it closely resembled actions on warranties, for the breach of which an action in the nature of deceit was early held to lie.<sup>41</sup>

It is true that the word "warrant" was early understood both by him who gave and him who acted upon it to imply an undertaking to answer for the existence of the fact warranted, while the informal statement was actionable only if the maker knew it to be false.

The obligation of the warranty, therefore, arises out of the consent of the warrantor to be bound by its terms and is consensual. On the other hand, the very informality of a statement, where the word "warranty" was not used, indicated an absence of intent to be bound to its truth. Thus the obligation to answer for an informal statement is not consensual but imposed by the policy of law to punish dishonesty and to protect the public against intentional deception. Therefore, it cannot be said to be a mere extension of the obligation upon a warranty. But the action of deceit gave a new and greater protection to the same interest previously protected only by the binding force of the cabalistic word "warrant," the interest which every man has in his right to rely upon statements which affect the advisability of his entering into some contractual or other relation affecting his pecuniary or proprietary interests.<sup>42</sup>

The limitation of the action of deceit to consciously dishonest and active misstatements is consistent with the judicial purpose to enforce a decent standard of commercial honor, which underlay the recognition of the action of deceit for informal misstatements. It would be ridiculous and futile to attempt to enforce a standard in advance of existing public conscience, by requiring those who are concerned with commercial transactions to put all their information at the disposal of one another.<sup>43</sup>

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<sup>41</sup> Indeed, the modern development of the law of deceit tends to assimilate misstatements intended to induce contractual relations to warranties, and, at least where the action is between persons party to a contract entered into in reliance upon the false statement, there is a marked tendency to give to informal statements substantially the same effect as is given to those whose truth is vouched by the magic word "warrant."

<sup>42</sup> The difference between the two is that the warranty entitles the person to whom it is given to expect the fact to be as warranted, while a mere informal statement only entitles him to whom it is made to rely upon the honesty of him who makes it.

<sup>43</sup> The cases show a constant improvement in commercial ethics. Compare *Harvey v. Young, Yelv.*, 20a, (1596); *Sherwood v. Salmon*, 2 Day (Conn.) 128 (1805); and



So, too, the limitation of liability in deceit to those to whom the statement is made and whom the maker intends to act upon it, followed almost inevitably from the close analogy of deceit to actions on warranties.

Since warranties did not run with the goods bought in reliance upon them, it was almost inevitable that it should be held that the right to recover upon a fraudulent misstatement did not pass to one who succeeds to rights acquired in reliance thereon, and that the right to rely on informal statements like the right to rely on the formal word "warrant," should be restricted to him to whom the statement indicates that its maker intends to pledge his faith.

But where not only is the fact misrepresented one on which the personal safety of others depends, but where also the misrepresentation leads to personal injury, the reasons for these limitations may well appear no longer controlling. Where human life and limb are at stake, the question is no longer one of mere commercial ethics.

While the business interests of the public may be adequately protected by requiring good faith from those who choose to speak, courts may well regard the personal safety of the public as sufficiently important to require full disclosure of those facts upon the knowledge of which its safety depends. And where something more than the sale or use value of an article bought or sold or the benefit to be derived from a financial transaction is involved, the analogies of warranty may well be ignored, and the liability even for non-disclosure of conditions, known to be dangerous to personal safety, should be held to extend to all those to whose safety a knowledge of the actual conditions is obviously necessary and who sustain personal injury through their ignorance thereof.

It is therefore not surprising to find that where the misrepresentation, whether positive or implied, whether active or through mere non-disclosure, is of a fact upon which the personal safety of others is or should be known to depend, and where personal injury has resulted directly or indirectly from the misrepresentation, the courts have consistently ignored the limitations which they have as consistently applied where the injury threatened and resulting is merely the loss of some pecuniary benefit, that would have ac-

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Gordon v. Parmelee, 2 Allen (Mass.) 212 (1861); with Pearson v. Lord Mayor of Dublin, L. R. [1907] A. C. 351; and compare Gordon v. Parmelee with Roberts v. French, 153 Mass. 60, 26 N. E. 416 (1891).

crued from some financial transaction had the statement been true.<sup>44</sup>

In so far as the landlord's making repairs implies a representation that the premises are put safe which is falsified by his negligence, the fact misrepresented is, like latently dangerous defects not disclosed by a vendor, lessor or donor of property, one which primarily concerns the safety of those who use the premises rather than its value. And where the action is to recover for personal injury re-

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<sup>44</sup> It is submitted that the proper classification of the cases to which these limitations should apply and those to which they should not, depends upon the nature of the injury sustained and not solely upon the nature of the injury likely to result from the reliance upon the misstatement.

Thus the mere non-disclosure of a defect in an article sold, no matter how obviously it affects the safety of its use, is not actionable if, it being discovered after the property has passed into the hands of the purchaser, the only loss sustained is the lessened resale or use value of the property caused by the defect. But if the property is used in reliance upon its apparent fitness for use and such use causes physical injury to the user, he may recover for the mere failure to disclose the defect. So, also, if property is sold through no matter how positive and fraudulent a misrepresentation of its safe condition, the vendor is not liable to one who buys or leases it from his purchaser, if, its true condition being discovered, it merely lessens the value of the article. But no matter through how many hands the property passes, the vendor is liable to any one who is injured by using it in innocent ignorance of the defect.

Where there is an express positive and fraudulent misstatement even of a fact upon which depends the safety of property for use, an action of deceit has been held to lie. But there is a marked tendency to relax the restrictions universally applied where the loss complained of is the lessened value of the property. Thus in *Langridge v. Levy*, 2 M. & W. 519 (1837) the defendant who had sold a gun to the father of the plaintiff knowing that it was bought for the plaintiff's use, was held liable to the plaintiff through the bursting of the gun which he had misrepresented to his father as made by Nock, a gunsmith, whose product was of the highest class, it, in fact, having been made by much inferior gunsmiths. *Accord*, *Cunningham v. Pease Co.*, 74 N. H. 435, 69 Atl. 120 (1908); *State to use of Hartlove v. Fox*, 79 Md. 514, 29 Atl. 60 (1894), where the declaration was held not to show a good cause of action because it did not allege it was natural and probable that one taking care of a horse with glanders would contract that disease; *contra* *Carter v. Harden*, 78 Me. 528, 7 Atl. 392 (1886), where one selling as kind and gentle a horse which he knew to be vicious was held not liable for injuries to the purchaser's wife, *Langridge v. Levy*, being distinguished on the ground that it did not appear that the vendor understood that the horse was being bought for the wife or her use.

*Langridge v. Levy* has given infinite trouble to judges and text writers. It is submitted that the decision can be supported only by recognizing that where personal injury naturally results from the misrepresentation, the liability is more extensive than where it causes only pecuniary loss. It seems obvious that the son, to whom the purchaser had given the gun, could have maintained no action of deceit, had he sustained no other loss than the difference between the value of a Nock gun and such a gun as was actually given him.

sulting from its use, directly or indirectly due to such misrepresentation, the liability should be at least as extensive in the one case as in the other and should not be restricted within those limitations which even in the action of deceit itself are only consistently applied where the resulting harm is pecuniary disappointment.

(2) It is more difficult to distinguish the liability of a landlord negligently making repairs, whether gratuitously or for a benefit to him as landlord, from that of contractor guilty of similar negligence in making repairs "for hire" in the course of his trade. Such a contractor is generally said to share the immunity which the majority of common-law jurisdictions have conferred on manufacturers, whom the course of decision in the last few years has relieved of any liability to persons other than their immediate vendees for carelessness or unskilfulness either in workmanship or in choice of materials.<sup>45</sup>

It may be conceded that the mere fact that the work is done by a landlord, or is done by him gratuitously rather than for a benefit moving to him as landlord, affords no logical basis for any distinction in the character of the obligation or in its extent. But it is submitted that this immunity is itself to be justified, if at all, as economically necessary rather than as legally sound. In so far as it professes to rest upon authority, it is generally, if not always, based upon *Winterbottom v. Wright*.<sup>46</sup> Now *Winterbottom v. Wright* involved no question of liability for misfeasance; the plaintiff's injury was due to the defendant's pure non-feasance, — his failure to make repairs required by his contract with the plaintiff's employer. The case came up on demurrer to the plaintiff's declaration, which alleged as his sole right to recover, his knowledge of and reliance upon this contract to which he was obviously not party. But this was overlooked and certain *dicta* of Baron Alderson and Lord Abinger were seized upon to torture the case into an authority for the doctrine that when work is done under a contract, or goods are made and sold, the liability for negligence in perform-

<sup>45</sup> The defendant was a contractor not only in *Winterbottom v. Wright* but also in *Earl v. Lubbock*, L. R. [1905] 1 K. B. 253, *Curtin v. Somerset*, 140 Pa. 70, 21 Atl. 244 (1891); *Congregation v. Smith*, 163 Pa. 561, 30 Atl. 279 (1894), and *Daugherty v. Herzog*, 145 Ind. 255, 44 N. E. 457 (1896), in all of which the contractor was held not to be liable for negligence after his work had been accepted by the person with whom he had contracted to do it.

<sup>46</sup> 10 M. & W. 109 (1842).

ance, or manufacture is restricted to those who are party to the contract or sale.<sup>47</sup>

The full recognition of this doctrine has been comparatively recent. Many early cases had held the negligent maker of various articles liable to persons, who, while using them, were injured by their latently dangerous condition, even though they had not bought the article directly from the makers and thus stood in no privity of contract to them.<sup>48</sup> All of these cases had certain features in common. The article was one which unless carefully made would be dangerous for the very use for which it was sold. It was one whose actual condition could not be discovered by any inspection which either the user or those through whose hands it passed to him could be required or expected to make and which must, therefore, be used in exclusive reliance upon its good workmanship.

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<sup>47</sup> Baron Alderson's statement, p. 115, that "if we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty," is sound when applied to the facts of the case before him, — and he says nothing to suggest that he intends it to apply to any other situation.

The *dictum* of Lord Abinger, 10 M. & W. 109, 114, 115 (1842) — an able advocate but never regarded as a great judge — goes farther: He says, "Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue. . . . There is also a class of cases in which the law permits a contract to be turned into a tort; but unless there has been some public duty undertaken, or public nuisance committed, they are all cases in which an action might have been maintained upon the contract." As an illustration of this principle, he then says, "Thus, a carrier may be sued either in assumpsit or case; but there is no instance in which a person, who was not privy to the contract entered into with him, can maintain any such action." It seems strange that the text writers and courts who have since attached so much importance to this *dictum*, have not noticed that nine years after it was pronounced it was completely discredited by *Marshall v. York, Newcastle & Berwick Ry. Co.*, 11 C. B. 655 (1851) which decided that just such an action could be maintained.

For a more extended discussion of this case and of the prevalent judicial misconception of its effect, see the author's "Basis of Affirmative Obligations, in the Law of Torts," 53 U. of PA. L. REV. 209, 273, 337, (1905), especially pp. 281 to 285 and its citation by Cardozo, J., in *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 392, 111 N. E. 1050 (1916).

<sup>48</sup> *Thomas v. Winchester*, 6 N. Y. 397 (1852), belladonna labeled as extract of dandelion; *Norton v. Sewall*, 106 Mass. 143 (1870), laudanum sold as rhubarb; *Bishop v. Weber*, 139 Mass. 411, 1 N. E. 154 (1885), bad devilled crab supplied by a caterer; *Dixon v. Bell*, 5 M. & S. 198 (1816), mulatto girl of thirteen sent to fetch a gun left loaded. *George v. Skivington*, L. R. 5 Ex. 1 (1869), hairwash; *Parry v. Smith*, L. R. 4 C. P. D, 325 (1879), gasfitters leaving leak in gas pipes.

But, refusing to recognize that these decisions implied a general principle imposing liability wherever these conditions exist, courts, determined to deny the existence of any such principle but, reluctant to disapprove or overrule these cases already decided, chose to regard them as imposing peculiar and exceptional liabilities, because of the particular purpose which the use of the various articles was to serve, — as that it was to preserve, destroy or affect human life or because of some extraordinarily dangerous quality, which they were arbitrarily assumed to possess.<sup>49</sup>

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<sup>49</sup> See Sanborn, J., in *Huset v. Case Threshing Machine Co.*, 120 Fed. 865, 870 (1903). "There are three exceptions to this rule. The first is that an act of negligence of a manufacturer or vendor [of an article which is imminently dangerous to the life or health of mankind] which is committed in the preparation or sale of an article intended to preserve, destroy or affect human life is actionable by third parties who suffer by the negligence." Very often the duty of a careful manufacturer is said to be confined to articles inherently dangerous, *Heizer v. Kingland*, 110 Mo. 605, 19 S. W. 630 (1892); or intrinsically dangerous to life or property as in *Lebourdais v. Vitrified Wheel Co.*, 194 Mass. 341, 80 N. E. 482 (1907).

In determining whether a duty to exercise care should be imposed, courts should and do consider the interests both of those on whom it is to be laid and those for whose protection it is required. It may, therefore, be proper to require care in the manufacture of an article, which if used for purpose for which it is sold is likely, unless carefully made, to do serious harm to life or limb or even to property, while imposing no duty to exercise care in making an article which, if defective, may be less valuable or less convenient for use but which is unlikely to do serious harm except under peculiar and exceptional circumstances.

But even if the duty of careful manufacture is to be restricted to those articles which, if defective, are likely to do serious harm to those who use them for the purpose for which they are sold as appropriate, it is purely arbitrary to deny the extra-hazardous nature of an article unless it be a drug, explosive, food-stuff or fire-arm, and so, capable of being inaccurately described as designed to preserve, destroy, or affect human life, as in *Liggett & Myers v. Cannon*, 132 Tenn. 419, 178 S. W. 1009 (1915) where it was held that the makers of chewing tobacco were not liable for negligence which permitted dangerous foreign substances in their "plugs" because chewing tobacco was not food since "it does not tend to build bodily tissues and as to the average adult its tendency is usually thought to retard the building up of fatty tissues"; and *Hasbrouck v. Armour & Co.*, 139 Wis. 357 (1909); with which compare *Pillars v. Reynolds Tobacco Co.*, 117 Miss. 490, 78 So. 365 (1918); and *Armstrong Packing Co. v. Clem*, 151 S. W. 576 (Tex. Civ. App., 1912), *infra* note 51.

It seems almost ridiculous to contend that a devilled crab, *Bishop v. Weber*, 139 Mass. 411, 1 N. E. 154 (1885), or an effervescent drink put up in bottles not stout enough to prevent their explosion, *O'Neill v. James*, 138 Mich. 567, 101 N. W. 828 (1904), or a floor varnish, *Thornhill v. Carpenter-Morton Co.*, 220 Mass. 593, 108 N. E. 474 (1915), is more dangerous unless carefully selected and compounded or put up, to him who eats, opens, or uses it, than a platform over the moving machinery of a threshing machine is to the farm-hand who is to stand upon it, or an emery wheel which

And these exceptions,<sup>50</sup> thus illogically and arbitrarily created to bring this judicial innovation into apparent conformity with previous decisions, have been as illogically applied and extended.<sup>51</sup>

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revolves at a very high rate of speed is to him who operates it if care is not taken to make it substantial and free from flaws.

<sup>50</sup> The liability of a manufacturer who sells his product without disclosing a latent defect known to him or who fails to disclose facts which to his knowledge make the existence of such a defect probable is not peculiar to those who sell their own product. All vendors, whether manufacturers, wholesalers or retailers, are equally liable not only to their immediate vendees but to all persons who use the articles in the right of the purchaser. See *supra*, note 39.

<sup>51</sup> Thus in *Herman v. Markham Air Rifle Co.*, 258 Fed. 475 (1918), it was held that an air rifle sold as a children's toy was intrinsically dangerous, whether because, in supposed analogy to fire-arms, it was regarded as intended to destroy human life, or because the fact of the accident proved that it was dangerous, is not clear. Chewing tobacco was held in *Pillars v. Reynolds Tobacco Co.*, 117 Miss. 490, 78 So. 365 (1918) to be intrinsically dangerous because, like food, it was to be taken into the mouth and chewed. The bottling of effervescing drinks was held to be intrinsically dangerous because past experience had shown that unless care was taken in bottling them, they were apt to explode when opened. *Grant v. Graham Bottling Co.*, 176 N. C. 256, 97 S. E. 27 (1918). In *Thornhill v. Carpenter-Morton Co.*, 220 Mass. 593, 108 N. E. 474 (1915) the Massachusetts Court holds that one who puts out a floor varnish as his own, though bought from another maker, is presumed to know that the ingredients from which it is compounded make it inflammable and so intrinsically dangerous. It is not clear whether this presumption is rebuttable or is a conclusive presumption of law. If the latter, it throws upon those who manufacture or sell as their own, chemical compounds, a duty to know its qualities. If, as is possible, one of the reasons for denying the liability of a manufacturer to persons other than his vendee lies in the fact that the change of manufacturing conditions from small shops where the work was done under the owner's eye, to large factories makes a rigid application of the maxim *respondet superior* unduly harsh, this decision can be supported on the ground that, while it may be a hardship to hold a manufacturer liable for the mere operative negligence of the innumerable workmen in his factory, yet it is not too much to require him to know the effect of the formula of any compound which he makes. This should equally apply where the defect is in the design or plan of construction adopted by the manufacturer.

In *Armstrong Packing Co. v. Clem*, 151 S. W. 576 (Tex. Civ. App., 1912), it was held that soap was an inherently dangerous substance because the manufacturer must have known that it contained ingredients "which unless neutralized by saponification" would remain poisonous, but compare *Slattery v. Colgate*, 25 R. I. 220, 55 Atl. 639 (1903). In *Olds Motor Works v. Shaffer*, 145 Ky. 616, 140 S. W. 1047 (1911) it is held that where the defect is one, which the workmen making it must have discovered during the process of manufacture, though concealed when the article was completed, the knowledge of the working force must be imputed to the manufacturer so as to hold him liable as having sold it with knowledge of its defective character. In *Davidson v. Montgomery Ward Co.*, 171 Ill. App. 355, (1912) it was held that a manufacturer of a fly-wheel was bound to know that it was safe before selling it. Though this enables the court to put the manufacturer's liability upon the ground that

The cases following *Gill v. Middleton* may be taken to be another exception to this new doctrine, none the less an exception because their inconsistency with it is not expressly recognized. *Gill v. Middleton* was decided before this undue extension of the principle correctly applied in *Winterbottom v. Wright* had come into full vogue. It was natural that the court gave no thought to it and it was equally natural that the American courts, which with substantial unanimity have instinctively perceived the common-sense justice of the decision in that case, should have continued to follow it even after they had adopted this new and fashionable restriction on the liability for careless and unskilful manufacture, without inquiring whether the two were logically consistent with one another.

As they thus tacitly recognize another exception to the new doctrine, it is submitted that it is the exception and not the doctrine which is in accord with general common-law principles and that any exception, however arbitrary and fortuitous, to a doctrine so illogical and ill-founded, is so much saved to sound law.

It may be suggested further that, if the restriction of a manufacturer's liability for bad workmanship to those who buy his product from him is to be justified only by economic necessity,<sup>82</sup> even those courts which think it necessary to encourage manufacture, by relieving those engaged therein from any real responsibility for the exercise of reasonable care and decent consideration for the safety of the consumers on whose patronage they depend, may not think it equally necessary to encourage landlords, — a class traditionally

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he sold with knowledge of its dangerously defective character, it substantially repudiates the immunity in *Huset v. Case Threshing Machine Co.*, as effectively as does the powerful and accurately reasoned opinion of Cardozo, J., in *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050 (1916).

<sup>82</sup> See Paxson, C. J., in *Curtin v. Somerset*, 140 Pa. 70, 80, 21 Atl. 244 (1891). "If a contractor who erects a house, . . . a manufacturer who constructs a boiler, piece of machinery, or a steamship, owes a duty to the whole world, that his work or his machine or his steamship shall contain no hidden defect, it is difficult to measure the extent of his responsibility, and no prudent man would engage in such occupations upon such conditions." See the very similar language of Stirling, L. J., in *Earl v. Lubbock*, L. R. [1905], 1 K. B. 253, 259. So Sanborn, J., says in *Huset v. Case Threshing Mach. Co.*, 120 Fed. 865, 867 (1903): "A wise and conservative public policy has impressed the courts with the view that there must be a fixed and definite limitation to the liability of manufacturers and vendors for negligence in the construction and sale of complicated machines."

well able to take care of themselves, and of late generally unpopular, — by adding this new immunity to those, with which the common law had already so richly endowed them.

It is perhaps significant that, while many countries have indirectly subsidized manufacturers at the expense of their consumers by enacting protective tariffs, no subsidies have been granted to landlords, either directly out of the public funds raised by general taxation, or indirectly by transferring the burden of taxation from them to their tenants. Indeed, even at those times when the lack of adequate housing has been most acute, whatever legislation there has been has looked toward preventing landlords from exploiting the situation by exacting exorbitant rentals rather than to aiding them in building more houses.

#### IV

American courts have been substantially unanimous in citing *Gill v. Middleton* with approval and accepting the general principle announced in its opinion.

In the great majority of cases in which this principle has been applied the injury has been to the tenant or his property.<sup>53</sup> There are comparatively few cases which have presented the question of the landlord's liability to persons other than the tenant, injured while using the premises in the tenant's right. In all but one of such cases American courts have permitted a recovery. In most of them the successful plaintiff was an adult or infant member of the tenant's family, such as his wife<sup>54</sup> or child.<sup>55</sup> In only a very few

<sup>53</sup> *Sparks v. Murray*, 120 Ark. 17, 178 S. W. 909 (1917); *Mann v. Fuller*, 63 Kan. 664, 66 Pac. 627 (1901); *Michael & Bros. v. Billings Co.*, 150 Ky. 253, 150 S. W. 77 (1912); *Peerless Co. v. Bagley*, 126 Mich. 225, 85 N. W. 568 (1901); *La Brasca v. Hinchman*, 81 N. J. L. 367, 79 Atl. 885 (1911); *Horton v. Early*, 39 Okla. 99, 134 Pac. 436 (1913); *Ara v. Rutland*, 172 S. W. 993 (Tex. Civ. App., 1915); *Wertheimer v. Saunders*, 95 Wis. 573, 70 N. W. 824 (1897), all cases where the injury was to the tenant's property. *Charney v. Cohen*, 94 N. J. L. 381, 110 Atl. 698 (1920); *Rowan v. Amoskeag Co.*, 109 Atl. 561 (N. H., 1920), *semble*. *Eblin v. Miller*, 78 Ky. 371 (1890), *semble*, in which the tenant sustained personal injuries.

<sup>54</sup> *Upham v. Head*, 74 Kan. 17, 85 Pac. 1017 (1906), facts substantially similar to those in *Gill v. Middleton*; *Carlton v. City Savings Bank*, 82 Neb. 582, 118 N. W. 334 (1908), 85 Neb. 659, 124 N. W. 91 (1909); *Little v. McAdaras*, 38 Mo. App. 187 (1889), facts

<sup>55</sup> *Salvetta v. Farley*, 123 N. Y. Supp. 230 (1910); *Petroski v. Mulvanity*, 78 N. H. 252, 99 Atl. 88 (1916), *semble*; *Rosenberg v. Zeitchik*, 52 Misc. 153, 101 N. Y. Supp. 591 (1906).



was the plaintiff a subtenant or a business invitee or bare licensee of the tenant. In all cases in which the landlord has been held liable,<sup>56</sup> *Gill v. Middleton* is accepted as authority for the maintenance of the action, with little or no discussion of its reason or the extent of the liability therein imposed. In many of them there is the curious tendency to use the word "tenant" in its popular rather than its legal sense and, like Justice Ames in *Gill v. Middleton*, to speak of a member of the tenant's family, particularly his wife, as the "tenant" or "lessee," though it is most unusual that premises should be leased to the husband and wife, and it is therefore altogether improbable that both man and wife were actually tenants. In some of these cases, it appeared, from the facts alleged or proved, that the plaintiff had joined with the tenant in complaining of the need of repairs or had at least been present when the landlord promised to make them. In others it did not appear that the plaintiff knew that any promise had been given or indeed that there had been any definite promise

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substantially identical with those in *Riley v. Lissner*, *supra*, n. 17; *Finer v. Nichols*, 175 Mo. App. 525, 157 S. W. 1023 (1913); *Miller v. Rehder*, 35 Pa. Sup. 344 (1908); *Callahan v. Loughran*, 102 Cal. 476, 36 Pac. 672 (1894) *semble*; *O'Dwyer v. O'Brien*, 13 App. Div. 570, 43 N. Y. Supp. 815 (1897), *semble*.

In *Callahan v. Loughran* recovery was denied because while the declaration averred that the tenant's wife "believed the work was completed also, it is not averred that it was so in fact, or that defendant so represented or considered it," p. 482, while in *O'Dwyer v. O'Brien* the plaintiff was held guilty of contributory negligence; see also, *Schoppel v. Daley*, 112 La. 201, 36 So. 322 (1904), *infra*, note 65.

<sup>56</sup> *Broome v. N. J. Conference*, 83 N. J. L. 621, 83 Atl. 901 (1912), employees of subtenants living on premises; see *Malone v. Laskey*, *infra*, *McKenna v. Grunbaum*, 33 Idaho, 46, 190 Pac. 919 (1920), subtenant injured by elevator negligently installed by landlord during the lease to his tenant; *Stamm v. Purroy*, 170 App. Div. 584, 156 N. Y. Supp. 415 (1915), *semble*, plaintiff resided with the lessee, recovery denied because it was not proved that the landlord had attempted to make the needed repairs; *Byers v. Essex Inv. Co.*, 281 Mo. 375, 219 S. W. 570 (1920), *semble*, recovery was denied to sub-lessee because there was no evidence that the landlord had repaired the railings whose collapse caused her injury; *cf. Galvin v. Beals*, *supra*, n. 18.

In *R. C. H. Covington Co. v. Masonic Temple Co.*, 176 Ky. 729, 197 S. W. 420 (1917), the defendant landlord made certain improvements in consideration of the tenant's paying an additional rental, *cf. Feeley v. Doyle*, *supra*, n. 22. The lease expiring, a new lease was executed to the same partnership, though one of the partners had died during the original term. It was held that the defendant's liability for negligence in making the improvements was limited to injuries sustained during the original term, and that his liability for injuries sustained during the second term depended upon his knowledge, at the time he delivered possession thereunder, that the improvements had been negligently made and so created a latent and dangerous defect in the premises.

antecedent to the landlord's making the repairs after learning of the need of them. In those where the plaintiff was an adult member of the tenant's family, it is highly probable that he or she knew that the landlord had made the repairs and accepted that fact as an assurance of safety, but in some of the cases the plaintiff was a child too young to recognize such an implication, even if old enough to realize that it was the landlord who had made them. In none of them was any importance attached to the plaintiff's presence or absence when the promise, if any, was made, or to his knowledge or ignorance of the landlord's having made it. In *Hill v. Day & Foss*<sup>57</sup> the plaintiff, a sublessee, was denied recovery because there was "no evidence that the plaintiff was a party to his [the landlord's] gratuitous undertaking, or had any knowledge of it before the accident. . . . It must be proved at least that she had knowledge of his undertaking, otherwise no confidence could have been induced in her by his acts."<sup>58</sup> It is knowledge of the fact

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<sup>57</sup> 108 Me. 467, 81 Atl. 581 (1911).

<sup>58</sup> King, J., p. 471. Justice King evidently does not regard the landlord's obligation as a mere implied term of his promise and so consensual and limited by the principles of contract law, for clearly mere knowledge that a party to a contract has attempted to perform his contract instead of repudiating it gives no right to one not a party thereto to rely upon it and then to complain that he has been injured because the attempted performance has been imperfect.

It is submitted that it was not necessary that the plaintiff, if a member of the tenant's family or a guest or sub-lessee, should know that the landlord had made repairs and so should have consciously relied upon his assurance that the premises were safe for his use. It should be enough that the landlord ought to have known that the tenant would rely upon his making them as justification for throwing the premises open to his family or guests or for subletting them without either making such repairs himself or giving notice of the defect. The element of "confidence imposed," which in the notes to *Coggs v. Bernard*, Smith's L. C., 6 Am. ed. 335, is said to be "a sufficient legal consideration to create a duty in the performance" of the voluntary undertaking, is supplied by the tenant's confidence which misleads him into the belief that the premises are safe for the use of others as well as of himself. The landlord must know that the tenant has trusted to him not only his own safety but also the safety of all those whom he has the right to admit to the premises. The word "consideration" is perhaps unfortunate as giving the impression that the obligation like that of a contract depends on privity to the confidence "imposed" or reposed. But it is submitted that what the annotator had in mind were those numerous cases which held that the payment of a consideration for services had some peculiar effect in requiring care in their performance, though the duty was not confined to the person who paid it but extended to those whose safety depended upon the care with which it was performed. See *Pippin v. Sheppard*, 11 Price, 400 (1822); *Gladwell v. Steggall*, 5 Bing. N. C. 733 (1839); *Erle, J.*, in *Dalyell v. Tyrer*, E. B. & E. 899 (1858); and *Marshall v. York* etc.

that the landlord had made the repair that is here regarded as essential, not knowledge of his promise, certainly not her presence when it was made, still less the fact that she had participated in the complaint and so was considered by the landlord, and had the right to consider herself, a party to the promise he made. This decision does not support *Thomas v. Lane*, which held that the authority of *Gill v. Middleton* is confined to cases where these facts are shown to exist.

In *Malone v. Laskey*,<sup>59</sup> the English Court of Appeal rejected the argument that defendant landlords, by making repairs (which consisted of putting a bracket under an insecure cistern in a lavatory) undertook a duty to make them properly, because they stood in no contractual relation to the plaintiff, and because there was no obligation to make the repairs which were "an entirely voluntary act on their part and (were) not done in the discharge of any duty which they owed to the plaintiff." "The utmost that can be said is that what was done amounted to a representation by the defendants that the plaintiff might safely use the lavatory, and, even if it did amount to such a representation, it was an innocent representation and gave the plaintiff no cause of action"<sup>60</sup> "for there is no evidence that they knew that the bracket was in an unsafe condition when the repairs had been done."<sup>61</sup>

While the injured plaintiff was the wife of the manager of a subtenant, who had been given the privilege of occupying rooms on the premises,<sup>62</sup> the language and reasoning of the court seem equally

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Ry., 11 C. B. 655 (1851). Indeed at the time that the note to *Coggs v. Bernard* was written the idea seems to have been prevalent, that a duty to exercise positive care even in a trade or profession required a consideration to support it.

<sup>59</sup> L. R. [1907] 2 K. B. 141.

<sup>60</sup> *Ibid.*, at p. 152, per Gorell-Barnes, Pres.

<sup>61</sup> *Ibid.*, at p. 155, per Fletcher-Moulton, L. J. Kennedy, L. J., doubted whether knowledge of the insufficiency of the repairs ought not to be imputed to the defendants, p. 156.

<sup>62</sup> The defendants had let the premises to a firm of law stationers, who sublet a part to a company which permitted its manager and his wife (the plaintiff) to occupy rooms therein. The manager or his wife complained to the tenant that the cistern in the lavatory was insecure. The tenant forwarded this complaint to the landlord, who sent two plumbers, part of their regular staff, to rectify the defect. They placed a bracket under the cistern to support it and as Gorell-Barnes, Pres., said, L. R. [1907] 2 K. B. 141, 150, "were then apparently satisfied that they had left it secure. This unfortunately turned out not to be the fact," and the cistern fell on the plaintiff, seriously injuring her.

applicable to an injury sustained by a tenant, for whom a landlord has gratuitously made repairs. And the decision indicates that the liability for misfeasance in the performance of a gratuitous undertaking is not to be extended, as in America, to cases where, in reliance upon care having been exercised in its performance, the subject matter is used in a way for which such care is required in order to make it safe.

In some jurisdictions the court has not been required to determine a landlord's liability for an injury even to a tenant, caused by his negligent failure to remove a preëxisting physical defect. In the only cases brought before them the landlord's negligence in making repairs or alterations or in rendering some other gratuitous service has created a physical defect not existing previous to his attempt to carry out his undertaking. But in almost all of these cases the nature of the repairs or services undertaken made the creation of this new defect inherently probable, if not certain, unless care and skill were exercised in the performance of the undertaking. The tenant for whom such repairs were made or to whom such services were rendered was therefore aware that some such dangerous defect was at least likely to be created unless they were properly done. When the landlord's negligence does not directly and actively injure the tenant or his property,<sup>68</sup> but merely creates a defect which makes the premises unsafe for the use of persons ignorant of its existence, the factors essential to liability are the same as when the landlord's negligence makes his attempt to remedy a preëxisting defect ineffectual.

The gist of the defendant's liability is that, knowing that the tenant will rely and is entitled to rely on his competence as a sufficient assurance that the premises will be made safe for use, he must know that the safety of those who may rightfully use them will depend upon his exercise of reasonable care and skill. The liability depends upon the tenant's right to rely on the landlord's care and skill. And it seems quite clear that the tenant is as much entitled to expect care to be taken to remove a defect which the landlord has undertaken to remove, as he is to expect that alterations

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<sup>68</sup> As in *Tarnogurski v. Rzepski*, 252 Pa. 507, 97 Atl. 697 (1916), where a landlord, who had gratuitously undertaken to repair the water pipes in his building, himself turned on the water for a tenant without any effort to ascertain whether the repairs had been made by a plumber whom he had employed to make them.

will be properly made, or that new floorings, to be substituted for those so decayed as to be beyond repair, will be properly laid.<sup>64</sup>

It is therefore not surprising to find that, in those jurisdictions in which the question came up for decision, the vastly preponderating weight of authority is to the effect that a landlord is as liable for negligence in failing to remove a preëxisting physical defect as for negligence in creating a new one.<sup>65</sup>

There is a noticeable tendency in many American jurisdictions to increase the landlord's obligation to keep the premises which he leases in at least as safe a condition for use, as when he turns them over to his tenant. A number of courts have held that a failure to make internal repairs necessary for the safe use of the premises after notice of their necessity makes a landlord who has covenanted to make them, liable for any personal injury sustained by the tenant or by any member of his family or by any one whom he has rightfully chosen to admit to the premises.<sup>66</sup> In order to

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<sup>64</sup> As in *Rehder v. Miller*, *supra*, note 54.

<sup>65</sup> *Horton v. Early*, *Charney v. Cohen*, *La Brasca v. Hinchman*, *supra*, note 53; *Upham v. Head*, *Carlton v. City Savings Bank*, *supra*, note 54; and *Salvetta v. Farley*, *supra*, note 55. In *Finer v. Nichols*, 175 Mo. App. 525, 157 S. W. 1023 (1913), the court expressly rejects the argument which the defendant's counsel seems to have strongly pressed, that the landlord is answerable for such negligence only in making gratuitous repairs as changes the physical character of the premises for the worse; *contra*, *Wynne v. Haight*, 27 App. Div. 7, 50 N. Y. Supp. 187 (1898), in which the court refused to permit a tenant's wife to recover, on the ground that the landlord's negligence in repairing a ceiling had not caused the injury which resulted from its fall, for the reason that the repairs had not weakened the ceiling but had merely failed to strengthen it; and so had not caused any new defect but merely failed to remedy the old. In the case of *Marston v. Frisbie*, 168 App. Div. 666, 154 N. Y. Supp. 367 (1915), the opinion at first glance appears to reiterate this view but a closer reading of the case shows that the plaintiff's right to recover was denied because the tenant had himself been present while the repairs were being made and had not entrusted the matter to the exclusive control of the defendant, his landlord.

<sup>66</sup> *Robinson v. Heil*, 128 Md. 645, 98 Atl. 195 (1916), plaintiff was an infant child of the tenant, *Burke, J.*, saying, p. 653, "the liability of the landlord to a member of the tenant's family for personal injuries resulting from *such negligent failure* to repair is practically the same as to the tenant himself," but the landlord is not liable unless he has reason to expect that serious injury will result from his failure to repair, *Thompson v. Clemens*, 96 Md. 196, 53 Atl. 919 (1903). *Barron v. Ludloff*, 95 Minn. 474, 104 N. W. 289 (1905), plaintiff had sublet an apartment from the tenant of a house leased by the defendant. "If his negligence in making or failing to make the repairs results in an unsafe condition of the premises, he is liable for injuries caused thereby to persons lawfully upon the premises" per *Start, C. J.*, p. 476; the only authority given for

extend it to such persons, who are obviously not party to the contract, the courts, which have recognized the landlord's obligation to them, do not attempt to give them a false appearance of privity by attaching any importance to their knowledge of the landlord's covenant. They boldly, if perhaps somewhat arbitrarily, treat the liability as based on negligence, and so a tort liability not restricted within those limits appropriate to contractual obligations; the covenant to repair becomes a mere inducement to the relation from which law creates the obligation. The attitude of the Massachusetts courts in treating a tort liability, based on misfeasance, as though it arose out of the promise to repair and so was sufficiently cognate to a contractual liability to require its limitation to those party to the promise or undertaking, thus runs directly counter to the prevailing tendency of American decision.

No jurisdiction, English or American, had prior to *Thomas v. Lane* and *Feeley v. Doyle* recognized the distinctions declared in them. Nor has any jurisdiction since followed those cases.<sup>67</sup> While Maine requires the plaintiff to have knowledge of the landlord's attempted performance of his gratuitous undertaking, the plaintiff's privity to the undertaking is not regarded as essential. The English Court of Appeal has refused to permit a subtenant to recover for the

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this is *Olson v. Schultz*, 67 Minn. 494, 70 N. W. 779 (1897), in which the defective elevator was retained in the control of the landlord and was for the common use of the landlord, the plaintiff's employees and the tenants of other portions of the building.

*Accord*: *Ashmun v. Nichols*, 92 Oreg. 223, 178 Pac. 234 (1919), where the tenant himself was injured; *Mesher v. Osborne*, 75 Wash. 439, 134 Pac. 1092 (1913), action by tenant to recover for death of infant child. In *Lowe v. O'Brien*, 77 Wash. 677, 138 Pac. 295 (1914), the agreement was made during the lease upon the threat to move out unless the landlord make the premises safe. In these cases it was held that the landlord's promise to repair an open defect "absolved the tenant from an assumption of risk" in analogy to the promise of an employer to repair a defective tool or appliance. See also, *accord*, *Stillwell v. So. Louisville Land Co.*, 22 Ky. Rep. 785, 58 S. W. 696 (1900), and *Schoppel v. Daly*, 112 La. 201, 36 So. 322 (1904), where, however, the landlord had not only agreed to make the repairs but had made them "to the extent which she deemed to be a compliance with her obligation . . . when the workmen left it was an assurance to the lessees [the plaintiff was the wife of the lessee] that everything was in order." Per Nicholls, C. J., p. 212.

<sup>67</sup> *Thomas v. Lane* is quoted with apparent approval by Fellows, J., in his minority opinion in *Sorenson v. Kalamazoo Sales Co.*, 201 Mich. 318, 167 N. W. 982 (1918), but the case did not require the court to adopt or reject its doctrine, the majority of the court holding that the repairs were made by and under the control of the tenant and not by the defendant landlord.

injury due to the insufficiency of repairs which the landlord had gratuitously made. But the reasons given are as applicable to an injury to a tenant to whom the landlord had gratuitously given his express promise to repair and the facts in their essence differed from those in *Gill v. Middleton* only in the fact that the subtenant was not present when the landlord made whatever promise he gave, though the tenant had merely transmitted the subtenant's complaint and the subtenant knew of the landlord's attempt to make the repairs.

In no case before or after *Feeley v. Doyle* is there any suggestion that the landlord's obligation to use care in making repairs is, by the fact that his promise is made upon a consideration moving to him as landlord, extended to persons not party to the consideration and to whom he would owe no duty had the repairs been gratuitously performed.<sup>68</sup> Whatever credit attaches to this invention belongs exclusively to the Massachusetts Supreme Judicial Court.

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<sup>68</sup> No jurisdiction other than Massachusetts has held that a landlord gratuitously making repairs is liable only if guilty of gross negligence. Indeed in some cases a duty is said to be "cast upon him to see that the repairs are made so as not to injure the tenant and the rule concerning independent contractors has no application," *Bland, J., in Vollrath v. Stevens*, 199 Mo. App. 5, 13, 202 S. W. 283 (1918). Other courts hold that "he can not absolve himself from liability by employing an independent contractor to do the work, if the work to be done is attended with danger to the tenant." *Covington Co. v. Masonic Temple*, 176 Ky. 729, 734, 197 S. W. 420 (1917); *aliter* where the repairs do not, like the putting on of a new roof, as in *Covington v. Masonic Temple*, *supra*, involve an obvious risk of injury unless special precautions are taken, but are ordinary repairs requiring no special care or skill for their safe performance, *Eblin v. Miller's Ex.*, 78 Ky. 371 (1880). In those jurisdictions which do not follow the modern tendency to make one employing an undoubtedly independent contractor liable if the work entrusted to him is inherently dangerous, unless special precautions are taken, the landlord is not held liable for the independent contractor's failure to take such necessary precautions, *Bains v. Dank*, 199 Ala. 250, 74 So. 341 (1917).

## THE PROGRESS OF THE LAW, 1919-1922

## EVIDENCE. III

## REAL EVIDENCE

**A**N article by Sidney L. Phipson analyzes the treatment of this subject by the text-writers and their definitions.<sup>148</sup> Finger-prints are discussed in two articles.<sup>149</sup> Decisions in Washington and Texas disagree on the question whether an unauthorized view by the jury should be a ground for reversal; it should not be if not prejudicial.<sup>150</sup>

## THE BEST EVIDENCE RULE

This rule has been too rigidly enforced in this country in situations where the secondary evidence is admittedly accurate. The simple English procedure, where a long series of letters and telegrams is involved in a case, is to include the full correspondence in the briefs, and read it to the jury without interruptions unless some matter is disputed.<sup>151</sup> We might wisely do likewise. Another rule which ought to be adopted everywhere is, that the incorporation of a party to a suit may be proved orally without the need of a record;<sup>152</sup> indeed, corporate existence might well be taken for granted unless questioned. Another matter which has sensibly been relieved from the burden of the best evidence rule is the moving picture. In *Feeney v. Young*<sup>153</sup> a woman, who being compelled to

<sup>148</sup> " 'Real' Evidence," 29 YALE L. J. 705 (1920).

<sup>149</sup> M. Carlson, "Forging Finger-prints," 11 J. CRIM. L. & CRIM. 141 (1920); A. M. Kidd, "The Right to take Finger-prints, Measurements and Photographs," 8 CAL. L. REV. 25 (1919). See Locard, *infra*, note 284.

<sup>150</sup> *Leopold v. Livermore*, 197 Pac. 778 (Wash., 1921), no reversal; *Texas Midland Ry. v. Brown*, 228 S. W. 915 (Tex. Comm. App., 1921), reversal; both noted in 31 YALE L. J. 217. The absence of the accused during the view does not violate his constitutional right of confrontation, *State v. Rogers*, 145 Minn. 303, 177 N. W. 358 (1920).

<sup>151</sup> Frank H. Burt, "Documentary Evidence in the English Law Courts," 5 MASS. L. Q. 63 (1920).

<sup>152</sup> *Kelley v. Stern Pub. & Nov. Co.*, 147 Ark. 383, 227 S. W. 609 (1921); the divided authorities are collected in 5 MINN. L. REV. 475.

<sup>153</sup> 191 App. Div. 501, 181 N. Y. Supp. 481 (1920), noted in 19 MICH. L. REV. 101.



undergo a surgical operation had consented that a film should be made for exhibition to medical societies, sued for violation of her statutory right of privacy because it was shown in two leading moving-picture houses in New York as part of a photoplay named "Birth." She offered spectators of the play to testify that they had recognized her in the pictures. This was excluded by the trial court on the ground that the film itself was the best evidence. As this was too small to ascertain anything, and a representation in court was impracticable, her complaint was dismissed. The Appellate Division granted a new trial, holding that the evidence of eyewitnesses was competent. In an English suit by Elinor Glyn to enjoin an unauthorized burlesque of "Three Weeks," the judge held that such evidence was not secondary evidence and was the only kind that in strictness could be given, although he was himself shown the play on the screen, which he found to be "vulgar to an almost inconceivable degree."<sup>154</sup>

#### THE PAROL EVIDENCE RULE<sup>155</sup>

Williston's new treatise on The Law of Contracts<sup>156</sup> has a chapter on "General Rules for the Interpretation or Construction of Contracts and the Parol Evidence Rule." The heading indicates the difficulty of discussing this rule apart from the whole question of interpretation of language. Whereas J. B. Thayer thought that there were three Parol Evidence Rules, and Wigmore increased the number to four, Williston<sup>157</sup> decides there is only a single rule. His discussion of parol warranties is especially interesting.<sup>158</sup>

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For the equitable and tort points in this case, see Z. Chafee, Jr., "Equitable Relief against Torts," 34 HARV. L. REV. 388.

<sup>154</sup> Glyn v. Western Feature Film Co. Ltd., 114 L. T. R. 354 (1915); the injunction was refused because the plaintiff's book was too immoral to be protected by copyright and because burlesques are not infringements.

<sup>155</sup> See also: Bills and notes cases, 21 COL. L. REV. 282, 596; 7 VA. L. REV. 84; 17 LAW. SER. MO. BULL. 51 (1919); 11 A. L. R. 637, note. Mistake, Forgiione v. Lewis, [1920] 2 Ch. 326. Custom contradicting writing, The Turid, [1920] P. 370. Parol agreement for time of performance when contract names no time, 5 MINN. L. REV. 226 (1921); 2 WILLISTON, CONTRACTS, § 640. Enrolled copy of statute as conclusive evidence of enactment, W. H. Loyd, "Pylkington's Case and its Successors," 69 U. PA. L. REV. 20 (1920). Parol contract for bequest to adopted child, not in adoption agreement, 22 COL. L. REV. 178.

<sup>156</sup> N. Y., 1920, Vol. II.

<sup>157</sup> *Op. cit.*, § 636.

<sup>158</sup> § 643.

*Delivery and Intent.* An article by H. W. Ballantine, "Delivery in Escrow and the Parol Evidence Rule,"<sup>159</sup> takes up the various views on the troublesome problem, whether the doctrine of *Pym v. Campbell*<sup>160</sup> allows parol proof of a conditional delivery of a deed or other sealed instrument to the grantee or obligee. On the whole he favors giving effect to such conditions, but says that the time has come to discard altogether the unsatisfactory ceremony of delivery in favor of a more clear-cut formality, such as execution before a government official. The recent Virginia case of *Whitaker v. Lane*<sup>161</sup> allows proof that a sealed contract was delivered in escrow to the obligee, following Wigmore's view<sup>162</sup> after an exhaustive survey of the authorities. The same position is taken by Tiffany<sup>163</sup> and a full note in the *Minnesota Law Review*.<sup>164</sup> On the other hand, some jurisdictions are bound by authority to declare the condition invalid, especially in the delivery of a deed. Oliver S. Rundell's article on "Delivery and Acceptance of Deeds in Wisconsin"<sup>165</sup> shows this to be the law in that state, and *Mitchell v. Clem*<sup>166</sup> declined to overrule the same proposition in Illinois, although the court by a bare majority managed to give effect to the condition on the ground that the facts showed want of delivery and only manual possession in the grantee, not an escrow. The dissenting judges vigorously question this interpretation of the facts. The case furnishes a striking illustration of Williston's statement<sup>167</sup> that the distinction between delivering in escrow to the obligee and entrusting possession to him without intention to deliver is "somewhat fine." The truth seems to be, that the majority of the Illinois Supreme Court felt the prevailing drift away from the old doctrine, and went as far as the principle of *stare decisis* permitted.

Another possible exception to *Pym v. Campbell*<sup>168</sup> is involved in

<sup>159</sup> 29 YALE L. J. 826 (1920); 3 ILL. L. BULL. 3.

<sup>160</sup> 6 E. & B. 370 (1856).

<sup>161</sup> 104 S. E. 252 (Va., 1920); 11 A. L. R. 1174, note.

<sup>162</sup> 4 WIGMORE, EVIDENCE, § 2408.

<sup>163</sup> 2 REAL PROPERTY, 2 ed., 1920, § 462.

<sup>164</sup> "Conditional Delivery of Deeds Direct to the Grantee," 5 MINN. L. REV. 287 (1921), discussing *Whitaker v. Lane* and *Mitchell v. Clem*.

<sup>165</sup> 1 WIS. L. REV. 65 (1921).

<sup>166</sup> 295 Ill. 150, 128 N. E. 815 (1920), three judges dissenting.

<sup>167</sup> 1 LAW OF CONTRACTS, § 212.

<sup>168</sup> 6 E. & B. 370 (1856).

*Supreme Lodge v. Dalzell*.<sup>169</sup> A fraternal order employed a collector of premiums, with whom a written contract was made. The collector, when sued thereon, sought to prove that he was not liable under the terms of a prior oral contract, which was the real agreement between the parties, and that the written contract was a mere sham, intended to deceive other collectors into supposing that all the contracts of the order were uniform. While this evidence is logically admissible to prove that the parties never intended to embody their agreement in the writing, public policy may hold them to their bargain since to set it aside would be unfair to the persons who were meant to be deceived.<sup>170</sup> On the other hand, public policy would seem to favor use of the parol evidence in *Hoe v. Ozello*,<sup>171</sup> where the written lease of a saloon conformed to the Sunday-closing law, but the lessee when sued for rent sought to show that the true agreement was oral and contemplated violation of that law. The Illinois Supreme Court excluded the evidence, and thus helped to carry out an illegal transaction.

*Integration.* If the Parol Evidence Rule rests on the principle, as J. B. Thayer, Wigmore, and Williston agree, that the parties have integrated all the terms of their agreement in the writing, so that evidence of a different agreement is irrelevant as proving something without binding force, then the writing is the sole contract for outsiders as much as for the contracting parties.<sup>172</sup> In proceedings *inter alios* parol evidence is inadmissible to prove a different contract, although it may come in for other purposes just as between the parties themselves. The New York Appellate Division has failed to make this distinction and declares that the rule has no application to criminal cases.<sup>173</sup>

The difficult problem of collateral agreements is neatly raised by *Hoyt's Proprietary, Ltd. v. Spencer*<sup>174</sup> in New South Wales. A let

<sup>169</sup> 205 Mo. App. 207, 223 S. W. 786 (1920), disapproved in 69 U. PA. L. REV. 78.

<sup>170</sup> This is Wigmore's view, 4 EVIDENCE, § 2406; *contra*, Southern Street Ry. Co. v. Metropole Co., 91 Md. 61, 46 Atl. 513 (1900).

<sup>171</sup> 290 Ill. 147, 125 N. E. 5 (1919), disapproved by Costigan in 15 ILL. L. REV. 213; see 5 WIGMORE, § 2406 n. 8.

<sup>172</sup> THAYER, PRELIMINARY TREATISE ON EVIDENCE, 397; 4 WIGMORE, § 2446; 2 WILLISTON, CONTRACTS, § 647.

<sup>173</sup> *People v. Glickman*, 194 App. Div. 103, 185 N. Y. Supp. 307 (1920), disapproved in 34 HARV. L. REV. 790.

<sup>174</sup> 19 N. S. W. Rep. 200 (1919), Ferguson, J., dissenting; noted in 4 MINN. L. REV. 368.

premises to B, who sublet to C in writing with a provision that B might terminate the sublease on four weeks' written notice. B gave such notice. C sued B for violation of a parol agreement made prior to the lease that B would not terminate the sublease unless required to do so by the head lessor, A. A majority of two judges held that this agreement was inadmissible because in conflict with the terms of the lease. One judge thought that B could validly bind himself not to exercise his power. His argument that the parties should be free to make any agreement they choose and modify their rights as they choose, provided they do not contravene some law, virtually begs the question, although it may be a reason for the abolition of the Parol Evidence Rule. The collateral promise might naturally have been embodied in the lease, and should therefore be ineffective if omitted. A Tennessee case<sup>175</sup> seems equally sound in refusing to allow an ordinary deed to be supplemented by proof of an oral agreement by the grantee to erect buildings of a certain quality upon the land conveyed. Such restrictions belonged in the deed.

*Scott v. Albermarle Horse Show Association*<sup>176</sup> presents a harder question. A vendor sought specific performance of a land contract to convey "with general warranty and covenants of title." The purchaser set up the existence of certain building restrictions as incumbrances. The plaintiff offered to rebut this defense by parol evidence that the purchaser knew of these incumbrances and their irremovability at the time of the contract. The court excluded the evidence because it would vary the contract of warranty which specified no such exceptions and dismissed the bill. If the parties' knowledge of the restrictions and their irremovability was adequately proved, then either they were entering on a useless transaction, or else they intended to except the incumbrances from the warranty, but mistakenly failed to do so. The second alternative seems much more sensible, and the parol evidence would thus be admissible to procure reformation for mistake. The decision may, however, be supported on the view of the concurring judge, that the purchaser's knowledge was not established.

<sup>175</sup> *McGannon v. Farrell*, 141 Tenn. 631, 214 S. W. 432 (1919), noted in 5 CORN. L. Q. 336.

<sup>176</sup> 104 S. E. 842 (Va., 1920), Sims, J., concurring; disapproved in 5 MINN. L. REV. 327.

*Construction.* The extent to which gaps in the description in wills may be filled from parol evidence is discussed by several decisions. Mistakes in section-numbers have provoked a long series of cases in Illinois,<sup>177</sup> of which the latest is *Johnston v. Gastman*.<sup>178</sup> The devise called for the east half of lot 1 in the northeast quarter of section 1, which the testator did not own; he did own a tract of the same description in section 2. He made similar mistakes as to two other tracts. A subsequent clause devised all the residue of his property, both real and personal. This residuary clause was held to show an intention to dispose of all his land, so that the court read the words "my property" into the three erroneous specific devises, and then applied the maxim, "falsa demonstratio non nocet," to strike out the incorrect portion of the descriptions, although under the previous Illinois decisions they would have refused to do this in the absence of the residuary clause. The Massachusetts court<sup>179</sup> found it easier to correct the misdescription of a will which bequeathed a fund for the benefit of "the New Bedford Home for Aged People." There was no institution of that precise name, but the fund was claimed by the New Bedford Home for Aged and by the Association for Relief of Aged Women of New Bedford. Evidence was admitted of the surrounding facts known to the testator and his relations to the two claimants. Similar evidence was used by an English judge to limit a bequest "for missionary purposes" to strictly charitable objects.<sup>180</sup> It will be noted that the testator's declarations of intention were not used in the Massachusetts decision, and would doubtless have been excluded, because it was not a case where the description fitted two persons equally well. Such declarations were excluded in California<sup>181</sup> when offered to prove that the words "my heirs" in a will meant only the testatrix's own kin. However, they were admitted

<sup>177</sup> *Kurtz v. Hibner*, 55 Ill. 514 (1870); *Lomax v. Lomax*, 218 Ill. 629, 75 N. E. 1076 (1905); *Stevenson v. Stevenson*, 285 Ill. 486, 121 N. E. 202 (1918); *contra*, *Re Boeck*, 160 Wis. 577, 152 N. W. 155 (1915); see Schofield, "So-called Equity Jurisdiction to Construe and Reform Wills" 6 ILL. L. REV. 485 (1912).

<sup>178</sup> 291 Ill. 516, 126 N. E. 172 (1920), noted by Wigmore in 15 ILL. L. REV. 99.

<sup>179</sup> *Kingman v. New Bedford Home for Aged*, 129 N. E. 449 (Mass., 1921), approved in 19 MICH. L. REV. 668.

<sup>180</sup> *In re Rees*, [1920] 2 Ch. 59, Sargant, J.

<sup>181</sup> *In re Watts' Estate*, 198 Pac. 1036 (Cal., 1921), approved in 20 MICH. L. REV. 251.

in the English case of *In re Battie-Wrightson*,<sup>182</sup> to clear up what the judge called a latent ambiguity. A testatrix who had accounts in seven banks gave her balance "at the said bank" to a specified legatee. One of the seven banks had been mentioned in the preceding clause of the will as it was originally executed. This clause had subsequently been cancelled and the will re-executed, so that there was nothing in the will as probated to show what bank was meant. The judge admitted the cancelled clause of the original will for that purpose. The authorities allowing erased portions of a will to be used justified the decision, but he went farther and employed language which would have admitted oral declarations of the testatrix entirely outside of any will, past or present.<sup>183</sup> "Evidence to show the actual testamentary intentions of a testator is admissible only in exceptional cases, one of which is to determine which of several persons or things was intended under an equivocal description." Thus he regards "my said bank" as an instance of equivocation like the bequest to "George Gord," where there were several men of that name, and declarations of intention were let in to show who was meant.<sup>184</sup> The difficult question is whether the description is sufficiently definite to pass anything. Suppose a bequest of "my bonds in the said railroad," and the testator owned bonds of forty railroads, or of "my house-lot," and he owned twenty such lots; would oral declarations of intention be admissible? Is not the hole in the document too big to be filled up?<sup>185</sup>

If the description in the will is equally erroneous when applied to either of two claimants, this has been held not to be an equivocation and parol evidence of the testator's intentions has been excluded.<sup>186</sup> An Irish decision, *Robertson v. Flynn*,<sup>187</sup> seems to reach a contrary result. The testator bequeathed property "to my sister Annie Neary." Two of his sisters were Annie Flynn and

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<sup>182</sup> [1920] 2 Ch. 330, Astbury, J.; noted in 37 L. QUART. REV. 4.

<sup>183</sup> [1920] 2 Ch. 330, 340.

<sup>184</sup> *Doe d. Gord v. Needs*, 2 M. & W. 129 (1836).

<sup>185</sup> A bequest "to A, his wife, and their daughter," when A had five daughters, was given to his daughter Phoebe, to whom the testator was shown by extrinsic circumstances to be attached. *In re Jeffery*, [1914] 1 Ch. 375, Warrington, J.

<sup>186</sup> *Doe d. Hiscocks v. Hiscocks*, 5 M. & W. 363 (1839); *Drake v. Drake*, 8 H. L. C. 172 (1860).

<sup>187</sup> I. R. [1920] 1 Ch. 78 (C. A.).

Bridget Neary. The contemporaneous written instructions for the will given to his solicitor were admitted to show that Annie Flynn was meant. Unless such instructions have a superior value to ordinary declarations of intention, the case supports Wigmore's view<sup>188</sup> that such a misdescription is an equivocation.

#### COMPETENCY OF WITNESSES<sup>189</sup>

The antique disqualification of a party to a civil suit has long been wholly abolished in many states, but others partially preserve it in the so-called "dead man statutes," which forbid the surviving participant in a contract or other transaction to tell about it unless the personal representative of the deceased participant waives the restriction. The purpose is to guard against the danger, sometimes very real, of dishonest claims against decedents' estates. Death gives the survivor of a transaction an unfair advantage. A creditor may lie if his debtor cannot possibly take the stand to tell the truth. There are two ways to equalize this difference in positions. First, the "dead man statutes," which prevent the survivor from lying by forbidding him to testify at all. These give rise to endless difficulties of application,<sup>190</sup> penalize the honest survivor especially when the estate makes unjust claims against him, and represent a last vestige of the old attitude of the law, — if any person is under the slightest temptation to perjure himself, we must assume that neither the law against perjury, nor supernatural punishment, nor his respect for the opinions of his fellow-citizens, nor the grilling of cross-examination, nor common decency will make him truthful, and the only solution is to disqualify him. The modern alternative method of eliminating the inequality between the living and the dead is, not to fasten a special gag upon the living, but to give the dead more freedom from ordinary re-

<sup>188</sup> 4 EVIDENCE, § 2474.

<sup>189</sup> *Children, Goy v. Director General*, 111 Atl. 855 (N. H., 1920), noted in 7 VA. L. REV. 663; *Maynard v. Keough*, 145 Minn. 26, 175 N. W. 891 (Minn., 1920), noted in 4 MINN. L. REV. 549. Jurors, in criminal contempt proceedings against jurors, 5 CORN. L. Q. 164 (1919). Intoxication at time of event, *State v. Magyar*, 114 Atl. 252 (N. J., 1921). Use of drugs, 15 A. L. R. 912. See Locard, *infra*, note 284.

<sup>190</sup> For recent illustrations see "Death of adverse party as affecting evidence with respect to book account," 6 A. L. R. 756 note, and see *Mansfield v. Gushee*, 114 Atl. 296 (Me., 1921); 6 IA. L. BULL. 61 (1920); 20 COL. L. REV. 229 (1920); 9 CAL. L. REV. 347 (1921).

strictions. Several states let the survivor testify, and then get the decedent's story through his hearsay declarations, which come in under a statutory exception to the hearsay rule.<sup>181</sup> They prevent lying by letting in more evidence than usual, and not by shutting ordinarily good evidence out. Even without such new statutes, the time has come in the opinion of Henry W. Taft, in his "Comments on Will Contests in New York,"<sup>182</sup> to abolish the "dead man" disqualification:

"This restriction not infrequently works intolerable hardship in preventing the establishment of a meritorious claim. Furthermore, it has been enforced with the most rigorous literalness, and has been the occasion of a labyrinth of subtle decisions. A long experience leads me to believe that the evils guarded against do not justify the retention of the rule. In the early development of our jurisprudence the testimony of all interested witnesses was excluded; but experience gradually led to the conclusion that the restriction should be relaxed and more reliance should be placed upon the efficacy of our process of investigating truth. Cross-examination, for instance, has been found to be well calculated to uncover a fraudulent scheme concocted by an interested party, and where that has failed the scrutiny to which the testimony of a witness is subjected by the court and by the jury, has proven efficacious in discovering the truth, to say nothing of the power of circumstantial evidence to discredit the mere oral statement of an interested witness."

In criminal cases at common law the accused was incompetent to testify under oath and was denied counsel. He was, however, allowed to make an unsworn statement, which consisted partly of presentation of facts and partly of argument on facts and law.<sup>183</sup> Does this right survive under modern statutes in the British Empire and the United States, which provide counsel and (except in Georgia) allow the accused to testify if he so desires? In a recent New Zealand case<sup>184</sup> the practice there and in England is described. The accused, whether defended by counsel or not, is permitted as part of his defense to make a statement not on oath, if he does not elect to be sworn as witness. This statement

<sup>181</sup> MASS. G. L. (1921) c. 233, § 66; CONN. GEN. STAT. (1918), §§ 5735, 5736; I OLSON, ORE. LAWS (1920), § 732; R. I. LAWS, 1915, ch. 1259.

<sup>182</sup> Address to the Association of the Bar of the City of New York, Jan. 13, 1921, printed in 30 YALE L. J. 593, 605 (1921).

<sup>183</sup> 1 WIGMORE, EVIDENCE, §§ 575, 579.

<sup>184</sup> *Rex v. Perry*, [1920] N. Z. L. R. 21, noted in 5 MINN. L. REV. 390.



is not subjected to cross-examination but the prosecutor may call evidence to contradict it. The statement is evidence for the consideration of the jury. In the United States courts, in prosecutions under the Espionage Act, this practice was usually followed, but when Townley, the president of the Non-Partisan League, was tried in Minnesota under the state war act, the privilege of speaking was refused him by the trial judge, who was held on appeal to have full discretion in the matter.<sup>196</sup> This agrees with the American authorities, but the discretion may wisely be exercised in the prisoner's favor in sedition trials, in accordance with the federal practice.<sup>198</sup>

The frequency with which attorneys act as witnesses in cases that they are trying, is made the subject of severe condemnation by Wigmore<sup>197</sup> in commenting on an Illinois decision. Since the courts, though giving little weight to the attorney's testimony, cannot exclude it, Wigmore recommends that the objectionable practice should be stopped by some kind of professional punishment.

The competency of husband and wife will be discussed in connection with their privileged communications.

#### PRIVILEGE

*Privilege against Self-incrimination.*<sup>198</sup> A review of this privilege with especial reference to the Iowa law is presented by D. O. McGovney in his discussion of the bill drafted by the Iowa Code Commission regarding self-criminating and self-disgracing testimony.<sup>199</sup> The bill continues the present Iowa privilege for answers which tend to expose the witness to "public ignominy." McGovney suggests that the witness is sufficiently protected if he be excused from such an answer when cross-examined to test his credibility, and that such protection may best be left to the dis-

<sup>196</sup> *State v. Townley*, 182 N. W. 773 (Minn., 1921), approved in 5 MINN. L. REV. 553, 35 HARV. L. REV. 86.

<sup>197</sup> Robert Ferrari, "The Trial of Political Prisoners Here and Abroad," 66 DIAL 647 (June 28, 1919); Z. CHAFFEE, JR., FREEDOM OF SPEECH, 85 and 136.

<sup>198</sup> 16 ILL. L. REV. 241, noting *Eshelman v. Rawalt*, 298 Ill. 192, 131 N. E. 675 (1921).

<sup>199</sup> Duty of court to instruct witness concerning privilege, 33 HARV. L. REV. 119 (1919). Incrimination under a foreign law, *In re Cappeau*, 198 App. Div. 357, 190 N. Y. Supp. 452 (1921). No waiver by filing involuntary bankruptcy schedules, *Arndstein v. McCarthy*, 254 U. S. 71 (1920). See *Bain v. United States*, note 314.

<sup>200</sup> "Self-criminating and Self-disgracing Testimony Code Revision Bill," 5 ILL. L. BULL. 174 (1920).

cretion of the trial judge and not made a hard-and-fast statutory guarantee.

Another recent privilege statute is the National Prohibition Act,<sup>200</sup> which compels all persons to testify even though incriminated, but grants immunity to natural persons in return for their evidence, if given in obedience to a subpoena under oath. The privilege is thus denied to corporations in accordance with settled practice.

The privilege against self-incrimination may be claimed in all kinds of proceedings held under governmental authority.<sup>201</sup> Does it extend to a private inquiry? In *Hickman v. London Assurance Corporation*,<sup>202</sup> a fire insurance policy provided that after a fire the insured, as a condition precedent to suit, should submit to an examination under oath before the company's agents when required, and produce his books and papers. The insured refused to answer any incriminating questions at this examination, on the ground that the company had caused a prosecution for arson to be instituted, in which whatever he now said or produced would be used against him. Therefore, he would not consent to testify or furnish books and papers until after the verdict in the prosecution. The criminal proceedings were subsequently dismissed for want of evidence, but no further offer or demand for an examination was made. The policyholder began suit against the company, which set up non-compliance with the condition precedent. The trial judge, sitting without a jury, ruled that the insured was justified by his constitutional privilege, and found for the plaintiff. Although similar clauses have frequently been upheld, this seems to be the first case to raise the question of privilege. The Supreme Court of California entered judgment for the defendants:

"Constitutional immunity has no application to a private examination arising out of a contractual relationship. . . . It must appear that compulsion was sought under public process of some kind."<sup>203</sup>

<sup>200</sup> 41 STAT. AT L., pt. I, c. 85, Title II, § 30, p. 317, Oct. 28, 1919; noted in 14 ILL. L. REV. 644, by Wigmore.

<sup>201</sup> Criminal contempt proceedings, *State ex rel. Sandquist v. District Court of Blue Earth County*, 144 Minn. 326, 175 N. W. 908 (1919); examination before a state council of defense, *Re Adams*, 42 S. D. 592, 176 N. W. 508 (1920).

<sup>202</sup> 195 Pac. 45 (Cal., 1920), approved in 5 MINN. L. REV. 475. See note 227, *infra*.

<sup>203</sup> 195 Pac. 45, 49 (1920).

Consequently, the plaintiff's unjustified rejection of the examination barred his recovery. The court might have advanced an alternative reason, that the privilege was waived by anticipation in the policy.

Whether a prisoner's silence during arrest is an admission of guilt, has already been discussed.<sup>204</sup> A somewhat different problem as to the effect of silence has been raised in British Columbia.<sup>205</sup> The defendants on a charge of wounding with intent to do grievous bodily harm swore at the trial to an alibi. In the police court they had given no indication that this would be their defense. The trial judge instructed the jury that, while the defendants had a right to reserve their defense, they laid themselves open to the suggestion that they did so to prevent the police from investigating the truth of their alibi and their actual whereabouts. This inference from the prisoner's silence before trial was held to violate the Canada Evidence Act, "The failure of the person charged . . . to testify shall not be made the subject of comment by the judge, or by counsel for the prosecution." The case shows how desirable it is that comment should be permitted in the United States and Canada as in England.<sup>206</sup>

*Miscellaneous Privileges.* In *Blair v. United States*<sup>207</sup> the Supreme Court refused to create a new kind of privilege. Witnesses summoned before a federal grand jury, which was investigating the primary expenditures of Senator Newberry of Michigan under the Corrupt Practices Act, refused to answer any questions on the ground that the statute was unconstitutional and the grand jury and the court were consequently without jurisdiction. The witnesses were adjudged guilty of contempt. They were not interested to challenge the jurisdiction of the court or grand jury, or to set limits to the investigation. That was the right of the accused,

<sup>204</sup> 35 HARV. L. REV. 429 (1922).

<sup>205</sup> *Rex v. Mah Hong Hing*, [1920] 3 W. W. R. 314 (B. C. A. C., 1920), noted in 24 LAW NOTES (N. Y.) 145. Cf. *Rex v. Higgins*, 36 New Bruns. 18 (1902).

<sup>206</sup> An interesting sidelight on the value of the privilege against incrimination in examinations by officials outside the court-room was afforded by the examinations of aliens by administrative officers after arrest for deportation, where no privilege existed against the disclosure of information which would render the witness deportable. This topic requires a separate article.

<sup>207</sup> 250 U. S. 273 (1919), approved in 33 HARV. L. REV. 119.

who in fact subsequently succeeded in having the statute declared unconstitutional.<sup>208</sup>

Physical examination of the accused is held in some jurisdictions to be a violation of the privilege against self-incrimination, but it may be required of other persons unless it is outside the common-law powers of the court or unless a special privilege against bodily inspection is recognized. A few jurisdictions will not allow an examination of the plaintiff in a personal injury suit or of the prosecutrix in a trial for sexual offenses.<sup>209</sup> A recent Kentucky case<sup>210</sup> sustains the refusal of the trial court to order an examination of the prosecutrix where the charge was detention against her will with intent to have carnal knowledge, and the defendant set up consent evidenced by prior intimacy. The discretion of the trial judge was properly sustained, but he should be permitted to give such an order when he thinks it desirable, just as he can compel the production of other evidence by orders to testify or to furnish documents. Since the supposed privilege, where it is recognized, is created by the common law and not by the constitution (unlike the privilege against self-incrimination), it should be removed by the legislature, which can expressly confer on the trial judge the necessary powers and specify the legal machinery by which examination is to be compelled.

*Privileged Communications.* The abolition of the attorney and client privilege was urged long ago by Bentham, but the modern trend has been in the opposite direction toward the statutory extension of the privilege to other professions, such as doctors, trained nurses, and priests. The unsatisfactory effects of these privileges in will cases is set forth by Henry W. Taft.<sup>211</sup> The time has come to overhaul the law on this subject.

The question whether the privilege of attorney and client is only personal to the client is raised by *State v. Snook*.<sup>212</sup> In a prosecution for manslaughter for death caused by an automobile, the state wished to show that the defendant was driving while drunk. An-

<sup>208</sup> *Newberry v. United States*, 41 Sup. Ct. 469 (1921).

<sup>209</sup> 4 WIGMORE, EVIDENCE, §§ 2194, 2220.

<sup>210</sup> *Thomas v. Commonwealth*, 188 Ky. 509, 222 S. W. 951 (1920). *Accord*, *Rettig v. State*, 233 S. W. 839 (Tex. Cr., 1921), noted in 20 MICH. L. REV. 451.

<sup>211</sup> "Comments on Will Contests in New York," 30 YALE L. J. 593, 605, 606 (1921).

<sup>212</sup> 94 N. J. L. 271, 109 Atl. 289 (1920), affirmance by necessity of 93 N. J. L. 29, 107 Atl. 62 (1919), noted in 18 MICH. L. REV. 781.

other occupant of the car testified that the occupants were all sober. To contradict him, an attorney, whom he consulted after the accident but did not retain, was questioned about the interview. The trial judge ruled that the professional relationship did not exist (erroneously, it seems), and also that even if it did the client alone could claim the privilege. The privilege was not claimed by the consultant, although not expressly waived, but the defendant objected to the lawyer's testimony and excepted. The conviction was sustained by an equally divided court. The result accords with Wigmore's view.<sup>218</sup> Wigmore is logically right, that only the witness's rights are affected by a wrongful denial of the privilege, but nevertheless it seems practically desirable to allow the party to take advantage of such a denial, for otherwise error by the court will not be sufficiently checked. First, suppose the client is on the stand and claims privilege. If the court rules in his favor, evidence will be excluded to the injury of the offering party, who can surely except (unless it is the state, as in this case). Consequently, if the opponent cannot except to a denial of the privilege, the court is tempted to deny it and avoid the chance of a reversal. But, Wigmore replies, the witness's remedy is adequate,—he can keep silent, be committed for contempt, and test the point by *habeas corpus* or other appropriate proceedings. Now, the witness may be willing to do this to uphold his privilege against self-incrimination and possibly his privilege as client when the matter communicated is particularly confidential, but in general he will prefer to disclose it rather than go to all this trouble and expense and perhaps be imprisoned in the end because the doubtful point of privilege will be decided against him. Secondly, suppose the attorney is on the stand and the client is absent or dead. Surely the lawyer, unless his sense of professional obligation is very high, will feel that he has done enough in raising the point and will prefer to submit to the adverse ruling of the trial judge rather than go to jail for his client's sake. All this applies with equal force to the statutory physician and patient privilege. Therefore, while the privilege against self-incrimination should be available to nobody except the witness himself, an improper denial of privilege for a professional communication should be a ground for objection and

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<sup>218</sup> 4 EVIDENCE, § 2321.

appeal or exception, not only by the persons immediately concerned, but also by the party opponent.

*Attorney and Client.*<sup>214</sup> Should the attorney and client privilege exist when the attorney occupies a special position, such as witness to a will or trustee, in which ordinarily full disclosure would be made of facts connected with the performance of this special task?

An attorney who was witness to a will drawn by him was not allowed, in *Anderson v. Searles*,<sup>215</sup> to disclose the testator's instructions to him in an action against the estate upon an alleged contract to make a bequest which did not appear in the will. The essential element of confidence seems negated by the testator when he selects the attorney for a task which by its very nature requires communication. "He cannot be an attesting witness and yet not attest."<sup>216</sup> It is possible to make a distinction in support of *Anderson v. Searles*; the evidence was not offered in a proceeding involving the validity or interpretation of the will. In the same way, the privilege might be denied as to the facts of execution and granted as to the preparation of the will. Nevertheless, such fine discriminations are inconvenient, and it seems better that a person whom the testator makes an attesting witness, whether lawyer or layman, should be free to give every bit of information in his possession about the will.

A solicitor was a co-executor and co-trustee in *O'Rourke v. Darbishire*,<sup>217</sup> but discovery of professional communications to him from the other executors and trustees was denied by the House of Lords. The will expressly provided that this person might act as solicitor of the trust estate and be paid all proper charges just as if he were not an executor and a trustee. The case decided several important points. (1) Although a lawyer is a co-trustee, communications made him for purposes of legal advice may be privileged. Viscount Finlay said:<sup>218</sup>

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<sup>214</sup> "Privilege of communication to attorney as affected by termination of employment," 5 A. L. R. 728, note. "Privilege of communication to attorney by client in attempt to establish false claim," 5 A. L. R. 977, note; 9 A. L. R. 1081, note.

<sup>215</sup> 93 N. J. L. 227, 107 Atl. 429 (1919), approved by 20 COL. L. REV. 216 (1920).

<sup>216</sup> 4 WIGMORE, EVIDENCE, § 2315.

<sup>217</sup> [1920] A. C. 581 (H. L., E.), affirming *In re Whitworth*, [1919] 1 Ch. 320 (C. A.) which reversed Peterson, J.; noted in 33 HARV. L. REV. 120, 19 MICH. L. REV. 100, 36 L. QUART. REV. 201. Cf. *In re Postlethwaite*, 35 Ch. D. 722 (1887).

<sup>218</sup> [1920] A. C. 581, 602.

"Trustees are entitled to consult a solicitor with reference to the affairs of the trust, and the communications between them and their legal adviser are privileged if for the purpose of obtaining legal advice. Why should such communications be less privileged because the solicitor is himself one of the trustees? . . . Of course the privilege is confined to communications genuinely for the purpose of getting legal advice. It would not extend to mere business communications with reference to the trust, nor for the purpose of getting legal advice."

And Lord Sumner added:<sup>219</sup>

"The necessity, which has sometimes been said to be the foundation for the claim of professional privilege, is not the necessity for confiding in the particular solicitor consulted, but the necessity for letting a litigant confide in some solicitor. It is equally obvious that this principle involves allowing the litigant to choose his own solicitor, and to consult the person in whom he feels confidence. To limit the persons among whom he can choose might be to deny him a choice. To say that if he chooses to consult a co-executor he does so on the terms that their written communications will be open to his opponent, so penalises that particular choice, that in effect it is a prohibition."

Lord Parmoor<sup>220</sup> showed that it would be undesirable to compel the trustees to take outside advice in preference to that of the solicitor especially cognizant of the trust affairs. (2) On the other hand, if documents relate to professional advice taken by the trustees on behalf of the interests of the beneficiaries, such documents are part of the property of the estate, and no question of privilege arises. The beneficiaries are entitled to see them because they are beneficiaries; but in this case the plaintiff's claim to be a beneficiary was the point in issue. (3) The Lords recognized that no privilege would exist if the trustees were engaged in defrauding the estate, but the privilege is not overcome if the opposing party merely alleges fraud. There must be something to give color to the charge. The statement must be made in clear and definite terms, and there must be *prima facie* evidence that it has some foundation in fact.<sup>221</sup> Moreover, the documents must be part of the fraud, and not merely relate to it:<sup>222</sup>

"To consult a solicitor about an intended course of action, in order to be advised whether it is legitimate or not, or to lay before a solicitor

<sup>219</sup> [1920] A. C. 615.

<sup>221</sup> *Ibid.*, 604.

<sup>220</sup> *Ibid.*, 621.

<sup>222</sup> *Ibid.*, 613, Lord Sumner.

the facts relating to a charge of fraud, actually made or anticipated, and make a clean breast of it with the object of being advised about the best way in which to meet it, is a very different thing from consulting him in order to learn how to plan, execute, or stifle an actual fraud."

(4) It was also held that the privilege was not restricted to documents which the party claiming privilege could put in evidence, but extended to those admissible on behalf of his opponent, or to inadmissible documents for which discovery was sought.

*Physician and Patient.*<sup>223</sup> Although English doctors occasionally seek the same professional privilege as the bar,<sup>224</sup> Parliament has hitherto wisely refused to imitate the American statutes. Indeed, the English Divorce Court has held<sup>225</sup> that a physician must disclose the physical condition of a patient, although he was compelled to attend him by the National Health Act under statutory regulations enjoining absolute secrecy. The disadvantages of the American medical privilege are brought out by two recent cases. Hospital physicians were forbidden to testify in a personal injury case that when the plaintiff was brought in after the accident they smelled liquor on his breath.<sup>226</sup> A widow suing as beneficiary under an accident insurance policy was unable to recover because the accidental cause of her husband's death could only be proved by the physicians who attended him.<sup>227</sup> Here the privilege, which is supposed to exist for the patient's benefit, operated to defeat one of his most important intentions. The policy provided that satisfactory proofs of death should be furnished, necessarily involving medical

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<sup>223</sup> John B. Sanborn, "Physician's Privilege in Wisconsin," 1 WIS. L. REV. 141 (1921). Physician's death certificate and privilege, *Bozicevich v. Kenilworth Mercantile Co.*, 199 Pac. 406 (Utah, 1921). Waiver if patient calls another physician, *U. S. Fid. & Guar. Co. v. Hood*, 124 Miss. 548, 87 So. 115 (1921). "Waiver of a patient's privilege," 31 YALE L. J. 529 (1922).

<sup>224</sup> On the discussions in the British Medical Association, see "The Privilege of Medical Witnesses," 64 SOL. J. 612 (1920); "Professional Privilege," 152 L. T. 53 (1921).

<sup>225</sup> *Garner v. Garner*, 36 T. L. R. 196 (Prob. Div., 1920), *McCardie, J.*; noted in 64 SOL. J. 218; 23 L. N. (N. Y.) 217; 84 JUST. P. 51.

<sup>226</sup> *Owens v. Kansas City, etc., Ry. Co.*, 225 S. W. 234 (Mo. App., 1920).

<sup>227</sup> *Maine v. Maryland Casualty Co.*, 172 Wis. 350, 178 N. W. 749 (1920), two judges dissenting, noted by John B. Sanborn, "Physician's Privilege in Wisconsin," 1 WIS. L. REV. 141, 144; 5 MINN. L. REV. 157; 19 MICH. L. REV. 202; 15 A. L. R. 1544. This case is opposed to my suggestion of anticipatory waiver of privilege by the policy in *Hickman v. London Assurance Corporation*, page 684, *supra*.



evidence, but this was held not to be a waiver of the privilege by the patient, and it had been established by prior decisions that after his death no one was allowed to waive it. Wigmore's view that nobody except the patient may take advantage of the privilege<sup>228</sup> would have accomplished a just result in this case. Certainly a person directly antagonistic to the patient should not profit from the privilege. The case shows the need of immediate legislation in every state where the statute makes no express provision for waiver after the patient's death.

Legislatures and courts have been occupied for over a century in closing the physician's mouth in the very place where the truth is badly needed. And yet the much more important obligation of his silence in private life has hardly been considered by the law at all.<sup>229</sup> We have put our money on the wrong horse. In the few instances where honest patients do dread disclosure of their physical condition by a doctor, their fear is not that the truth may some day be forced from him in court, but that he may voluntarily spread the facts among his friends and theirs in conversation; and against this really dangerous possibility the statutes give almost no protection. The first and only decision on the doctor's liability to pay damages to his patient for a breach of confidence was made in 1920, under the common law, and recovery was denied, although a possible liability under different circumstances was suggested by the Nebraska court.<sup>230</sup>

In states where the patient's privilege exists, only information necessary to enable the doctor to act in his professional capacity is privileged. Matters which are entirely distinct from medical facts may be disclosed; for instance, the patient's remarks about his will. Oftentimes, however, the illness and another fact are closely connected, as in a recent divorce proceeding,<sup>231</sup> where a physician was asked to disclose a communication as to the paternity of an expected child, though it must have been given as a sequel to the mother's disclosure of her pregnancy, which was clearly privileged

<sup>228</sup> Note 213, *supra*.

<sup>229</sup> 4 WIGMORE, EVIDENCE, § 2380; Z. Chafee, Jr. "The Doctor as Witness," *N. Y. Evening Post*, July 2, 1921.

<sup>230</sup> *Simonsen v. Swenson*, 104 Neb. 224, 177 N. W. 831 (1920); noted in 34 HARV. L. REV. 312; 20 COL. L. REV. 890; 30 YALE L. J. 289; s. c., 38 MED. LEG. J. 13.

<sup>231</sup> *Stillman v. Stillman* (N. Y. Sup. Ct., referee's ruling, 1921, unreported).

and could not be repeated. A similar problem arises when the victim of an accident in describing his symptoms to a physician throws in occasional statements about the way he was hurt. Of course, the speed of the trolley car which hit him and the fact that he himself was not looking as he crossed the street are not really necessary for the application of surgical dressings, and the legitimacy of an expected child has no bearing on the medicines or osteopathic treatment which should be given to the mother. (If the doctor were a psychiatrist, curing her of melancholia or some other mental or nervous disorder, information on such a fact would be highly important.)

Logically, it may be that the facts leading up to a physical condition are often not "necessary to enable the physician to act in a professional capacity" and consequently are not protected by the statute, but practically it is very unjust to a patient, consulting a physician in a state where the law insists that the utmost confidence shall be preserved, if his conversation with the physician can be sifted out by the law into two classes of utterances and one class will be kept secret. One sentence will be held necessary for treatment but the next, dealing only with the cause of the ailment, receives no protection. The dividing line may fall in the middle of a sentence. What sort of confidence is secured by the statute if a sick and perhaps hysterical patient must be constantly on the alert, every time a question is asked him, to determine at his peril whether it is necessary for treatment, and, even if it is, must be watchful lest he add something to his answer which is not necessary? If the privilege is to exist at all, the New York court was wise in taking the position that all the communications of the patient which are actuated by his feeling of confidence in his medical adviser and which he would naturally make in furnishing the doctor with information as a basis of treatment are entitled to secrecy, even though some of these facts if wrenched from the conversation and taken singly had no medical value. A patient should not be forced to tell his story to the doctor with the circumspection of a lawyer.

*Marital Incompetency and Privilege.* A husband or wife at common law could not testify for or against each other. The injustice of this rule is shown by an Illinois case in which two women were tried for murder, and the husband of one of them was unable to

testify that he saw a suspicious-looking man near the scene of the crime because this would tend to cause the acquittal of his own wife as well as the other woman.<sup>232</sup> A somewhat different obstacle was overcome in Pennsylvania, when a husband was allowed to testify against a doctor who had caused the wife's death by a criminal operation.<sup>233</sup> He did not testify against his wife, inasmuch as she was not an accomplice to the crime but only a victim. Furthermore, death should terminate the incompetency, for his disparagement of his wife's conduct can no longer disturb marital relations. Incompetency should not survive like the privilege of marital communications, where the preservation of secrecy after death is helpful in encouraging full confidence during life. For similar reasons, the wife becomes a competent witness against her husband after divorce, but confidential marital communications cannot be divulged.<sup>234</sup> In many states, statutes limit the privilege to "confidential communications,"<sup>235</sup> and the restriction might well be implied even when the statute reads "any communication."<sup>236</sup>

*Government Informants.* The principle that communications to public officials for use in the prosecution of crime are not to be disclosed without the consent of the Government has long been established. In *Attorney General v. Tufts*,<sup>237</sup> a proceeding for the removal of a District Attorney, which was brought by the Attorney General, the latter offered evidence of conversation between the District Attorney and persons who, fearing that they might be

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<sup>232</sup> *People v. Holtz*, 294 Ill. 143, 128 N. E. 341, 350 (1920), disapproved by Wigmore, 15 ILL. L. REV. 453. If statute allows wife to testify for her husband but not against him, her evidence in his behalf cannot in Texas be impeached by her prior inconsistent statements. *Doggett v. State*, 86 Tex. Cr. 98, 215 S. W. 454 (1919), noted in 33 HARV. L. REV. 873; accord, *Turner v. State*, 89 Tex. Cr. 615, 232 S. W. 801 (1921); but her testimony may be broken down on cross-examination, *Boaz v. State*, 89 Tex. Cr. 515, 231 S. W. 790 (1920).

<sup>233</sup> *Commonwealth v. Bricker*, 74 Pa. Super. Ct. 234 (1920), noted in "The Privileged Character of Anti-marital Testimony," 69 U. PA. L. REV. 164.

<sup>234</sup> *Patterson v. Hill*, 212 Mich. 635, 180 N. W. 352 (1920), approved by 69 U. PA. L. REV. 382.

<sup>235</sup> *Stillman v. Stillman*, 187 N. Y. Supp. 383 (1921). A charge of infidelity was held to be a confidential communication in *Gisel v. Gisel*, 219 S. W. 664 (Mo. App., 1920), noted in 21 LAW SER. MO. BULL. 40.

<sup>236</sup> *Contra*, *Pugaley v. Smyth*, 98 Ore. 448, 194 Pac. 686 (1921), disapproved in 19 MICH. L. REV. 655.

<sup>237</sup> 132 N. E. 322 (Mass., 1921). See also "Privilege of communications made to public officers," 9 A. L. R. 1099 (1920).

accused of crime, went to show themselves to him and, if possible, avert the apprehended prosecution. The District Attorney objected that these communications were privileged since they were made to him in his official capacity. The Court held that the privilege prevented communications made in order to secure the enforcement of the law from being revealed at the instance of private parties in aid of actions at law, but that it had no application to the case at bar. The Commonwealth was here proceeding through the Attorney General to inquire into the fitness of an important official, and had waived whatever privilege it might have in order to obtain a full investigation. The same privilege was also limited in *Centoamore v. State*.<sup>238</sup> The defendant was convicted of a serious crime, largely on the testimony of a girl. The trial court excluded her prior statements to the County Attorney that another person had committed the crime. This was held erroneous, since the public policy behind the privilege was outweighed by the importance of acquitting the accused if innocent.<sup>239</sup> Indeed, since the identity of the informant was known, disclosure would have no bad effect.

An interesting question arose at the trial of *Colyer v. Skeffington*.<sup>240</sup> The head of the local Bureau of Investigation of the Department of Justice was asked how many men he had detailed to arrest aliens for deportation during a raid. He declined to answer, but under threat of contempt proceedings, he eventually arranged to submit the figures privately to the judge on a slip of paper so that the Government should not be injured by publicity about the size of its secret police force.<sup>241</sup>

*Miscellaneous Privileged Communications.*<sup>242</sup> Information given to a Juvenile Court judge by a boy under his care about the murder of the boy's father was held not to be privileged in a much discussed case, *Lindsey v. The People*.<sup>243</sup> The relation between the

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<sup>238</sup> 181 N. W. 182 (Neb., 1920), approved in 5 MINN. L. REV. 570 and 35 HARV. L. REV. 209.

<sup>239</sup> See 4 WIGMORE, EVIDENCE, § 2374, who would always allow disclosure of the contents, and limit the privilege to the identity of the informant.

<sup>240</sup> 265 Fed. 17, 67 (D. C., Mass., 1920). This incident was reported only in the daily press.

<sup>241</sup> See 4 WIGMORE, EVIDENCE, § 2375, on privilege for secrets of state.

<sup>242</sup> Peculiar English privilege for sources of newspaper information, *Lyle-Samuel v. Odhams*, [1920] 1 K. B. 5 (C. A.), noted in 34 HARV. L. REV. 213.

<sup>243</sup> 66 Colo. 343, 181 Pac. 531 (1919), noted in "Must We Recognize a New Privi-

boy and the judge is analogous to that between a client and his counsel, so that a well-recognized privilege might have been extended to cover this case. The administration of the Juvenile Court undoubtedly depends upon the encouragement of complete confidence in its wards. On the other hand, confidence between children and their parents is equally desirable, and yet the law gives no secrecy. In view of the undesirable results which have come from established privileges, the Colorado court might well have hesitated to act without legislation. The fact that, in spite of the widespread attention which this case has received, the Colorado legislature has failed to provide subsequently for the privilege, indicates that the decision conformed to the local views on the conflicting policies involved in the situation.

Communications from a ghost have been held privileged in the past,<sup>244</sup> but the modern appetite for psychic phenomena would be gratified by a different decision to-day.

#### SEARCHES AND SEIZURES

The Fourth Amendment to the United States Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Similar guarantees are given by most state constitutions. A long-standing controversy about the effect of these clauses upon the law of Evidence has received new life from the fact that infractions of the Fourth Amendment frequently interfere with the consumption of liquor in violation of the Eighteenth Amendment. The weight of state authority, which has the strong backing of Wigmore,<sup>245</sup> has held that evidence obtained by an unconstitutional seizure is admissible as much as any other evidence secured by illegal means. The only remedy of the injured person is a civil

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lege in the Law of Evidence?" 33 HARV. L. REV. 88; 29 YALE L. J. 356; 4 MINN. L. REV. 227.

<sup>244</sup> Blewett Lee, "Psychic Phenomena and the Law," 34 HARV. L. REV. 625, 634 (1921).

<sup>245</sup> 4 EVIDENCE, § 2264; 9 ILL. L. REV. 43; 15 ILL. L. REV. 393.

action against the offending official, although a recent South Carolina case<sup>246</sup> held the official liable in a prosecution for assault. At any rate, this view would not let an offender go free because a Government official has also done wrong. It would place the penalty for the violation of the Constitution upon the official and not upon society. The opposing view makes the evidence inadmissible if obtained through unreasonable seizure, just as the violation of the privilege against self-incrimination results in the exclusion of the incriminatory statement. Although other kinds of illegality do not keep out evidence, in this instance the illegality is condemned by the Constitution. Some effective sanction should be provided to make sure that the Constitution is enforced. The civil action for damages is insufficient to-day. When the victims of wrongful search represented a popular majority contending against an unpopular government, large verdicts were given by the jurors which belonged to that majority; but it is very unlikely that the damages awarded to Wilkes and his friends by juries of London citizens would be given by an American jury to a radical alien whose constitutional rights were violated by the agents of the Department of Justice.<sup>247</sup> The Fourth Amendment would be a dead letter if the United States Supreme Court had not since the decision in *Weeks v. United States*<sup>248</sup> adopted the exclusion theory. The recent case of *Silverthorne Lumber Company v. United States*<sup>249</sup> gives additional strength to the Constitution. Representatives of the Department of Justice, without a shadow of authority, went to the office of a corporation and made a clean sweep of all the books, papers and documents found there. Photographs and copies of

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<sup>246</sup> *State v. Wagstaff*, 115 S. C. 198, 105 S. E. 283 (1920), liquor case. A bill was introduced in the last session of Congress, imposing a criminal liability upon officials committing illegal searches and seizures. (66th Congress, 2d. Sess., H. R. 12816).

<sup>247</sup> *Colyer v. Skeffington*, 265 Fed. 17, 25, 44, and *passim* (D. C., Mass., 1920) describes the extent of these violations in the Communist raids of Jan. 2, 1920. The Government took no appeal from this portion of the case. See also the reports of Senators Walsh and Stirling to the Senate Committee on the Judiciary. The silence of the press with respect to the repeated violations of the Constitution in this and other raids against radicals contrasts significantly with the numerous editorial protests against illegal seizures of liquor and stills.

<sup>248</sup> 232 U. S. 383, 392 (1914).

<sup>249</sup> 251 U. S. 385 (1920), White, C. J., and Pitney, J., dissenting; noted in 33 HARV. L. REV. 869, 958; 20 COL. L. REV. 484; 8 CAL. L. REV. 347; 8 GEO. L. J. No. 3, p. 31; 6 VA. L. REG. N. S. 223.

material papers were made and an indictment was framed, based upon the knowledge thus obtained. The originals were then returned to the corporation. Subpoenas to produce these originals were then served and failure to obey these was punished by the District Court as contempt. The Supreme Court reversed the judgment. Justice Holmes said that it would reduce the Fourth Amendment to a form of words if the protection of the Constitution covered only the physical possession of the documents but not the advantages that the Government gains over the object of its pursuit by doing the forbidden act. The seizure was, he said, admittedly an "outrage," and he refused to allow the Government to make any use of the knowledge gained through its wrong-doing.

The effect of the Supreme Court decisions upon state courts is beginning to be felt. Although the majority of these limit redress to a civil action,<sup>250</sup> Michigan<sup>251</sup> and Kentucky<sup>252</sup> have lately held the evidence inadmissible. In fact the Kentucky decision has gone beyond the Federal doctrine in two respects. The United States courts usually require a petition for the return of the evidence to be made within a reasonable time after the discovery of the illegal seizure.<sup>253</sup> The Kentucky court says:<sup>254</sup>

"In our practice the proper time, and the only time, in which objection can be made to the introduction of evidence by the mouth of wit-

<sup>250</sup> Recent instances are *Rippey v. State*, 86 Tex. Crim. 539, 219 S. W. 463 (1920); *Benson v. State*, 233 S. W. 758 (Ark., 1921); *Johnson v. State*, 151 Ga. 21, 109 S. E. 662 (1921). See "Right to recover property held by public authorities as evidence for use in a criminal trial," 11 A. L. R. 681, annotating *Asparren v. Ferrel*, 191 Pac. 571 (Nev., 1920) which refused replevin.

<sup>251</sup> *People v. Le Vasseur*, 213 Mich. 177, 182 N. W. 60 (1921); disapproved in 20 MICH. L. REV. 108; *People v. Marxhausen*, 204 Mich. 559, 171 N. W. 557 (1919); see also *People v. De La Mater*, 213 Mich. 167, 182 N. W. 57 (1921). Accord, *People v. Mayen*, 35 Cal. App. Dec. 442, 660 (1921), noted in 10 CALIFORNIA L. REV. 165.

<sup>252</sup> *Youman v. Commonwealth*, 189 Ky. 152, 224 S. W. 860 (1920), approved in 19 MICH. L. REV. 355; 6 VA. L. REG. N. S. 850.

<sup>253</sup> *Weeks v. United States*, *supra*. In *Amos v. United States*, 255 U. S. 313 (1921), it was filed after the trial began; noted in 5 MINN. L. REV. 465. However, in *Colyer v. Skeffington*, *supra*, no petition for return was made, and none was filed in *Holmes v. United States*, 275 Fed. 49 (C. C. A., 4th, 1921), noted in 35 HARV. L. REV. 470. In *Gould v. United States*, *infra*, note 262, failure to make application before trial was excused because the defendant first knew of the seizure when the evidence was offered.

<sup>254</sup> *Youman v. Commonwealth*, 189 Ky. 152, 160, 224 S. W. 860, 867 (1920). The illegality is immaterial if raised for the first time on appeal, *Bruner v. Commonwealth*, 233 S. W. 795 (Ky., 1921).

nesses is when it is offered during the trial, and we cannot think of any good reason why this practice should not obtain in a case like the one we are now considering."

Also, the Kentucky court reversed the order of the trial judge, that the whiskey be confiscated and poured by the sheriff of the county into a sewer, and ordered it returned to the owner; while at least one United States District Judge<sup>265</sup> has held that while the illegal seizure requires a conviction to be set aside — "The Eighteenth Amendment to the Federal Constitution is as sacred as the Fourth and Fifth Amendments, but no more so"<sup>266</sup> — the illicit mash, liquors, stills, and parts of stills would not be returned because they were contraband and might be again used in violation of the law.

An exhaustive article, "Concerning Searches and Seizures," by Osmond K. Fraenkel,<sup>267</sup> reviews the decisions before the end of 1920. He agrees with Wigmore that the famous opinion of Justice Bradley in *Boyd v. United States*<sup>268</sup> is open to just criticism for stating that unreasonable searches and seizures violate both the Fourth Amendment and the privilege in the Fifth Amendment against self-incrimination. Wigmore has shown that the history of the two constitutional rights is entirely distinct, the privilege originating in the sixteenth and seventeenth centuries, especially through the agitation of John Lilburn, popularly known as "Free-born John," and the Fourth Amendment in the eighteenth century, especially through the agitation of John Wilkes and the decisions of Chief Justice Pratt, afterwards Lord Camden. Wigmore also seems logically correct in believing that the two rights dovetail into each other. The privilege is violated when a man

<sup>265</sup> *United States v. Rykowski*, 267 Fed. 866 (S. D., Ohio, 1920), Sater, J., noted in 21 COL. L. REV. 291; 15 ILL. L. REV. 532. This seems to be the practice in the District of Massachusetts.

<sup>266</sup> 267 Fed. 866, 871 (1920).

<sup>267</sup> 34 HARV. L. REV. 361 (1921). See also "Search, Seizure, and the Fourth and Fifth Amendments," 31 YALE L. J. 518 (1922); "Constitutionality of the La Follette Amendment to the Internal Revenue Law of 1921" (requiring a federal income tax return to specify what state and municipal bonds are owned by the tax-payer), 20 MICH. L. REV. 527 (1922); 10 CALIF. L. REV. 165; 16 ILL. L. REV. 392; T. R. POWELL, "The Supreme Court's Construction of the Federal Constitution in 1920-21," 20 MICH. L. REV. 381, 390-400.

<sup>268</sup> 116 U. S. 616 (1886).



is compelled to do something active, whereas he usually remains passive during an unreasonable search and seizure.<sup>259</sup> On the other hand, Fraenkel points out that there has been a very close association of ideas with respect to the two rights.<sup>260</sup> He concludes his article with a statement of the then pending case of *Gouled v. United States*,<sup>261</sup> in which six questions had been submitted to the United States Supreme Court, and ventured a prophecy as to the answers to these questions which might be expected from the Court.

On February 28th, 1921, the Supreme Court decided *Gouled v. United States*,<sup>262</sup> and it is interesting to note what answers agreed with Fraenkel's expectations. The most important point decided was the extent to which seizure may lawfully be authorized by search warrant. Title XI of the Espionage Act provides that search warrants may be issued when the property to be seized is used as the means of committing a felony.<sup>263</sup> The defendants were indicted for conspiracy to defraud the United States through contracts with it for clothing and equipment. A search warrant directed the seizure of a certain contract between one defendant and an outside person, which was said to be used "as a means of committing a felony, to wit . . . as a means for the bribery of a certain officer of the United States." As a matter of fact, the contract was not criminal, and was not part of any bribery, but was valuable to the Government only as evidence against the defendant. The Court held that the contract was inadmissible because the warrant was not really issued to obtain the instrumentality of a crime but for the purpose of seeking evidence. For example, a letter from the defendant to the officer offering him a bribe could be seized under a proper search warrant but not a letter to some other person admitting the fact of bribery. This result was in accordance with decisions in the lower United States courts and

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<sup>259</sup> See note 245, *supra*.

<sup>260</sup> 34 HARV. L. REV., 361, 364, 366, 367; *Matter of Foster*, 139 App. Div. 769, 124 N. Y. Supp. 667 (1910).

<sup>261</sup> 264 Fed. 839 (C. C. A., 2d., 1920), see note 262, *infra*; 34 HARV. L. REV. 385-387.

<sup>262</sup> 255 U. S. 298 (1921), noted with varying views in 30 YALE L. J. 769; 5 MINN. L. REV. 465; 20 MICH. L. REV. 93; 70 U. PA. L. REV. 55. See also 31 YALE L. J. 521.

<sup>263</sup> Act June 15, 1917, c. 30, Title XI, § 2, 40 STAT. at L. 228.

the anticipation of *Fraenkel*.<sup>264</sup> Unfortunately, the form in which the case was certified to the Supreme Court makes it impossible to limit the decision to the sensible proposition of statutory construction, that Congress had not as yet authorized the seizure of purely evidentiary material. The decision necessarily holds that such a seizure violates the Constitution, so that Congress cannot authorize it hereafter, even with a search warrant. Consequently, a criminal, who is clever enough to gather into his possession all the damaging documents which are not actually instruments of crime, will always be able to defy the Government to make the slightest use of such papers against him. What are the police to do, even though they know exactly where the evidence is? They can not obtain a subpoena *duces tecum* ordering him to bring the papers into court himself, for that would violate his privilege against self-incrimination. They cannot break into his house with a search warrant and take the papers from him by force, because the warrant would be invalid and the evidence wholly inadmissible, at least if the accused made a seasonable demand for its return. This "astonishing situation" stirs the *Yale Law Journal* to apply Wigmore's phrase, "justice tampered with mercy."<sup>265</sup>

The Court also held, contrary to *Fraenkel*'s prophecy, that the admission of unlawfully seized papers was a violation of the privilege against self-incrimination in the Fifth Amendment. This holding seems to establish beyond further question the overlapping of the Fourth and Fifth Amendments propounded by Justice Bradley in *Boyd v. United States*.

In each instance where the *Gouled* case differs from *Fraenkel*'s forecast, the Court gave increased force to the constitutional guarantee. One more such point should be noted. In *United States v. Maresca*<sup>266</sup> Judge Hough had held that if the government detective obtained books by fraud or guile without use of force, the

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<sup>264</sup> 34 HARV. L. REV. 361, 379, note 116, 387. *Fraenkel*, however, expected that the affirmative answer would be qualified probably as indicated in *MacKnight v. United States*, 263 Fed. 832 (C. C. A., 1st, 1920) and *Haywood v. United States*, 268 Fed. 795 (C. C. A., 7th, 1920). The Supreme Court does not mention any qualifications. The *Haywood* case is questioned, *infra*, page 704.

<sup>265</sup> 31 YALE L. J. 522.

<sup>266</sup> 266 Fed. 713 (S. D. N. Y., 1920); disapproved in 21 COL. L. REV. 193; approved by Wigmore in 15 ILL. L. REV. 393, and by *Fraenkel* in 34 HARV. L. REV. 377 and 386, but see 382, note 135.

Fourth Amendment was not violated. In the *Gouled* case the Circuit Court of Appeals for the Second Circuit certified to the Supreme Court the question whether "the secret taking, without force, from the house or office of one suspected of crime, of a paper belonging to him, of evidential value only," by a government representative, violated the Amendment. The Supreme Court gave an affirmative reply,<sup>267</sup> thus apparently overruling the *Maresca* case. The security or privacy of the home or office would be as much invaded and the search and seizure as much against the owner's will, whether admission was obtained by force and coercion, or by stealth or through social acquaintance or in the guise of a business call, and whether the owner was present or absent. The protection of the Constitution is carried a step farther by the companion decision of *Amos v. United States*,<sup>268</sup> which holds that there is implied coercion when government officers come without warrant and demand admission to make search under government authority. No consent can be implied under such circumstances, especially if the owner be absent and his agent in charge of the premises.

The privilege against self-incrimination is not violated, as we have seen,<sup>269</sup> when the compulsion is exerted by a private person, and a similar limitation was applied to the right against unreasonable searches by the latest decision of the Supreme Court, *Burdeau v. McDowell*.<sup>270</sup> In the previous cases the attack on the validity of the seizure was collateral, but here it was direct. The proceeding began by a petition to a District Court for the return of papers and books in the possession of a Special Assistant to the Attorney General. The petitioner's employers, suspecting him of fraud, had hired detectives who stole the documents from his private office by blowing open his safes, forcing his desk locks, and breaking into his files. The employers discovered in the papers evidence

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<sup>267</sup> 255 U. S. 298, 305 (1921).

<sup>268</sup> 255 U. S. 313 (1921). *Accord*, *Dukes v. United States*, 275 Fed. 142 (C. C. A., 4th, 1921).

<sup>269</sup> *Hickman v. London Assurance Corporation*, note 202, *supra*.

<sup>270</sup> 41 Sup. Ct. Rep. 574 (1921), Justices Brandeis and Holmes, dissenting; noted in 35 HARV. L. REV. 84; 70 U. PA. L. REV. 54; 31 YALE L. J. 335; 13 A. L. R. 1159; 20 MICH. L. REV. 353; 6 MINN. L. REV. 70; 22 COL. L. REV. 77. However, a post-office inspector is subject to a summary order for the return of papers seized by him, *United States v. Lydecker*, 275 Fed. 976 (W. D. N. Y., 1921).

of fraudulent use of the mails, and voluntarily turned them over to the Department of Justice, which had no prior knowledge of the theft. Before the government officials presented these papers to the grand jury, the petition for their return was filed and granted by the District Judge, on the ground that although no unlawful act had been committed by a representative of the United States, the government should not use stolen property after a demand had been made for its return. He added that the Fourth and Fifth Amendments had been violated. On appeal, his order was reversed by the Supreme Court.

Justice Day, delivering the opinion of the Court, said:<sup>271</sup>

"We do not question the authority of the court to control the disposition of the papers, and come directly to the contention that the constitutional rights of the petitioner were violated. . . . The Fourth Amendment . . . applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies. Whatever wrong was done was the act of individuals in taking the property of another. . . . We assume that petitioner has an unquestionable right of redress against those who illegally and wrongfully took his private property . . . , but with such remedies we are not now concerned."

He added that if the government had learned that papers incriminating McDowell were in the hands of his employers, a subpoena could have issued for their production without violation of the Fourth and Fifth Amendments. Since they had now come into the government's possession without wrong by officials, the wrong of others should not prevent their use in prosecution.

The case really raises two questions. First, the constitutional problem, — was there any violation of the Bill of Rights? The answer is clearly negative, because only private thefts took place. Secondly, had the petitioner a right to recover the documents on some non-constitutional ground? The decision does not throw so much light on this point as we should be glad to get. If a unique chattel is stolen, the owner may recover it in equity from the thief, and may also, if the analogy of trusts applies, follow it into the hands of a donee or taker with notice. The government in this

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<sup>271</sup> 41 Sup. Ct. Rep. 574, 575, 576 (1921).

case was not a purchaser for value. Consequently, it was under an equitable obligation to return the documents, unless it could justify its retention of converted papers by the public policy in favor of bringing suspected criminals to justice by all available evidence. Can we say that this policy furnishes a sufficient justification to negative tort liability, except when the Fourth Amendment is violated? To test the matter, would a civil action for trover lie against the Assistant to the Attorney General after demand and refusal? Governmental use is no defense to a civil action when the officials themselves stole the documents; does it become a defense whenever the constitutional protection ceases to operate? Or could it be argued that although Burdeau would be liable at law, equity for reasons of public policy would refuse specific reparation?

The remedy actually chosen was more than a bill in equity; it was a petition to the court as to the control of its own proceedings. It did not ask the court to undergo the burden of compelling an unwilling defendant to surrender chattels; it appealed to the District Judge to right an admitted wrong and administer justice fairly by surrendering stolen papers in his custody. Justice Day expressly said that the District Court had authority to control the disposition of the papers.<sup>273</sup> The judge, as master of proceedings, has a wide discretion to determine what evidence may properly be laid before the grand jury, and it would seem a reasonable exercise of that discretion for him to return stolen evidence to the petitioning owners, no matter who stole it, and insist that if the prosecution wants to offer it, a proper search warrant or subpoena *duces tecum* must be issued. The arguments made by Wigmore<sup>273</sup> against collateral attack do not cover this problem. Justice Day's argument that a subpoena could have been issued<sup>274</sup> does not meet the fact that none was issued. Such writs are not mere forms. Evidence seized without a search warrant cannot be retained on the ground that a search warrant would have been granted if applied for.

The reasons for allowing this exercise of discretionary power by the judge are set forth in Justice Brandeis's dissent, in which Justice Holmes concurred:<sup>275</sup>

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<sup>273</sup> 41 Sup. Ct. Rep. 575.

<sup>274</sup> 41 Sup. Ct. Rep. 574, 575.

<sup>275</sup> 4 EVIDENCE, §§ 2183, 2264.

<sup>276</sup> *Ibid.*

"At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen. And in the development of our liberty insistence upon procedural regularity has been a large factor. Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play."

The theoretical result of the majority view is that the lower judge abuses his discretionary control over evidence if he orders its return because of illegality of seizure, unless that illegality is committed by representatives of the government so as to violate the Bill of Rights. Thus, the preceding decisions of the Supreme Court extended the limits of collateral attack to coincide with the scope of the Fourth Amendment; *Burdeau v. McDowell* restricts direct attack to coincide with the same constitutional protection. If evidence is stolen by private persons and turned over to the government, the courts must not return it to the owners, and a conviction secured by its use will not be reversed.

The practical results of this decision are very serious. The way is opened to an easy evasion of the guarantee against unreasonable searches and seizures. The *Silverthorne*, *Gouled*, and *Amos* cases furnish abundant proof that some agents of the Department of Justice occasionally incline to the lawless enforcement of law, and more proof can be found in decisions by District and Circuit judges.<sup>276</sup> The Supreme Court has made it emphatic that if the agents themselves commit lawless acts they will be forbidden to use the evidence. That road is closed; but they know from the *Burdeau* case that if private detectives break in and steal, and then the papers come into the hands of the Department of Justice, the course is smooth. This creates a strong temptation, which may not always be resisted, to arrange for searching and seizing by non-governmental agencies. The courts must be vigilant to detect any, connection, before the searching and seizing, between the federal detectives and the private detectives.<sup>277</sup>

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<sup>276</sup> See 34 HARV. L. REV., 382, note 135; *supra*, note 247.

<sup>277</sup> The Interchurch World Movement Report on the Steel Strike of 1919, page 18, finds: "The Federal Department of Justice seems to have placed undue reliance on co-operation with corporations' secret services." See also page 225.

Interesting questions are raised by two decisions in lower United States courts. In *Haywood v. United States*,<sup>278</sup> the court stated that agents of the Department of Justice, without proper search warrants, raided the offices of the I. W. W. in various cities and seized their files of correspondence with copies of newspapers and pamphlets. The greater part was taken from the Chicago office in charge of Haywood. He and other members of the organization were indicted, and five months after the seizure petitioned for return of the documents. The motion was denied, and at the trial the evidence was used against them over objection. On appeal it was held that they could not complain of any violation of the Fourth Amendment, because the documents did not belong to them, but to the voluntary unincorporated association. This is an interesting recognition of the entity theory of partnerships. And even if the I. W. W., and not its members, owned the property, the case is hard to reconcile with *Silverthorne Lumber Co. v. United States*,<sup>279</sup> which held that property belonging to a corporation and illegally seized could not be used against individuals.

The Federal Trade Commission has by statute<sup>280</sup> wide powers to compel individuals to testify and produce documentary evidence, and to obtain for its agents access to "documents, papers, and correspondence in existence at or after the passage" of the statute in the possession of a corporation engaged in interstate or foreign commerce. The question whether these powers violate the Fourth and Fifth Amendments was raised, though not settled, in *United States v. Basic Products Co.*,<sup>281</sup> which went off on the point that the scope of the particular order related to the trade secrets and manufacturing costs of a corporation not shown to be engaged in interstate or foreign commerce. An interesting note on this case in the *California Law Review*<sup>282</sup> expresses grave doubts of the constitutionality of the procedure authorized by the Federal Trade Commission Act.

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<sup>278</sup> 268 Fed. 795, 801 (C. C. A. 7th, 1920), citing 4 WIGMORE, EVIDENCE, § 2264 with approval.

<sup>279</sup> 251 U. S. 385, 392 (1920); see note 249, *supra*.

<sup>280</sup> Act of Sept. 26, 1914, c. 311, §§ 4, 6, 38 STAT. AT L. 719, 721; U. S. COMP. STAT. 1918, § 8836 d, f.

<sup>281</sup> 260 Fed. 472 (D. C. W. D. Pa., 1919).

<sup>282</sup> 8 CAL. L. REV. 241 (1920).

THE EXAMINATION OF WITNESSES <sup>283</sup>

Dr. Edmond Locard, Director of the Police Laboratory at Lyons, in his "*L'Enquête criminelle et les Methodes scientifiques*," <sup>284</sup> besides an interesting discussion of finger-prints, tracks, traces, stains, handwriting, sympathetic inks, and cryptograms, devotes a chapter to testimony. In this he analyzes the psychological process which culminates in the production of evidence by the witness into (1) sensations, (2) perception, (3) fixation, in which memory, imagination, association of ideas, and judgment take part, (4) expression, by which the testimony comes out from the witness's consciousness to enter that of the men in the tribunal (or, if hearsay, into that of another witness). Each stage of the process is presented in detail with the possible opportunities for error. A section on false testimony examines the causes, — fear, affection, interest, revenge, corruption, light-minded acceptance of gossip (*légèreté*), emotion, and vanity. Pathological false testimony is treated separately in the same concrete fashion, with examples of hysteria, hallucinations, and hypnotism. The section on the testimony of children states as one conclusion: "*Le témoignage des filles n'a pratiquement pas plus de valeur que celui des aliénés.*" He then shows how much testimony is moulded by the questioner, and discusses the technique of examination of a witness on various points, such as accuracy in dates and hours, realiza-

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<sup>283</sup> C. J. Ramage, "A Few Rules for the Cross-examination of Witnesses," 91 CENT. L. J. 354 (1920). Statutory abolition of rule in *Queen's Case* in Virginia, 107 S. E. 697 (Va., 1921). "Cross-examination of witnesses called to testify on particular point or under order of court," 7 A. L. R. 1116, note (1920). "Right to cross-examine accused as to previous prosecution for, or conviction of, crime, for purpose of affecting his credibility," 6 A. L. R. 1608 (1920). "Testimony tending to show that party or witness has made contradictory statements as ground for evidence as to his truth and veracity," 6 A. L. R. 862, note; see also *Orris v. Chicago, R. I. & P. R. R. Co.*, 279 Mo. 1, 214 S. W. 124 (Mo., 1919), noted in 18 LAW SER. MO. BULL. 43. Scotch statute on impeachment by prior inconsistent statements, J. C. Lorimer, 36 SCOT. L. REV. 168 (1920). Impeachment of witness by extrinsic evidence of inconsistent statement, *State v. Claymonst*, 114 Atl. 155 (N. J. Sup., 1921). Examination of witness by judge allowed, *People v. Limeberry*, 298 Ill. 355, 131 N. E. 691, 698 (1921); denied, *State v. Sandquist*, 178 N. W. 883 (Minn., 1920), noted in 30 YALE L. J. 196. "Admissibility of evidence of good reputation for truth and veracity of witness who has not been impeached," 15 A. L. R. 1065, note (1921). Impeachment by conviction for misdemeanor, 20 MICH. L. REV. 126.

<sup>284</sup> Bibliothèque de Philosophie Scientifique, Paris, 1920.



tion of direction, quantity, and size, capacity to identify a dead body or recognize persons. One example will illustrate the readable nature of the book.<sup>285</sup> A teacher arranged for the sudden entrance into the lecture-room of a man wearing a clown's mask. The students were then asked to pick this mask out from a set of ten. Of the twenty-three who ventured a choice only five were right, and this was perhaps the effect of chance. Such experiments throw doubt on much identification testimony.

A brief summary of the experience of French psychiatrists and experts in legal medicine is given in the *Journal of Criminal Law and Criminology*,<sup>286</sup> and a note on "Identification from Photograph" <sup>287</sup> in *Law Notes* points out the possibilities of error as urged in a recent case, for which Dr. Locard's book would have furnished many parallels.

*Impeachment.* The proposal of scientists to subject witnesses to intelligence tests has been discussed in an earlier portion of this article.<sup>288</sup> Similar legal obstacles arose in *State v. Driver*,<sup>289</sup> when the defendant on a charge of attempted rape offered a physician and a psychologist, who after explaining the immorality and untrustworthiness of morons sought to state that the testimony of the prosecutrix proved her to be a moron. This evidence was held properly excluded, on the ground that the character of a witness cannot be attacked generally except by evidence of her bad reputation for veracity. "It is yet to be demonstrated that the psychological and medical tests are practical, and will detect the lie on the witness stand." The case thus excludes evidence of mental defectiveness insufficient to constitute insanity.

Somewhat opposed is *State v. Prentice*,<sup>290</sup> an Iowa prosecution for automobile stealing, in which the state was allowed to show that an important alibi witness had bought morphine from a druggist at various times ending over six months before the theft, and had been seen on various undated and unenumerated occasions to

<sup>285</sup> *Op. cit.*, 95.

<sup>286</sup> T. A. Williams, "Some Remarks about Testimony," 10 J. CRIM. L. AND CRIM. 609 (1920).

<sup>287</sup> 23 LAW NOTES (N. Y.) 83 (1919).

<sup>288</sup> 35 HARV. L. REV. 307 (1922).

<sup>289</sup> 107 S. E. 189 (W. Va., 1921), noted in 15 A. L. R. 932, "Impeachment of witness by expert evidence tending to show mental or moral defects."

<sup>290</sup> 183 N. W. 411 (Iowa, 1921), noted in 31 YALE L. J. 97; 15 A. L. R. 912.

dissolve little white tablets and inject the solution hypodermically. Three situations may be distinguished. (a) Proof that the witness was actually under the influence of the drug on the day of the alleged alibi (or when testifying) would clearly be admissible to attack her specific credibility. It shows that definite inability existed at a significant moment. (b) Proof that the witness's mental powers were permanently impaired by drugs might also come in, like evidence of near-sightedness, deafness, etc. To demonstrate an absolutely continuous condition shows that such a condition existed at any given significant moment. (c) The case at bar, however, involves evidence of a much weaker nature. At best it established a frequent, but not a continuous, subjection to drugs, and nothing was said directly to show impaired mentality. It was possible that the woman's mind was normally clear between the observed occasions of use or purchase, and that the alibi occurred during such a lucid interval. The case involves too many weak logical links to be satisfactory, but it indicates a trend toward wider inquiries into the witness's general mental capacity, which may find room for expert grading of morons and other feeble-minded types.

A preliminary question is required in many jurisdictions before impeachment by a prior inconsistent statement, but a recent South Dakota case <sup>291</sup> shows it is unnecessary before extrinsic proof that the witness has committed acts which show bias or corruption. The mere fact that he was offered a bribe seems hardly enough to impeach the witness, although it is probably not collateral, for it was an admission by the party who tried to bribe him that his case was bad. Possibly the court was convinced that the offer was accepted.

An unusually interesting problem of impeachment by conduct is raised by *Hardy v. State*.<sup>292</sup> The defendant in a prosecution for murder admitted the killing but set up self-defense. He took the stand and was asked on cross-examination if he had not said before the trial, "I killed two men, and twelve men will try to get me; and if they convict me and don't watch me, I will get some of them." After his denial, the state proved the making of this threat

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<sup>291</sup> *State v. Smith*, 183 N. W. 873 (S. D., 1921) — full opinion.

<sup>292</sup> 86 Tex. Cr. App. 515, 217 S. W. 939 (1920); noted in 8 A. L. R. 1361, "Admissibility of threats by accused against jury or prosecuting attorney in criminal case."

against the jury, by a witness who heard it. The judge's refusal to strike out this testimony was held cause for reversal. The threat is not collateral, because such an attitude might well be regarded as inconsistent with innocence. On the other hand, it is susceptible of another explanation, that he resented prosecution for a non-criminal act. The evidence would certainly incline the jury against the accused, and they might give it a greater weight than it deserves. Its relevance is perhaps outweighed by its prejudicial effect. A different objection might be taken to the question on cross-examination, that it violates the orthodox rule limiting cross-examination to the scope of direct examination. This is unsound, first, because this rule does not prevent questions going to bias or other elements of credibility, such as prior convictions;<sup>293</sup> and secondly, because that rule should not apply to the accused, inasmuch as the state is unable to call him as its own witness when it wishes to go outside the scope of the direct examination.

*Cross v. State*<sup>294</sup> holds that a confession, which was improperly obtained and not admissible as actual evidence, cannot be used as a prior inconsistent statement to impeach the credibility of the testimony of the accused. This result does not necessarily follow. The ordinary prior inconsistent statement is available as such, though not evidence in itself, and even a confession improperly obtained is sufficiently trustworthy to be admissible against its maker in a civil action, and if made by a witness in any proceeding would probably be available to attack his credibility on the ground of inconsistency.<sup>295</sup> The problem resembles that of the impeachment of a wife's testimony on behalf of her husband by her prior inconsistent statements unfavorable to him, which are

<sup>293</sup> *State v. McBride*, 231 S. W. 592 (Mo., 1921) — statute enacting orthodox rule, but allowing "impeachment."

<sup>294</sup> 142 Tenn. 510, 221 S. W. 489 (Tenn., 1920), noted in 9 A. L. R. 1358, "Use of confession improperly obtained, for purpose of impeaching defendant as a witness."

<sup>295</sup> Such a problem might have arisen in *People v. Lindsey*, *supra*, note 243, where the boy's testimony was impeached by his inconsistent confession to the Juvenile Court judge. Even if he confessed under promise of immunity, the statement seems admissible if no privilege exists. In *State v. Geddes*, 22 Mont. 68, 55 Pac. 919 (1899), and *State v. Miller*, 68 Wash. 239, 122 Pac. 1066 (1912), an accomplice under threats and inducements turned the state's evidence and gave testimony implicating himself, which was admitted; so also, *Newhall v. Jenkins*, 2 Gray (Mass.) 562 (1854), a civil case. See WIGMORE, EVIDENCE, § 815.

unavailable as actual evidence because of her privilege.<sup>296</sup> However, if Wigmore<sup>297</sup> is right in saying that the basis of the confession rule is the desirability of an unusually high degree of caution toward suspicious testimony when it tends to injure an accused person, this caution would seem to apply to the confession, whether introduced as actual evidence or for purposes of impeachment, and *Cross v. State*<sup>298</sup> is sound.

The danger of narrow construction of Evidence statutes is shown by an Oregon decision,<sup>299</sup> holding that proof of bias was not "impeachment" but only "discrediting," especially as it was not one of the methods specified in the statute "by which a witness may be impeached."<sup>300</sup> The dissenting judge, while finding no prejudicial error, put himself on record that impeaching and discrediting were the same thing, that bias was one method of impeachment, classified as such by Wigmore, and that the statute listing methods of impeachment should not be construed as exhaustive.

A liberal Utah decision<sup>301</sup> allows a party to impeach his own witness by prior inconsistent statements.

Whether the disbarment of a witness may be used to impeach him, like conviction of crime, is asked but not decided by *State v. Egan*,<sup>302</sup> which holds that at any rate the opinions of the disbarring court are inadmissible.

*Use of memoranda in testifying.* The complexity of modern life makes it impossible for any one to remember many facts which may subsequently become important in litigation, but that very complexity has brought about the increased keeping of written records in which these facts are preserved. Consequently, courts should be extremely liberal in allowing witnesses to use such records, either to revive their memory or as a substitute for it. Unfortunately, many courts have taken an extremely narrow attitude, such as the rule in New York and the United States courts,<sup>303</sup> that the writing is inadmissible unless it actually refreshes the witness's

<sup>296</sup> Note 232, *supra*.

<sup>297</sup> 1 EVIDENCE, § 821, note 2, paragraph 4, collects the cases.

<sup>298</sup> Note 294, *supra*.

<sup>299</sup> *State v. Holbrook*, 98 Ore. 43, 188 Pac. 947 (1920), Bennett, J., dissenting.

<sup>300</sup> 1 OLSON, ORE. LAWS (1920), §§ 863, 864.

<sup>301</sup> *State v. Scott*, 55 Utah, 553, 188 Pac. 860 (1920).

<sup>302</sup> 183 N. W. 652 (S. D., 1921).

<sup>303</sup> 1 WIGMORE, EVIDENCE, § 738.

present memory or unless his mind is a complete blank. Thus the honest witness who admits a hazy recollection is penalized by losing the best means of proof, and the dishonest witness is encouraged to say the writing brings all the facts back to him when he really remembers nothing but reading the words on the paper before him.<sup>304</sup>

A full discussion of present memory refreshed is given by a Connecticut decision,<sup>305</sup> reversing the ruling of the trial judge that a detective could not refresh her recollection from typewritten daily reports made by a stenographer from the detective's dictation because not written by her or verified at the time. Missouri<sup>306</sup> has allowed a similar refreshing from a report of testimony before the grand jury. An informal account-book kept by the witness was admitted as past recollection recorded by the Supreme Court of Minnesota,<sup>307</sup> who pointed out that the case was independent of the statutory hearsay exception for account-books. An Iowa case,<sup>308</sup> though excluding the record for insufficient evidence of accuracy, contains a good statement of principles. A Washington decision,<sup>309</sup> resembling *Mayor of New York v. Second Ave. Ry.*,<sup>310</sup> allowed a woman to prove the time she had worked, from a book in which her husband had placed the figures each day at her dictation, she being unable to read or write. The book was verified from time to time by the employer, and the wife testified, but apparently not the husband.

#### CONCLUSION<sup>311</sup>

The need of simplification of the law of Evidence is obvious from the preceding long survey of two years' output of decisions.

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<sup>304</sup> ARTHUR TRAIN, *THE PRISONER AT THE BAR*, c. XII.

<sup>305</sup> *Neff v. Neff*, 114 Atl. 126 (Conn., 1921).

<sup>306</sup> *State v. De Priest*, 232 S. W. 83 (Mo., 1921), distinguishing *State v. Patton*, 255 Mo. 245, 164 S. W. 223 (1914), which was disapproved by 5 WIGMORE, EVIDENCE, § 759. Cf. *Putnam v. United States*, 162 U. S. 687 (1896). See also *Gass v. United Ry. Co.*, 232 S. W. 160 (Mo. App., 1921), 35 HARV. L. REV. 442, note 106.

<sup>307</sup> *Force Bros. v. Gottwald*, 183 N. W. 356, 359 (Minn., 1921).

<sup>308</sup> *State v. Easter*, 185 Iowa, 476, 170 N. W. 748 (1919), noted in 5 IOWA L. BULL. 115.

<sup>309</sup> *Foy v. Pacific Power & Light Co.*, 110 Wash. 248, 188 Pac. 514 (1920).

<sup>310</sup> 102 N. Y. 572 (1886).

<sup>311</sup> The following points not discussed in the article may be noted: Legality of con-

Such a simplification is likely to come in the near future through several methods. First, trial judges may be given increasing power to make a final determination whether testimony shall be admitted or excluded. Already refusals to reverse are frequent when the error was not clearly shown to be prejudicial, and the old Exchequer rule has also been abolished by statute in several jurisdictions.<sup>312</sup> Among such statutes is the Act of Congress of February 26, 1919,<sup>313</sup> amending section 269 of the Judicial Code by requiring an appellate court to give judgment "without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." It has already been applied in several decisions relating to rulings on evidence.<sup>314</sup>

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tract to procure evidence, *Johnson v. Higgins*, 108 Atl. 647 (Del., 1917), noted in 33 HARV. L. REV. 984. Curative admissibility, *Graham v. Commonwealth*, 103 S. E. 565 (Va., 1920), noted in 7 VA. L. REV. 157; *MacDonald v. United States*, 264 Fed. 733, 739 (C. C. A., 1st, 1920); *State v. Ritter*, 231 S. W. 606 (Mo., 1921). Waiver of defendant's motion to discharge in criminal cases by his introduction of evidence, *Wukina v. State*, 128 N. E. 435 (Ind., 1920), noted in 21 COLUMBIA L. REV. 193. Expunging false testimony by bill in equity after conviction, *Coppock v. Reed*, 178 N. W. 382 (Ia., 1920) noted in 6 IA. L. B. 119. Conviction of perjury on circumstantial evidence, *State v. Storey*, 182 N. W. 613 (Minn., 1921), noted in 5 MINN. L. REV. 553; 15 A. L. R. 634. N. C. Collier, "Discovery under New Rules of Practice for Federal Courts of Equity," 91 CENT. L. J. 428 (1920). "Power of court to issue or to honor letters rogatory," 9 A. L. R. 966, note (1920). L. P. Baumblatt, "Law of Evidence in Wisconsin," 4 MARQUETTE L. REV. 45, 94, 158 (1919, 1920). "The offer of proof in grounding exceptions," 31 YALE L. J. 542 (1922). Statutes requiring two witnesses to prove lost will, 7 CORN. L. Q. 69 (1921).

The question of prior crimes, discussed in a previous instalment, has just been treated by F. L. Stow, "Evidence of Similar Facts," 38 LAW Q. REV. 63 (1922).

<sup>312</sup> Austin W. Scott, "Progress of the Law, 1918-1919 — Civil Procedure," 33 HARV. L. REV. 236, 250 and notes (1919).

<sup>313</sup> 40 STAT. AT L., c. 48, 1181, U. S. COMP. STAT., 1919 Annot. p. 273.

<sup>314</sup> *Horning v. District of Columbia*, 254 U. S. 135 (1920), *supra*, 35 HARV. L. REV., 432; *Thompson v. United States*, 258 Fed. 196 (C. C. A., 8th, 1919); *Bain v. United States*, 262 Fed. 664 (C. C. A., 6th, 1920), notice to accused to produce papers as violation of privilege; *Sneierson v. United States*, 264 Fed. 268 (C. C. A., 4th, 1920), admission of stenographic notes; *MacDonald v. United States*, 264 Fed. 733, 756 (C. C. A., 1st, 1920) in dissenting opinion, *supra*, 35 HARV. L. REV. 435; *Haywood v. United States*, 268 Fed. 795, 798 (C. C. A., 7th, 1920), *supra*, note 278, statute held constitutional; *Kennedy v. United States*, 275 Fed. 182 (C. C. A., 4th, 1921). It was held in *August v. United States*, 257 Fed. 388 (C. C. A., 8th, 1918), that the statute authorized a review by the appellate court of errors to which no exception was taken. This has always been possible in criminal cases, *Wiborg v. United States*, 163 U. S. 632, 659 (1896), but it is doubtful if the statute enlarges the power or extends it to civil cases. See *Storgard v. France & Canada S. S. Corp.*, 263 Fed. 545 (C. C. A., 2nd, 1920); *Rosen v. United States*, 271 Fed. 651 (C. C. A., 2nd, 1920).

Secondly, it will not do to leave everything to the discretion of a particular trial judge, or at least he must be guided in his rulings on evidence by some established principles, so that members of the bar may know how to present their cases, instead of being at the mercy of the unaided individual judgment of one man. These principles have in the past been established in two ways. (a) Decisions of appellate courts. These will not suffice as a guide in the future so much as in the past, for we hope that they will become far less frequent, and that many points which often arise in practice will never be taken up on appeal. Moreover, reform of existing bad judge-made rules will be slow indeed, if every one of them has to be appealed by some adventurous litigant to the highest court of his state, with the hope that it will overrule the decisions now in force. (b) Legislation affords a cheaper and more rapid method of progress, for it can act without waiting for a point to arise in a specific litigation, and it can alter a dozen or a hundred bad rules at one stroke. Nevertheless, a modern legislature is occupied with too many exciting topics to spare time and energy for the painstaking task of revising the law of Evidence, and its members are chosen for other qualifications than those which this task demands. Moreover, such a revision should not be made once for all, but should be subject to flexible modification as unsatisfactory rules make themselves plain. In short, changes in the rules of proof ought in large measure to be made by the men who are in daily contact with the operation of those rules, instead of by legislators, who are unfamiliar with them and may not fairly be requested to give the immense labor necessary to understand them. Legislative changes in this field are rarely made except in response to some isolated legislator or some powerful group who feel aggrieved by a recent decision, or else after prolonged and tedious effort by a bar association. The same considerations which have led the American Bar Association to suggest that procedure at law in the United States courts should be regulated by power given to the Supreme Court to make rules of court (similar to its existing rule-making power in equity) and have prompted similar proposals as to procedure in many states,<sup>315</sup> also make legislation desirable empowering courts of last resort to lay down the rules which are

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<sup>315</sup> A. W. Scott, *op. cit.*, in note 46, 236-238 and notes.

to guide trial judges in large portions of the law of Evidence. Such a power is clearly suitable to the form and manner of taking testimony,<sup>216</sup> such as judicial notice, the scope of cross-examination, impeaching one's own witness, hypothetical questions to experts, opinions by lay witnesses, etc. These are purely machinery of the trial. On the other hand, self-incrimination, a matter of constitutional construction, and the parol evidence rule, which determines the legal effect of contracts, seem outside the proper scope of rule-making. Between lies a debatable ground. A rule shifting the burden of proof in a tort action to the defendant, while nominally procedural, may as a practical matter impose a liability in many cases where the plaintiff would not recover if the burden were on him. A rule making hearsay generally admissible may greatly widen the possibilities of recovery on doubtful claims. Consequently, it may be that judges ought not to make changes in such portions of Evidence except as the outcome of litigation where each side of the matter is hard-fought by counsel, and that any sweeping alterations should be left to the action of the legislature, which expresses more fully the popular will. Others will prefer to embrace even these topics within the judicial rule-making power, on the ground that the present law was made by judges and should be changed by judges, being on the whole procedural rather than substantive. However, such problems do not need to be worked out until the rule-making power for Evidence is more nearly within grasp than now.

Thirdly, whatever body builds the future law of Evidence, a great deal of surveying and digging is necessary to prepare the site, and this must largely be done through prior research by law teachers, writers, judges, and practitioners. Fortunately, most of the work of criticism of the existing law and promulgation of the right principles for the new system has already been accomplished, first by Bentham and then by Wigmore. The most hopeful impression derived from a lengthy examination of recent decisions is the frequency with which Wigmore's *Treatise on Evidence* is cited by the courts. More than any other textbook, it is actually making law. Yet it is a long step from criticism and the establishment of

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<sup>216</sup> A bill giving this rule-making power was introduced a few years ago in the Ohio legislature, but failed of passage.



right principles to the actual submission of drafts of desirable rules for the consideration of legislatures or rule-making courts. Much assistance in this step will, it is hoped, be given by the investigations of the Commonwealth Fund <sup>317</sup> and other foundations. Before many years, we ought to be able to report real progress in the law of Evidence.

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<sup>317</sup> Commonwealth Fund, Annual Report, 1921, 12; Benjamin N. Cardoso, "A Ministry of Justice," 35 HARV. L. REV. 113, 125 (1921).

## COMMERCIAL LETTERS OF CREDIT

*(Concluded)*

**I**N a previous article<sup>129a</sup> an analysis was made of:

I. The business transaction which gives rise to commercial letters of credit; and

II. The rights of the seller, as the accredited party or beneficiary of the credit, against the issuing and drawee banks.<sup>129b</sup>

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<sup>129a</sup> 35 HARV. L. REV. 539 (March, 1922).

<sup>129b</sup> Two recent English cases which deal incidentally with the rights of the seller, as the accredited party, against the issuing and drawee banks have been brought to the attention of the writer since the first part of this article was published in 35 HARV. L. REV. 539.

In *Stein v. Hambro's Bank of Northern Commerce*, 9 Lloyd's List Law Rep. 433, 507 (K. B. D., decided Dec. 8, 1921, and Dec. 13, 1921), a seller in England sold hides to a buyer in Venice. The hides were to be shipped from India. The buyer procured an irrevocable letter of credit from the defendant bank, authorizing the seller to draw under certain conditions upon the defendant bank. The buyer, contending that a condition had not been met, instructed the bank to cancel the credit and to refuse acceptance, which was accordingly done. In an action by the seller against the issuing bank it was held that there had been a breach of the letter of credit contract and that the seller could recover the amount of the bill of exchange for which acceptance was refused. The case is concerned chiefly with the question of the measure of damages. The right of the seller to maintain the action, if the conditions had been met, seems to have been assumed without discussion. The theory underlying this result is therefore conjectural. Mr. Justice Rowlatt said in part: "It seems to me that this is clearly a case of a simple contract to pay money upon the fulfillment of conditions which have been fulfilled. . . . The obligation of the bank is absolute, and is meant to be absolute, that when the documents are presented they have to accept the bill. That is the commercial meaning of it."

In *Urquhart, Lindsay & Co., Ltd. v. Eastern Bank, Ltd.*, 9 Lloyd's List Law Rep. 572 (K. B. D., decided Dec. 5, 1921), the seller in England contracted to manufacture, over a period of months, and to deliver machinery to a buyer in India, prices to advance according to advances in costs of labor and materials, payment to be made by a confirmed, irrevocable letter of credit. The buyer obtained a letter from the defendant bank in which the defendant bank promised the seller to pay the seller's drafts on the buyer, accompanied by specified shipping documents. The seller made two shipments and received payment according to the terms of the letter. The seller had added to the invoice price the increase in the costs of labor and materials. The buyer instructed the defendant bank to pay in the future only the original invoice prices. The defendant bank proceeded to carry out these instructions. Thereupon the seller cancelled the sales contract on the ground that it had been repudiated by the buyer and brought

In this article an examination will be made of:

III. The rights of the purchasing bank against the issuing and drawee banks;

IV. The rights of the issuing and drawee banks;

V. The suretyship element in the letter of credit transaction; and

VI. Assignability of the letter of credit.

The nature of the authority conferred upon the seller presents the most difficult problems in the subject of letters of credit. The rights of the purchasing bank against the issuing and drawee banks and the rights of the issuing and drawee banks present no great difficulties. On the whole, the law in reference to these matters may be said to be fairly definite and uniform. Most of the cases involving commercial letters of credit have arisen under this branch of the subject. The suretyship element in the letter of credit transaction and the assignability of the letter of credit are in a judicially undetermined state.

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an action against the defendant bank for damages for loss on materials thrown on the seller's hands and for loss of profits. It was *held* that the contract between the bank and the seller had been repudiated by the bank, and that the principles underlying recovery by the seller against the bank were the same as those underlying recovery by a seller against a buyer in the ordinary case of repudiation of an installment contract, namely, anticipatory breach. The court was bothered by the fact that this was a negotiation credit. The court recognized that ordinarily a negotiation credit can be cancelled as to the future at any time prior to the given negotiation. This case presented the unusual situation of an authority to draw and an authority to purchase issued in the irrevocable form. The court held that a binding contract had been made over the specified period of time. Mr. Justice Rowlatt said in part: "There can be no doubt that upon the plaintiffs' acting upon the undertaking contained in this letter of credit, consideration moved from the plaintiffs, which bound the defendants to the irrevocable character of the arrangement between the defendants and the plaintiff. . . . The credit was irrevocable; and the effect of that was that the bank really agreed to buy the contemplated series of bills and documents representing the contemplated shipments, just as the buyer agreed to take, and pay for, by this means, the goods themselves."

This decision may illustrate an English tendency to apply the offer theory. But it does not necessarily mean this. It must be remembered that the case involved a negotiation credit which is normally worked out on the offer analysis. See 35 HARV. L. REV. 549-551, 567-568, 581-582 (March, 1922).

See also *Equitable Trust Co. v. Keene*, N. Y. Law Journal, Jan. 26, 1922 (decided in the New York Court of Appeals, Jan. 10, 1922).

## III

RIGHTS OF THE PURCHASING BANK AGAINST THE  
ISSUING AND DRAWEE BANKS

A letter of credit has two characteristics: (1) it contains an authority to one person, the accredited party, to draw bills of exchange and a promise to that person that they will be honored, and (2) it contains a promise to another person, the accrediting party, that if he purchases them the drafts will be honored. What are the rights against the issuing and drawee banks of a *bona fide* purchaser of the drafts drawn in conformity with the provisions of the revocable or irrevocable direct or indirect import or export letter of credit or either form of the advice of credit opened?

The rights of purchasers of drafts may be analyzed on three theories: (1) the letter of credit may be considered as a contract to accept made directly between the issuing and drawee banks and the purchaser; (2) the letter of credit may be considered as an actual acceptance of the drafts; (3) the letter of credit may be regarded as an authority which will enable the purchaser of the drafts to hold the issuing and drawee banks as drawer.

1. *Rights under the Letter of Credit as a Contract*

In reference to prospective purchasers of drafts the letter of credit may contain (1) a specific promise that the drafts will be honored made to a designated person,<sup>120</sup> or (2) a general promise that the drafts will be honored made to all *bona fide* purchasers,<sup>121</sup> or (3) it may simply authorize the accredited party to draw, and be silent in reference to the accrediting party.<sup>122</sup>

<sup>120</sup> Sigel-Campion Live Stock Commission Co. v. Davis, 69 Colo. 511, 194 Pac. 468 (1921); American National Bank v. Pillman, 176 Mo. App. 430, 158 S. W. 433 (1913); Union Bank v. Shea, 57 Minn. 180, 58 N. W. 985 (1894); First National Bank v. Bensley, 2 Fed. 609 (1880); Burns v. Rowland, 40 Barb. (N. Y.) 368 (1863); Dickins v. Beal, 10 Pet. (U. S.) 572 (1836). See McLaren v. Watson, 26 Wend. (N. Y.) 425 (1841).

<sup>121</sup> Bank of Taiwan v. Gorgas-Pierie Mfg. Co., 273 Fed. 660 (1921); Bank of Seneca v. First National Bank of Carthage, 105 Mo. App. 722, 78 S. W. 1092 (1904); Oriental Banking Corporation v. Lippert, 5 Buch. (S. A.) 152 (1875); Roman v. Serna, 40 Tex. 306 (1874); Union Bank of Louisiana v. Coster, 3 N. Y. 203 (1850).

<sup>122</sup> Oil Well Supply Co. v. MacMurphey, 119 Minn. 500, 138 N. W. 784 (1912); Putnam National Bank v. Snow, 172 Mass. 569, 52 N. E. 1079 (1899); Exchange Bank v. Hubbard, 62 Fed. 112 (1894); Bank of Montreal v. Thomas, 16 Ont. 503 (1888); First National Bank v. Clark, 61 Md. 400 (1883); Franklin Bank of Baltimore v. Lynch, 52 Md. 270 (1879); Pollock v. Helm, 54 Miss. 1 (1876); Smith v. Ledyard,

Where the letter is silent, or where it contains a general promise, courts, especially English courts, at first had some difficulty in finding a privity of contract between the writer and the purchaser of the drafts.<sup>133</sup> As late as 1842 four leading English barristers<sup>134</sup> gave it as their expert opinion in an American court that by the law of England the purchaser could maintain no action in his own name against the writer. The first English case which subsequently presented the question was a suit in equity, and the court had no trouble in recognizing the equitable rights of the purchaser as assignee of the drawer's contract right.<sup>135</sup> The court went further and strongly intimated that an action at law would lie. Later cases seem to have settled the English law to the effect that the purchaser may maintain an action at law in his own name on a direct contract made between himself and the writer.<sup>136</sup> The seller has a power to communicate the offer and create a contract between the writer and the purchaser of the draft.<sup>137</sup>

The American cases seem never to have been in doubt on this point.<sup>138</sup> In *Lawrason v. Mason*<sup>139</sup> Chief Justice Marshall described

49 Ala. 279 (1873); *Merchants' Exchange National Bank v. Cardozo*, 35 N. Y. Super. Ct. 162 (1872); *Ranger v. Sargent*, 36 Tex. 26 (1871); *In re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation*, L. R. 2 Ch. App. 391 (1867); *Vallé v. Cerré*, 36 Mo. 575 (1865); *Bissell v. Lewis*, 4 Mich. 450 (1857); *Monroe v. Pilkington*, 14 How. Pr. (N.Y.) 250 (1857); *Lonsdale v. Lafayette Bank*, 18 Ohio, 126 (1849); *Nisbett v. Galbraith*, 3 La. Ann. 690 (1848); *Birckhead v. Brown*, 5 Hill (N. Y.) 634 (1843); 2 Denio (N. Y.) 375 (1845); *Russell v. Wiggin*, 2 Story, 213 (1842); *Carrollton Bank v. Tayleur*, 16 La. 490 (1840); *Lawrason v. Mason*, 3 Cranch (U. S.) 492 (1806).

<sup>133</sup> See *In re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation*, L. R. 2 Ch. App. 391 (1867). See also *Evansville National Bank v. Kaufmann*, 93 N. Y. 273 (1883); *Worcester Bank v. Wells*, 8 Metc. (Mass.) 107 (1844); *Birckhead v. Brown*, 5 Hill (N. Y.) 634 (1843); *Carrollton Bank v. Tayleur*, 16 La. 490 (1840).

<sup>134</sup> See *Russell v. Wiggin*, 2 Story, 213 (1842). Opinion of Sir William Follett and Sir John Baigley (p. 219); opinion of Sir Frederic Pollock (p. 219); and the opinion of M. D. Hill (p. 220).

<sup>135</sup> *Iren A rag and Masterman's Bank, Ex parte Asiatic Banking Corporation* L. R. 2 Ch. App. 391 (1867).

<sup>136</sup> See *Chartered Bank of India, Australia & China v. Macfayden & Co.*, 64 L. J. Q. B. 367 (1895); *Bank of Montreal v. Thomas*, 16 Ont. 503 (1888); *Oriental Banking Corporation v. Lippert*, 5 Buch. (S. A.) 152 (1875); *Maitland v. Chartered Mercantile Bank of India, London & China*, 38 L. J. Ch. 363 (1869).

<sup>137</sup> *Union Bank of Canada v. Cole*, 47 L. J. Q. B. 100 (C. A. 1877).

<sup>138</sup> *Oil Well Supply Co. v. MacMurphey*, 119 Minn. 500, 138 N. W. 784 (1912); *Putnam National Bank v. Snow*, 172 Mass. 569, 52 N. E. 1079 (1899); *Exchange Bank*

<sup>139</sup> 3 Cranch (U. S.) 492 (1806).

the letter as "an actual assumpsit to all the world." In *Russell v. Wiggin*,<sup>140</sup> the leading case on this aspect of the letter of credit, Mr. Justice Story, holding that there was a contract between the purchaser and the writer, said:

"The second question is: Whether a promise, contained in a letter of credit, written by persons, who are to become the drawees of bills drawn under it, promising to accept such bills when drawn, which letter, although addressed to the persons, who are to be the drawers of the bills, is designed to be shown to any and all person or persons whatsoever, to induce them to advance money on, and take the bills, when drawn, will be an available contract in favor of the persons, to whom the letter of credit is shown, who advance money and take the bills on the faith thereof, or is void for want of privity between them and the person writing the letter of credit. . . .

"The second question is one, upon which, until I heard the present argument, I did not suppose, that any real doubt could be raised, as to the law, either in England or America. . . .

"I have understood, and always supposed, that . . . the party, giving such a letter, held himself out to all persons, who should advance

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*v. Hubbard*, 62 Fed. 112 (1894); *Brown v. Ambler*, 66 Md. 391, 7 Atl. 903 (1887) *Franklin Bank of Baltimore v. Lynch*, 52 Md. 270 (1879); *Pollock v. Helm*, 54 Miss. 1 (1876); *Smith v. Ledyard*, 49 Ala. 279 (1873); *Northumberland County Bank v. Eyre*, 58 Pa. St. 97 (1868); *Vallé v. Cer*, 6, 36 Mo. 575 (1865); *Bissell v. Lewis*, 4 Mich. 450 (1857); *Monroe v. Pilkington*, 14 How. Pr. (N. Y.) 250 (1857); *Barney v. Newcomb*, 9 Cush. (Mass.) 46 (1851); *Union Bank of Louisiana v. Coster*, 3 N. Y. 203 (1850); *Lonsdale v. Lafayette Bank*, 18 Ohio, 126 (1849); *Nisbett v. Galbraith*, 3 La. Ann. 690 (1848); *Russell v. Wiggin*, 2 Story, 213 (1842); *Boyce v. Edwards*, 4 Pet. (U. S.) 111 (1830); *Lawrason v. Mason*, 3 Cranch (U. S.) 492 (1806). Compare American cases *supra*, note 133. The doubt as to privity expressed in those cases is really a doubt as to whether the letter was intended to be shown as an offer.

<sup>140</sup> 2 Story, 213, 229, 230, 231 (1842).

Letters of credit raise some questions in conflict of laws.

In *Russell v. Wiggin*, 2 Story, 213 (1842) the letter was written and delivered to the buyer in the United States. The draft was drawn and was sold to the plaintiff, the purchasing bank, in England. It was *held* that the contract between the issuing and purchasing banks was made in the United States and that English law did not govern. It may well be that English law would not govern the liability for breach. But it is obviously erroneous to say that the contract was not made in England, and that the law of England should not determine whether plaintiff had a contract right.

See *Brazilian & Portuguese Bank v. British & American Exchange Banking Corporation*, 18 L. T. R. 823 (1868).

Compare *North Atchison Bank v. Garretson*, 51 Fed. 168 (1892).

As to what law governs the contract between the drawee and issuing banks and the seller, see *supra*, note 88.

money on bills drawn under the same, and upon the faith thereof, as contracting with them an obligation to accept and pay the bills."

If therefore the letter on its face indicates that it was written for the purpose of being shown,<sup>141</sup> in order to obtain the negotiation of bills drawn pursuant to its provisions, and if the purchaser is within the terms of the letter, the letter amounts to an offer to him that if he purchases the drafts the drafts will be honored. The offer becomes a direct unilateral contract between the writer and the purchaser as soon as the draft is bought. This is the explanation of the insistence of the courts that the purchaser must take the draft on the faith of and in reliance on the letter,<sup>142</sup> although it is not necessary that he actually see it:<sup>143</sup> he must know of the offer and intend to accept it. If the letter contains a specific promise to a designated purchaser no other person can make himself offeree,<sup>144</sup> unless it clearly appears that the letter was also intended to be shown generally.<sup>145</sup> But if the letter is silent, or if it contains a general promise to all *bona fide* purchasers,<sup>146</sup> there is a general offer which may be accepted by any one.

## 2. Rights on the Bill of Exchange: (a) Against the Issuing and Drawee Banks as Acceptor

In England an acceptance must be written on the bill of exchange.<sup>147</sup> Consequently the letter of credit can never amount

<sup>141</sup> *Oil Well Supply Co. v. MacMurphey*, 119 Minn. 500, 138 N. W. 784 (1912); *Atlanta National Bank v. Northwestern Fertilizing Co.*, 83 Ga. 356, 9 S. E. 671 (1889); *Nevada Bank v. Luce*, 139 Mass. 488, 1 N. E. 926 (1885); *Evansville National Bank v. Kaufmann*, 93 N. Y. 273 (1883); *Union Bank of Canada v. Cole*, 47 L. J. Q. B. 100 (C. A. 1877); *Smith v. Ledyard*, 49 Ala. 279 (1873); *Bissell v. Lewis*, 4 Mich. 450 (1857); *Munroe v. Pilkington*, 14 How. Pr. (N. Y.) 250 (1857); *Birkhead v. Brown*, 5 Hill (N. Y.) 634 (1843); *Lawrason v. Mason*, 3 Cranch (U. S.) 492 (1806).

<sup>142</sup> See *Springfield Bank v. Mitchell*, 48 Ill. App. 486 (1892); *Vallé v. Cerré*, 36 Mo. 575 (1865); *Barney v. Newcomb*, 9 Cush. (Mass.) 46 (1851); *Worcester Bank v. Wells*, 8 Metc. (Mass.) 107 (1844); *McLaren v. Watson*, 26 Wend. (N. Y.) 425 (1841).

<sup>143</sup> *Lewis v. Kramer*, 3 Md. 265 (1852); *Michigan Bank v. Ely*, 17 Wend. (N. Y.) 506 (1837).

<sup>144</sup> See *Dickins v. Beal*, 10 Pet. (U. S.) 572 (1836). See also cases *infra*, note 214.

<sup>145</sup> *Wilson & Co. v. Niffenegger*, 211 Mich. 311, 178 N. W. 667 (1920); *Union Bank of Canada v. Cole*, 47 L. J. Q. B. 100 (C. A. 1877).

<sup>146</sup> *Bank of Taiwan v. Gorgas-Pierie Mfg. Co.*, 273 Fed. 660 (1921). See cases *supra*, note 131.

<sup>147</sup> For the earlier English law see *Pierson v. Dunlop*, 2 Cowp. 571 (1777); *Mason v. Hunt*, 1 Doug. 296 (1779). For the later English law see *Bank of Ireland v. Archer*

to an acceptance in favor of a *bona fide* purchaser. In the United States, however, a letter of credit may amount to an actual acceptance in favor of *bona fide* purchasers who take the drafts on the faith of the letter.<sup>148</sup> It is not necessary that a purchaser actually see the letter if he acts in reliance thereon.<sup>149</sup> The classical language of collateral acceptance is to be found in the opinion of Chief Justice Marshall in *Coolidge v. Payson*.<sup>150</sup>

"A letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance binding the person who makes the promise."

Whether the purchaser of a draft drawn under a letter of credit proceeds upon the theory of an actual acceptance or upon a contract to accept will make a practical difference in the measure of damages.<sup>151</sup>

### 3. *Rights on the Bill of Exchange : (b) Against the Issuing and Drawee Banks as Drawer*

It has been suggested that the seller is agent for the issuing and drawee banks to draw bills of exchange and that one who purchases

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and Daly, 11 M. & W. 383 (1843). Stat. 19 & 20 Vict., c. 97, § 6. See cases cited in *Exchange Bank of St. Louis v. Rice*, 98 Mass. 288 (1867).

<sup>148</sup> *Wilson & Co. v. Niffenegger*, 211 Mich. 311, 178 N. W. 667 (1920); *Bank of Beaver County v. Bradstreet*, 89 Neb. 186, 130 N. W. 1038 (1911); *Milmo National Bank v. Cobbs*, 53 Tex. Civ. App. 1, 115 S. W. 345 (1908); *North Atchison Bank v. Garretson*, 51 Fed. 168 (1892); *Woodard v. Griffiths-Marshall Grain Commission Co.*, 43 Minn. 260, 45 N. W. 433 (1890); *Merchant's Bank of Canada v. Griswold*, 72 N. Y. 472 (1878); *Steman v. Harrison*, 42 Pa. St. 49 (1862); *Lugrue v. Woodruff*, 29 Ga. 648 (1860); *Bissell v. Lewis*, 4 Mich. 450 (1857); *Lewis v. Kramer*, 3 Md. 265 (1852); *Michigan Bank v. Ely*, 17 Wend. (N. Y.) 508 (1837); *Parker v. Greele*, 5 Wend. (N. Y.) 414 (1830); *Coolidge v. Payson*, 2 Wheat. (U. S.) 66 (1817). See NEGOTIABLE INSTRUMENTS LAW, §§ 134, 135; BRANNAN, NEGOTIABLE INSTRUMENTS LAW ANNOTATED, 3 ed., pp. 361-364 (1920); See also *Exchange Bank v. Rice*, 98 Mass. 288 (1867); *Howland v. Carson*, 15 Pa. St. 453 (1850); *Boyce v. Edwards*, 4 Pet. (U. S.) 111 (1830); *Wildes v. Savage*, 1 Story, 22 (1839); *Brown v. Ambler*, 66 Md. 391, 7 At 903 (1887).

<sup>149</sup> *Woodard v. Griffiths-Marshall Grain Commission Co.*, 43 Minn. 260, 45 N. W. 433 (1890).

<sup>150</sup> 2 Wheat. (U. S.) 66, 75 (1817).

<sup>151</sup> *Prehn v. Royal Bank of Liverpool*, L. R. 5 Ex. 92 (1870); *Russell v. Wiggin*, 2 Story, 213 (1842). See 2 SEDGWICK, DAMAGES, 9 ed., §§ 700, 707 (1912).

See *Stein v. Hambro's Bank of Northern Commerce*, 9 Lloyd's List Law Rep. 433,



the bills on the faith of the letter can maintain an action against the writer of the letter as drawer of the bills, and that no notice of dishonor or protest is necessary.<sup>152</sup> The *dicta* of these cases are, however, contrary to well-settled principles governing parties to negotiable instruments, and the proposition is thoroughly unsound.<sup>153</sup>

#### 4. *Effect of Revocation of the Letter of Credit*

If the letter of credit is issued in the revocable form it constitutes a number of revocable offers. Will a revocation in respect to the seller, if the writer does not destroy or regain possession of the letter, revoke the offer to persons who purchase drafts in ignorance of the revocation? The seller has a power to communicate the offer. Must there be actual authority, or may the purchaser rely

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507 (K. B. D., decided Dec. 8, 1921, and Dec. 13, 1921). For the facts of this case see *supra*, p. 715 note 129b. Mr. Justice Rowlatt said in part: "I took time to consider whether the damages which the plaintiff [the seller] was entitled to recover were simply the money equivalent of the bill or whether they were the same damages as he would be entitled to as against a buyer for non-acceptance of the goods. . . . It seems to me that this is clearly a case of a simple contract to pay money upon the fulfilment of conditions which have been fulfilled. . . . The obligation of the bank is absolute, and is meant to be absolute, that when the documents are presented they have to accept the bill. That is the commercial meaning of it. . . . Therefore, it seems to me that the plaintiff is entitled to judgment for the amount of the bill, which should have been accepted, plus interest from the date it would have become due until to-day, and is entitled to the costs of the action."

In *Urquhart, Lindsay & Co., Ltd. v. Eastern Bank, Ltd.*, 9 Lloyd's List Law Rep. 572 (K. B. D., decided Dec. 5, 1921), it was held that the seller could recover from the issuing bank damages for loss on materials thrown on the seller's hands and also for loss of profits.

In both of these cases the action was for a breach of contract to accept, which is the only action maintainable in England when the acceptance is not actually written on the draft. So far as damages are concerned, it would seem better to bring an action for breach of contract to accept rather than an action on the acceptance, even where such an action is possible under a letter of credit, for if the letter is treated as an acceptance, only the face of the draft plus interest can be recovered, whereas if the action is brought for breach of contract to accept, the face of the draft may be recovered, or other items of damages may be recovered, such as loss of profits, loss of credit due to cancellation of the letter, and incidental expenses involved in procuring new credit.

See also *Belgian Grain & Produce Co., Ltd. v. Cox & Co., Ltd.*, 1 Lloyd's List Law Rep. 256, 546 (C. A. 1919).

<sup>152</sup> See *Exchange Bank v. Hubbard*, 62 Fed. 112 (1894); *Michigan Bank v. Ely* 17 Wend. (N. Y.) 508, 512 (1837).

<sup>153</sup> *Kirk v. Blurton*, 9 M. & W. 284 (1841); *Grist v. Backhouse*, 4 Dev. & B. (N. C.) 362 (1839); *Siffkin v. Walker*, 2 Camp. 308 (1809). See also 2 AMES, CASES ON BILLS AND NOTES, p. 873 (1894).

upon the apparently unrevoked letter? If the letter of credit is issued in the irrevocable form the same problem arises. There is a contract between the issuing and drawee banks and either the buyer or the seller — for this purpose it matters not whom. A revocation would consequently be a breach of contract in respect to the buyer or the seller for which there is a right of action. But wrong although it is, the writer has a power to revoke the offer to prospective accrediting parties which the letter of credit contains. Is it enough that the actual authority to the drawer has been terminated, or must the writer get the fact of revocation home to all those who may accept the apparent offer? If revocation of actual authority is not enough, the writer's only remedy, in those cases where the seller refuses to surrender or destroy the letter of credit and insists upon his contract rights, is the equitable relief of cancellation. And, although the power of the drawer is not technically a power coupled with an interest, it is doubtful if the writer could under the circumstances obtain cancellation in equity. The practical effect of inability to obtain cancellation would be specific performance of the contract and an irrevocable power in the seller. Again, suppose the amount for which the seller may draw has been exhausted but prior purchasers have neglected to indorse the draft on the letter. Is the writer to be bound to a subsequent *bona fide* purchaser?

The cases are not altogether satisfactory. Where the letter is not intended to be shown, the seller must conform to his actual authority in order to bind the bank to the purchaser.<sup>154</sup> Where the letter is intended to be shown, two cases seem to rest upon the theory of assignment and to measure the purchaser's rights as assignee by the rights of the seller as assignor.<sup>155</sup> Where the letter contains no provision for indorsement but states that the writer will pay drafts to a designated aggregate amount, the purchaser takes the draft at his own risk that the amount has already been exhausted.<sup>156</sup> If the letter requires that the number of the letter be indorsed on the drafts and that drafts drawn under the letter shall be indorsed thereon by purchasers, and the writer pays

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<sup>154</sup> *Nevada Bank v. Luce*, 139 Mass. 488, 1 N. E. 926 (1885).

<sup>155</sup> *First National Bank v. Clark*, 61 Md. 400 (1883); *Union Bank of Canada v. Cole*, 47 L. J. Q. B. 100 (C. A. 1877).

<sup>156</sup> *Roman v. Serna*, 40 Tex. 306 (1874); *Ranger v. Sargent*, 36 Tex. 26 (1871).

drafts which are not so indorsed and which were not taken by the purchaser on the faith of the letter, the writer is liable to subsequent purchasers because no contract had been formed with the first purchaser which exhausted the letter, and the letter is an outstanding continuing offer.<sup>157</sup> The cases, therefore, seem to permit the generalization that a prospective purchaser of drafts drawn under a letter of credit may rely on the face of the letter. Thus, if the letter is issued in the revocable form a purchaser acts at his own risk that it has been revoked, but if it is issued in the irrevocable form it is, during the life of the letter, a continuing offer to all *bona fide* purchasers.

#### IV

##### RIGHTS OF THE ISSUING AND DRAWEE BANKS

###### 1. *Relation of the Sales Contract to the Letter of Credit*

The sales contract is no part of the contract between the issuing and drawee banks and the seller. It does not form the consideration for the letter of credit. Nor is performance of the sales contract a condition precedent either of the letter of credit or of the buyer's agreement to reimburse. The letter of credit is a wholly independent contract.<sup>158</sup>

A considerable amount of litigation has recently arisen in England and in the United States over the relation of the sales contract to the letter of credit. Since the relation depends upon the terms of the two contracts in so far as they refer to each other, that is upon questions of fact and construction, the litigation upon this point is probably not at an end. It is therefore desirable to set forth briefly the more important recent cases in order to show the way in which the courts have been dealing with this problem.

In the recent case of *Lamborn v. Lake Shore Banking & Trust Co.*<sup>159</sup> it is said:

<sup>157</sup> *Bank of Seneca v. First National Bank of Carthage*, 105 Mo. App. 722, 78 S. W. 1092 (1904); *Omaha National Bank v. First National Bank*, 59 Ill. 428 (1871).

<sup>158</sup> *Bank of Taiwan v. Gorgas-Pierie Mfg. Co.*, 273 Fed. 660 (1921); *Bank of Plant City v. Canal-Commercial Trust & Savings Bank*, 270 Fed. 477 (1921); *Lamborn v. Lake Shore Banking & Trust Co.*, 196 App. Div. 504, 188 N. Y. Supp. 162 (1921); *Imbrie v. Nagase & Co.*, 187 N. Y. Supp. 692 (1921); *American Steel Co. v. Irving National Bank*, 266 Fed. 41 (1920); *Frey & Son v. Sherburne Co. and the National City Bank*, 193 App. Div. 849, 184 N. Y. Supp. 661 (1920); *Baring v. Lyman*, Fed. Cas. No. 983 (1841).

<sup>159</sup> 196 App. Div. 162, 188 N. Y. Supp. 162, 163, 164 (1921).

"This letter of credit constitutes the sole contract with the shipper, and . . . the bank issuing the letter of credit has no concern with any question which may arise between the vendor and the vendee of the merchandise for the purchase price for which the letter of credit was issued. . . . It is clear that the defendant is not under obligation to investigate and ascertain whether the contract between the vendor and vendee has been fulfilled."

In another recent case, *Imbrie v. D. Nagase & Co., Ltd.*,<sup>160</sup> it is said:

"A bank issuing a letter of credit is in no way concerned with any contract existing between the buyer and seller. . . . Disputes between buyer and seller are likewise no concern of it."

In *American Steel Co. v. Irving National Bank*,<sup>160a</sup> the buyer procured an irrevocable letter of credit authorizing the seller to draw on the issuing bank, drafts to be accompanied by specified shipping documents. Acceptance was subsequently refused by the bank. In an action by the seller against the bank, the bank set up as defenses that the seller failed to make shipment of the merchandise within the time limited by the sales contract, and that, by reason of federal prohibition of exports from the United States of tin plates, the subject matter of the sales contract, the performance of the sales contract became impossible inasmuch as the buyer was unable to obtain a license permitting the export of merchandise within the time required by that contract. The court dismissed the first defense as having no basis in fact. The second defense was held to be bad.

Circuit Judge Rogers said:<sup>160b</sup>

"The second defense, that the contract became impossible of execution, inasmuch as the MacDonnell Corporation [the buyer] was unable to obtain a license from the United States government permitting the export of the tin plate, is wholly inconsequential. The liability of the bank on the letter of credit as agreed upon between plaintiff and defendant was absolute from the time it was issued, and it was quite immaterial whether the defendant could export the tin or not. . . . The defendant in effect seeks to read into the contract a provision that the plaintiff's rights under the letter of credit should be subject to the superior right

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<sup>160</sup> 196 App. Div. 380, 187 N. Y. Supp. 692, 695 (1921).

<sup>160a</sup> 266 Fed. 41 (1920).

<sup>160b</sup> 266 Fed. 41, 43, 44 (1920).

of the MacDonnell Chow Corporation to modify the contract which the bank had made with the plaintiff. We do not so understand the law."

The relation of the sales contract to the letter of credit and the distinct and independent aspects of the two contracts are well brought out by two recent New York cases, the so-called Sugar Injunction Cases.

In *Frey & Son v. E. R. Sherburne Co. and the National City Bank*<sup>180c</sup> the buyer, a Maryland corporation, entered into a written sales contract in New York with the seller, a Massachusetts corporation. The buyer purchased 350 tons of Java sugar, shipments to be made from Java by steamer or steamers to New York in five separate shipments. Payment was to be made in cash in New York on presentation of a warehouse receipt or delivery order and the buyer was to furnish an irrevocable letter of credit for the full amount of the invoice. The sales contract also provided that if any shipment should be delayed beyond a specified time by unforeseen circumstances the buyer should have the option of cancelling such portion of the contract or of taking the sugar without claim to damages. The buyer procured a letter of credit from the National City Bank authorizing the seller to draw upon that bank. The letter of credit was silent as to the provision for cancelling shipments. One shipment was delayed. The buyer cancelled that shipment under his option. The seller threatened nevertheless to draw the draft upon the bank and to negotiate it. The buyer sought to restrain the seller from drawing the draft and the bank from honoring or paying any drafts which may have been drawn and which may then be in the hands of third parties. The court denied the injunction.

Mr. Justice Greenbaum, writing the opinion of the court, said:<sup>180d</sup>

"It is equally clear here that the bank issuing the letter of credit is in no way concerned with any contract existing between the buyer and the seller. The bank may only be held liable in case of a violation of any of the terms of the letter of credit. It would thus follow that if the bank paid any drafts violative of the terms of the letter, the buyer would have recourse to the bank in an action for damages for the breach of

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<sup>180c</sup> 193 App. Div. 849, 184 N. Y. Supp. 661 (1920).

<sup>180d</sup> 193 App. Div. 849, 853, 854, 184 N. Y. Supp. 661 (1920).

its contract. Similarly, if the defendant Sherburne Company [the seller] violated its contract with the plaintiff, [the buyer] the latter has a remedy in an action at law for damages against the defendant. It is not alleged in the complaint that the National City Bank is in financial difficulties. Nor is it alleged that the Sherburne Company is not financially able to respond to damages. . . . Interests of innocent parties who may hold drafts upon the letter of credit should not be made to suffer by reason of rights that may exist between the parties to the contract of sale in reference to which the letter of credit was issued. It would be a calamity to the business world if for every breach of a contract between buyer and seller a party may come into a court of equity and enjoin payments on drafts drawn upon a letter of credit issued by a bank which owed no duty to the buyer in respect of the breach. The parties should be remitted upon their claims for damages to an action at law."

In *Gambrill Mfg. Co. v. American Foreign Banking Corporation Impleaded with E. R. Sherburne Co.*<sup>100</sup> the facts were practically the same as those in the preceding case. The buyer sought to restrain the seller from drawing and negotiating the drafts because of an alleged breach of the sales contract. The court examined the provisions of the sales contract and declined to issue the injunction because of the construction which the court put upon that contract.

In other words, the buyer cannot enjoin the drawing and negotiating and acceptance of drafts under the letter of credit contract unless there has been a breach or a non-performance of the letter of credit contract, or unless a condition of that contract has not been met. But the seller may be enjoined by the buyer from drawing and negotiating drafts if there has been a breach or non-performance of the sales contract, or if a condition of that contract has not been met.

A recent English case very neatly brings out the relation between the sales contract and the letter of credit. In *National Bank of South Africa v. Banca Italiana Disconto*<sup>100f</sup> the seller had sold to one Gaslini in Genoa a cargo of China sesamum seed. Bills of lading were taken out to the order of the shipper, to notify Gaslini.

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<sup>100</sup> The trial court gave an injunction against the seller but denied an injunction against the bank. 113 Misc. 448 (1920). The Appellate Division reversed the judgment in respect to the seller. 194 App. Div. 425 (1920).

<sup>100f</sup> 9 Lloyd's List Law Rep. 501 (K. B. D., decided Dec. 9, 1921).

Subsequently the contract between the shipper and Gaslini was cancelled. The seller then entered into a sales contract with the present buyer in respect to the same goods. Payment was to be made by four months' sight drafts on confirmed credits, drafts to be accepted against delivery order or bill of lading. The buyer procured a letter of credit from the Banca Italiana Disconto, authorizing the seller to draw on the National Bank of South Africa in London. This credit was duly confirmed. The letter of credit differed from the sales contract in that it provided for payment against delivery order and fire policy or equivalent documents. The seller presented drafts with bills of lading to the South African bank. This bank took the papers but required the seller to give an indemnity, since the papers did not correspond to the requirements of the letter of credit. The buyer refused to pay for the goods and instructed the Italian bank not to pay. The goods were sold at a loss and the South Africa bank claimed against the seller on the indemnity and against the Italian bank on the letter of credit. Both parties brought in the buyer. Mr. Justice Bailhache gave judgment on the indemnity against the seller but dismissed the claim against the Italian bank. The seller then claimed against the buyer for procuring the letter of credit in terms different from the sales contract. The court gave judgment against the buyer for the price.

Mr. Justice Greer said: <sup>160<sup>a</sup></sup>

"The result is that the defendants [the seller] are in the same position as if they had never had the money at all. But as between the defendants and the third parties, [the buyer] they had done all that was required of them under the contract. They had delivered a good bill of lading to the bank and were entitled to be paid. They have not been paid in the result, and it is not open to the third parties to say that the delivery of this bill of lading to the bank was not a proper delivery which entitled the defendants to their money, because the third parties by their conduct represented that the bank had authority to accept the documents which were deliverable under the contract."

In *Urquhart, Lindsay & Co., Ltd. v. Eastern Bank, Ltd.*, the court said: <sup>160<sup>b</sup></sup>

"In my view, the defendants [issuing bank] committed a breach of

<sup>160<sup>a</sup></sup> 9 Lloyd's List Law Rep. 501, 506 (1921).

<sup>160<sup>b</sup></sup> 9 Lloyd's List Law Rep. 572 (K. B., 1921). For the facts of this case see *supra* p. 715 note 129b.

their contract with the plaintiffs [the seller] when they refused to pay the amount of the invoices as presented. Mr. Stuart Brown contended that the letter of credit must be taken to incorporate the contract between the plaintiffs and their buyers, and that, according to the true meaning of that contract, the amount of any increase claimed in respect of an alleged advance in manufacturing costs was not to be included in any invoice to be presented under the letter of credit, but was to be the subject of subsequent independent adjustment.

"The answer to this is that the defendants undertook to pay the amount of invoices for machinery without qualification, the basis of this form of banking facility being that the buyer is taken, for the purposes of all questions between himself and his banker or between his banker and the seller, to be content to accept the invoices of the seller as correct. It seems to me that so far from the letter of credit being qualified by the contract of sale, the latter must accommodate itself to the letter of credit. The buyer having authorized his banker to undertake to pay the amount of the invoice as presented, it follows that any adjustment must be made by way of refund by the seller and not by way of retention by the buyer."

The analysis of these cases follows necessarily from the analysis that the letter of credit is a contract between the bank and the seller with consideration moving from the buyer to the bank. Non-performance or improper performance<sup>161</sup> of the sales contract, in and of itself, is no defense in an action against the bank by the seller<sup>162</sup> or by the purchaser,<sup>163</sup> and is no ground for equitable relief in the form of injunction by the buyer against the bank's performance of its letter of credit contract.<sup>164</sup>

This is the result upon the decisions. But a difference might well be made between cases in which the seller, as the accredited party, is proceeding against the issuing or drawee banks and cases in which the purchasing bank, as the accrediting party, is suing. There are two distinct letter of credit contracts: one between the

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<sup>161</sup> *Frey & Son v. Sherburne Co. and National City Bank*, 193 App. Div. 849, 184 N. Y. Supp. 661 (1920).

<sup>162</sup> *American Steel Co. v. Irving National Bank*, 266 Fed. 41 (1920).

<sup>163</sup> *Maitland v. Chartered Bank*, 38 L. J. Ch. 363 (1869).

<sup>164</sup> *Frey & Son v. Sherburne Co. and National City Bank*, 193 App. Div. 849, 184 N. Y. Supp. 661 (1920); *Maitland v. Chartered Bank*, L. J. Ch. 363 (1869).

Compare *National City Bank v. Partola Mfg. Co.*, 191 App. Div. (N. Y.) 424 (1920); *Higgins v. Steinhardt*, 106 Misc. (N. Y.) 168 (1919), *Welsh v. Gossler*, 89 N. Y. 540 (1882).



the bills on the faith of the letter can maintain an action against the writer of the letter as drawer of the bills, and that no notice of dishonor or protest is necessary.<sup>152</sup> The *dicta* of these cases are, however, contrary to well-settled principles governing parties to negotiable instruments, and the proposition is thoroughly unsound.<sup>153</sup>

#### 4. *Effect of Revocation of the Letter of Credit*

If the letter of credit is issued in the revocable form it constitutes a number of revocable offers. Will a revocation in respect to the seller, if the writer does not destroy or regain possession of the letter, revoke the offer to persons who purchase drafts in ignorance of the revocation? The seller has a power to communicate the offer. Must there be actual authority, or may the purchaser rely

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507 (K. B. D., decided Dec. 8, 1921, and Dec. 13, 1921). For the facts of this case see *supra*, p. 715 note 129b. Mr. Justice Rowlatt said in part: "I took time to consider whether the damages which the plaintiff [the seller] was entitled to recover were simply the money equivalent of the bill or whether they were the same damages as he would be entitled to as against a buyer for non-acceptance of the goods. . . . It seems to me that this is clearly a case of a simple contract to pay money upon the fulfillment of conditions which have been fulfilled. . . . The obligation of the bank is absolute, and is meant to be absolute, that when the documents are presented they have to accept the bill. That is the commercial meaning of it. . . . Therefore, it seems to me that the plaintiff is entitled to judgment for the amount of the bill, which should have been accepted, plus interest from the date it would have become due until to-day, and is entitled to the costs of the action."

In *Urquhart, Lindsay & Co., Ltd. v. Eastern Bank, Ltd.*, 9 Lloyd's List Law Rep. 572 (K. B. D., decided Dec. 5, 1921), it was held that the seller could recover from the issuing bank damages for loss on materials thrown on the seller's hands and also for loss of profits.

In both of these cases the action was for a breach of contract to accept, which is the only action maintainable in England when the acceptance is not actually written on the draft. So far as damages are concerned, it would seem better to bring an action for breach of contract to accept rather than an action on the acceptance, even where such an action is possible under a letter of credit, for if the letter is treated as an acceptance, only the face of the draft plus interest can be recovered, whereas if the action is brought for breach of contract to accept, the face of the draft may be recovered, or other items of damages may be recovered, such as loss of profits, loss of credit due to cancellation of the letter, and incidental expenses involved in procuring new credit.

See also *Belgian Grain & Produce Co., Ltd. v. Cox & Co., Ltd.*, 1 Lloyd's List Law Rep. 256, 546 (C. A. 1919).

<sup>152</sup> See *Exchange Bank v. Hubbard*, 62 Fed. 112 (1894); *Michigan Bank v. Ely* 17 Wend. (N. Y.) 508, 512 (1837).

<sup>153</sup> *Kirk v. Blurton*, 9 M. & W. 284 (1841); *Grist v. Backhouse*, 4 Dev. & B. (N. C.) 362 (1839); *Siffkin v. Walker*, 2 Camp. 308 (1809). See also 2 AMES, CASES ON BILLS AND NOTES, p. 873 (1894).

upon the apparently unrevoked letter? If the letter of credit is issued in the irrevocable form the same problem arises. There is a contract between the issuing and drawee banks and either the buyer or the seller — for this purpose it matters not whom. A revocation would consequently be a breach of contract in respect to the buyer or the seller for which there is a right of action. But wrong although it is, the writer has a power to revoke the offer to prospective accrediting parties which the letter of credit contains. Is it enough that the actual authority to the drawer has been terminated, or must the writer get the fact of revocation home to all those who may accept the apparent offer? If revocation of actual authority is not enough, the writer's only remedy, in those cases where the seller refuses to surrender or destroy the letter of credit and insists upon his contract rights, is the equitable relief of cancellation. And, although the power of the drawer is not technically a power coupled with an interest, it is doubtful if the writer could under the circumstances obtain cancellation in equity. The practical effect of inability to obtain cancellation would be specific performance of the contract and an irrevocable power in the seller. Again, suppose the amount for which the seller may draw has been exhausted but prior purchasers have neglected to indorse the draft on the letter. Is the writer to be bound to a subsequent *bona fide* purchaser?

The cases are not altogether satisfactory. Where the letter is not intended to be shown, the seller must conform to his actual authority in order to bind the bank to the purchaser.<sup>154</sup> Where the letter is intended to be shown, two cases seem to rest upon the theory of assignment and to measure the purchaser's rights as assignee by the rights of the seller as assignor.<sup>155</sup> Where the letter contains no provision for indorsement but states that the writer will pay drafts to a designated aggregate amount, the purchaser takes the draft at his own risk that the amount has already been exhausted.<sup>156</sup> If the letter requires that the number of the letter be indorsed on the drafts and that drafts drawn under the letter shall be indorsed thereon by purchasers, and the writer pays

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<sup>154</sup> Nevada Bank v. Luce, 139 Mass. 488, 1 N. E. 926 (1885).

<sup>155</sup> First National Bank v. Clark, 61 Md. 400 (1883); Union Bank of Canada v. Cole, 47 L. J. Q. B. 100 (C. A. 1877).

<sup>156</sup> Roman v. Serna, 40 Tex. 306 (1874); Ranger v. Sargent, 36 Tex. 26 (1871).

drafts which are not so indorsed and which were not taken by the purchaser on the faith of the letter, the writer is liable to subsequent purchasers because no contract had been formed with the first purchaser which exhausted the letter, and the letter is an outstanding continuing offer.<sup>157</sup> The cases, therefore, seem to permit the generalization that a prospective purchaser of drafts drawn under a letter of credit may rely on the face of the letter. Thus, if the letter is issued in the revocable form a purchaser acts at his own risk that it has been revoked, but if it is issued in the irrevocable form it is, during the life of the letter, a continuing offer to all *bona fide* purchasers.

#### IV

#### RIGHTS OF THE ISSUING AND DRAWEE BANKS

##### 1. *Relation of the Sales Contract to the Letter of Credit*

The sales contract is no part of the contract between the issuing and drawee banks and the seller. It does not form the consideration for the letter of credit. Nor is performance of the sales contract a condition precedent either of the letter of credit or of the buyer's agreement to reimburse. The letter of credit is a wholly independent contract.<sup>158</sup>

A considerable amount of litigation has recently arisen in England and in the United States over the relation of the sales contract to the letter of credit. Since the relation depends upon the terms of the two contracts in so far as they refer to each other, that is upon questions of fact and construction, the litigation upon this point is probably not at an end. It is therefore desirable to set forth briefly the more important recent cases in order to show the way in which the courts have been dealing with this problem.

In the recent case of *Lamborn v. Lake Shore Banking & Trust Co.*<sup>159</sup> it is said:

<sup>157</sup> *Bank of Seneca v. First National Bank of Carthage*, 105 Mo. App. 722, 78 S. W. 1092 (1904); *Omaha National Bank v. First National Bank*, 59 Ill. 428 (1871).

<sup>158</sup> *Bank of Taiwan v. Gorgas-Pierie Mfg. Co.*, 273 Fed. 660 (1921); *Bank of Plant City v. Canal-Commercial Trust & Savings Bank*, 270 Fed. 477 (1921); *Lamborn v. Lake Shore Banking & Trust Co.*, 196 App. Div. 504, 188 N. Y. Supp. 162 (1921); *Imbrie v. Nagase & Co.*, 187 N. Y. Supp. 692 (1921); *American Steel Co. v. Irving National Bank*, 266 Fed. 41 (1920); *Frey & Son v. Sherburne Co. and the National City Bank*, 193 App. Div. 849, 184 N. Y. Supp. 661 (1920); *Baring v. Lyman*, Fed. Cas. No. 983 (1841).

<sup>159</sup> 196 App. Div. 162, 188 N. Y. Supp. 162, 163, 164 (1921).

"This letter of credit constitutes the sole contract with the shipper, and . . . the bank issuing the letter of credit has no concern with any question which may arise between the vendor and the vendee of the merchandise for the purchase price for which the letter of credit was issued. . . . It is clear that the defendant is not under obligation to investigate and ascertain whether the contract between the vendor and vendee has been fulfilled."

In another recent case, *Imbrie v. D. Nagase & Co., Ltd.*,<sup>160</sup> it is said:

"A bank issuing a letter of credit is in no way concerned with any contract existing between the buyer and seller. . . . Disputes between buyer and seller are likewise no concern of it."

In *American Steel Co. v. Irving National Bank*,<sup>160a</sup> the buyer procured an irrevocable letter of credit authorizing the seller to draw on the issuing bank, drafts to be accompanied by specified shipping documents. Acceptance was subsequently refused by the bank. In an action by the seller against the bank, the bank set up as defenses that the seller failed to make shipment of the merchandise within the time limited by the sales contract, and that, by reason of federal prohibition of exports from the United States of tin plates, the subject matter of the sales contract, the performance of the sales contract became impossible inasmuch as the buyer was unable to obtain a license permitting the export of merchandise within the time required by that contract. The court dismissed the first defense as having no basis in fact. The second defense was held to be bad.

Circuit Judge Rogers said:<sup>160b</sup>

"The second defense, that the contract became impossible of execution, inasmuch as the MacDonnell Corporation [the buyer] was unable to obtain a license from the United States government permitting the export of the tin plate, is wholly inconsequential. The liability of the bank on the letter of credit as agreed upon between plaintiff and defendant was absolute from the time it was issued, and it was quite immaterial whether the defendant could export the tin or not. . . . The defendant in effect seeks to read into the contract a provision that the plaintiff's rights under the letter of credit should be subject to the superior right

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<sup>160</sup> 196 App. Div. 380, 187 N. Y. Supp. 692, 695 (1921).

<sup>160a</sup> 266 Fed. 41 (1920).

<sup>160b</sup> 266 Fed. 41, 43, 44 (1920).

of the MacDonnell Chow Corporation to modify the contract which the bank had made with the plaintiff. We do not so understand the law."

The relation of the sales contract to the letter of credit and the distinct and independent aspects of the two contracts are well brought out by two recent New York cases, the so-called Sugar Injunction Cases.

In *Frey & Son v. E. R. Sherburne Co. and the National City Bank*<sup>100</sup> the buyer, a Maryland corporation, entered into a written sales contract in New York with the seller, a Massachusetts corporation. The buyer purchased 350 tons of Java sugar, shipments to be made from Java by steamer or steamers to New York in five separate shipments. Payment was to be made in cash in New York on presentation of a warehouse receipt or delivery order and the buyer was to furnish an irrevocable letter of credit for the full amount of the invoice. The sales contract also provided that if any shipment should be delayed beyond a specified time by unforeseen circumstances the buyer should have the option of cancelling such portion of the contract or of taking the sugar without claim to damages. The buyer procured a letter of credit from the National City Bank authorizing the seller to draw upon that bank. The letter of credit was silent as to the provision for cancelling shipments. One shipment was delayed. The buyer cancelled that shipment under his option. The seller threatened nevertheless to draw the draft upon the bank and to negotiate it. The buyer sought to restrain the seller from drawing the draft and the bank from honoring or paying any drafts which may have been drawn and which may then be in the hands of third parties. The court denied the injunction.

Mr. Justice Greenbaum, writing the opinion of the court, said:<sup>101</sup>

"It is equally clear here that the bank issuing the letter of credit is in no way concerned with any contract existing between the buyer and the seller. The bank may only be held liable in case of a violation of any of the terms of the letter of credit. It would thus follow that if the bank paid any drafts violative of the terms of the letter, the buyer would have recourse to the bank in an action for damages for the breach of

<sup>100</sup> 193 App. Div. 849, 184 N. Y. Supp. 661 (1920).

<sup>101</sup> 193 App. Div. 840, 853, 854, 184 N. Y. Supp. 661 (1920).

its contract. Similarly, if the defendant Sherburne Company [the seller] violated its contract with the plaintiff, [the buyer] the latter has a remedy in an action at law for damages against the defendant. It is not alleged in the complaint that the National City Bank is in financial difficulties. Nor is it alleged that the Sherburne Company is not financially able to respond to damages. . . . Interests of innocent parties who may hold drafts upon the letter of credit should not be made to suffer by reason of rights that may exist between the parties to the contract of sale in reference to which the letter of credit was issued. It would be a calamity to the business world if for every breach of a contract between buyer and seller a party may come into a court of equity and enjoin payments on drafts drawn upon a letter of credit issued by a bank which owed no duty to the buyer in respect of the breach. The parties should be remitted upon their claims for damages to an action at law."

In *Gambrill Mfg. Co. v. American Foreign Banking Corporation Impleaded with E. R. Sherburne Co.*<sup>160</sup> the facts were practically the same as those in the preceding case. The buyer sought to restrain the seller from drawing and negotiating the drafts because of an alleged breach of the sales contract. The court examined the provisions of the sales contract and declined to issue the injunction because of the construction which the court put upon that contract.

In other words, the buyer cannot enjoin the drawing and negotiating and acceptance of drafts under the letter of credit contract unless there has been a breach or a non-performance of the letter of credit contract, or unless a condition of that contract has not been met. But the seller may be enjoined by the buyer from drawing and negotiating drafts if there has been a breach or non-performance of the sales contract, or if a condition of that contract has not been met.

A recent English case very neatly brings out the relation between the sales contract and the letter of credit. In *National Bank of South Africa v. Banca Italiana Disconto*<sup>161</sup> the seller had sold to one Gaslini in Genoa a cargo of China sesamum seed. Bills of lading were taken out to the order of the shipper, to notify Gaslini.

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<sup>160</sup> The trial court gave an injunction against the seller but denied an injunction against the bank. 113 Misc. 448 (1920). The Appellate Division reversed the judgment in respect to the seller. 194 App. Div. 425 (1920).

<sup>161</sup> 9 Lloyd's List Law Rep. 501 (K. B. D., decided Dec. 9, 1921).

Subsequently the contract between the shipper and Gaslini was cancelled. The seller then entered into a sales contract with the present buyer in respect to the same goods. Payment was to be made by four months' sight drafts on confirmed credits, drafts to be accepted against delivery order or bill of lading. The buyer procured a letter of credit from the Banca Italiana Disconto, authorizing the seller to draw on the National Bank of South Africa in London. This credit was duly confirmed. The letter of credit differed from the sales contract in that it provided for payment against delivery order and fire policy or equivalent documents. The seller presented drafts with bills of lading to the South African bank. This bank took the papers but required the seller to give an indemnity, since the papers did not correspond to the requirements of the letter of credit. The buyer refused to pay for the goods and instructed the Italian bank not to pay. The goods were sold at a loss and the South Africa bank claimed against the seller on the indemnity and against the Italian bank on the letter of credit. Both parties brought in the buyer. Mr. Justice Bailhache gave judgment on the indemnity against the seller but dismissed the claim against the Italian bank. The seller then claimed against the buyer for procuring the letter of credit in terms different from the sales contract. The court gave judgment against the buyer for the price.

Mr. Justice Greer said: <sup>180d</sup>

"The result is that the defendants [the seller] are in the same position as if they had never had the money at all. But as between the defendants and the third parties, [the buyer] they had done all that was required of them under the contract. They had delivered a good bill of lading to the bank and were entitled to be paid. They have not been paid in the result, and it is not open to the third parties to say that the delivery of this bill of lading to the bank was not a proper delivery which entitled the defendants to their money, because the third parties by their conduct represented that the bank had authority to accept the documents which were deliverable under the contract."

In *Urquhart, Lindsay & Co., Ltd. v. Eastern Bank, Ltd.*, the court said: <sup>180h</sup>

"In my view, the defendants [issuing bank] committed a breach of

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<sup>180d</sup> 9 Lloyd's List Law Rep. 501, 506 (1921).

<sup>180h</sup> 9 Lloyd's List Law Rep. 572 (K. B., 1921). For the facts of this case see *supra* p. 715 note 129b.

their contract with the plaintiffs [the seller] when they refused to pay the amount of the invoices as presented. Mr. Stuart Brown contended that the letter of credit must be taken to incorporate the contract between the plaintiffs and their buyers, and that, according to the true meaning of that contract, the amount of any increase claimed in respect of an alleged advance in manufacturing costs was not to be included in any invoice to be presented under the letter of credit, but was to be the subject of subsequent independent adjustment.

"The answer to this is that the defendants undertook to pay the amount of invoices for machinery without qualification, the basis of this form of banking facility being that the buyer is taken, for the purposes of all questions between himself and his banker or between his banker and the seller, to be content to accept the invoices of the seller as correct. It seems to me that so far from the letter of credit being qualified by the contract of sale, the latter must accommodate itself to the letter of credit. The buyer having authorized his banker to undertake to pay the amount of the invoice as presented, it follows that any adjustment must be made by way of refund by the seller and not by way of retention by the buyer."

The analysis of these cases follows necessarily from the analysis that the letter of credit is a contract between the bank and the seller with consideration moving from the buyer to the bank. Non-performance or improper performance<sup>161</sup> of the sales contract, in and of itself, is no defense in an action against the bank by the seller<sup>162</sup> or by the purchaser,<sup>163</sup> and is no ground for equitable relief in the form of injunction by the buyer against the bank's performance of its letter of credit contract.<sup>164</sup>

This is the result upon the decisions. But a difference might well be made between cases in which the seller, as the accredited party, is proceeding against the issuing or drawee banks and cases in which the purchasing bank, as the accrediting party, is suing. There are two distinct letter of credit contracts: one between the

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<sup>161</sup> *Frey & Son v. Sherburne Co. and National City Bank*, 193 App. Div. 849, 184 N. Y. Supp. 661 (1920).

<sup>162</sup> *American Steel Co. v. Irving National Bank*, 266 Fed. 41 (1920).

<sup>163</sup> *Maitland v. Chartered Bank*, 38 L. J. Ch. 363 (1869).

<sup>164</sup> *Frey & Son v. Sherburne Co. and National City Bank*, 193 App. Div. 849, 184 N. Y. Supp. 661 (1920); *Maitland v. Chartered Bank*, L. J. Ch. 363 (1869).

Compare *National City Bank v. Partola Mfg. Co.*, 191 App. Div. (N. Y.) 424 (1920); *Higgins v. Steinhardt*, 106 Misc. (N. Y.) 168 (1919), *Welsh v. Gossler*, 89 N. Y. 540 (1882).



issuing and drawee banks and the seller; the other between the issuing and drawee banks and the purchasing bank. In order to charge the purchasing bank with the terms of the sales contract, that contract should be an express condition precedent to the letter of credit contract. But as between issuing and drawee banks and the seller the sales contract might well be construed as an implied condition of the letter of credit. But courts have not made this distinction.

## 2. Conditions

The sales contract, in whole or in part, may be made an express condition precedent to the liability of the issuing and drawee banks on the letter of credit and of the buyer on the agreement to reimburse. Usually the conditions are contained in the letter of credit, and no express conditions are contained in the buyer's agreement. But since this agreement refers to the letter of credit and agrees to its terms, both instruments must be read together, and this is sufficient to make the conditions of the letter of credit conditions precedent to the buyer's liability to put the bank in funds.

The essential thing is that the condition must be a condition of the letter of credit, and not simply a condition of some other contract, such as the sales contract.

"A party who is entitled to draw against a letter of credit must strictly observe the terms and conditions under which the credit is to become available, and if he does not, and the bank refuses to honor his draft, he has no cause of action against the bank."<sup>166</sup> The conditions "cannot be departed from with safety to the mercantile community."<sup>168</sup>

If the condition is construed as a condition precedent to performance of the letter of credit contract, courts require the strictest compliance.<sup>167</sup> It has been held, for example, that the issuing

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<sup>166</sup> *Lamborn v. Lake Shore Banking & Trust Co.*, 196 App. Div. 162, 188 N. Y. Supp. 162, 164 (1921).

<sup>168</sup> *Murdock v. Mills*, 11 Metc. (Mass.) 5, 13 (1846).

<sup>167</sup> *People's Savings Bank & Trust Co. v. Landstreet*, 87 So. 227 (Fla., 1920); *Palmer v. Rice*, 36 Neb. 844, 55 N. W. 256 (1893); *Lindley v. First National Bank* 76 Iowa, 629, 41 N. W. 381 (1889); *Brown v. Ambler*, 66 Md. 391, 7 Atl. 903 (1887); *Germania National Bank v. Taaks*, 101 N. Y. 442, 5 N. E. 76 (1886); *Craig v. Marx*, 65 Tex. 649 (1886); *First National Bank v. Bensley*, 2 Fed. 609 (1880); *Brinkman v.*

and drawee banks and the buyer are under no liability where the letter of credit provided that bills of lading,<sup>168</sup> or inspection certificates,<sup>169</sup> should be attached to the draft and no bill of lading or inspection certificate was attached; where the draft was for a larger amount than was provided in the letter of credit;<sup>170</sup> where the letter of credit provided for shipment to one port and the bills of lading showed the destination of the ship to be another port;<sup>171</sup> where the letter of credit provided for shipment of produce to be bought and paid for by the seller and the produce was not bought and paid for by the seller;<sup>172</sup> where the letter of credit provided for stock to be shipped and no stock was actually shipped;<sup>173</sup> where the letter of credit provided for shipment of yellow pine flooring and the bill of lading read yellow pine lumber;<sup>174</sup> where the letter of credit provided for shipment of silk goods of a certain width stripe and the invoice was silent on this point;<sup>175</sup> where by custom certain action on the part of the seller was precluded.<sup>176</sup>

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Hunter, 73 Mo. 172 (1880); Lockwood v. Brownson, 53 Tex. 523 (1880); Michigan Bank v. Estate of Leavenworth, 28 Vt. 209 (1855); Murdock v. Mills, 11 Metc. (Mass.) 5 (1846); Ulster County Bank v. McFarlan, 3 Den. (N. Y.) 553 (1846). Compare Krakauer v. Chapman, 16 App. Div. 115, 45 N. Y. Supp. 127 (1897).

For recent cases construing the conditions of letters of credit see Stein v. Hambro's Bank of Northern Commerce, 9 Lloyd's List Law Rep. 433 (K. B. D., decided Dec. 8, 1921); Urquhart, Lindsay & Co., Ltd. v. Eastern Bank, Ltd., 9 Lloyd's List Law Rep. 572 (K. B. D., decided Dec. 5, 1921); National Bank of South Africa v. Banca Italiana Disconto, 9 Lloyd's List Law Rep. 501 (K. B. D., decided Dec. 9, 1921). Belgian Grain & Produce Co., Ltd. v. Cox & Co., Ltd., 1 Lloyd's List Law Rep. 256, 546 (C. A. 1919); National Bank of Egypt v. Hannevig's Bank, Ltd., 1 Lloyd's List Law Rep. 69 (C. A. 1919). See also Higgins v. Steinhardter, 106 Misc. 168 (N. Y., 1919).

<sup>168</sup> First National Bank v. Bensley, 2 Fed. 609 (1880); Murdock v. Mills, 11 Metc. (Mass.) 5 (1846).

<sup>169</sup> Craig v. Marx, 65 Texas, 649 (1886).

<sup>170</sup> People's Savings Bank & Trust Co. v. Landstreet, 87 So. 227 (Fla., 1920); Brinkman v. Hunter, 73 Mo. 172 (1880).

<sup>171</sup> Brazilian & Portuguese Bank v. British & American Exchange Banking Corporation, 18 L. T. R. 823 (1868).

<sup>172</sup> Chartered Bank of India, Australia & China v. Macfayden & Co., 64 L. J. Q. B. 367 (1895).

<sup>173</sup> Burke v. Utah National Bank, 47 Neb. 247, 66 N. W. 295 (1896).

<sup>174</sup> Brown v. Ambler, 66 Md. 391, 7 Atl. 903 (1887).

<sup>175</sup> International Banking Corporation v. Irving National Bank, 274 Fed. 122 (1921).

<sup>176</sup> First National Bank v. Fiske, 133 Pa. St. 241, 19 Atl. 554 (1890).

The seller<sup>177</sup> and the purchaser of drafts<sup>178</sup> are both subject to the conditions, but on different theories if the letter of credit is of the irrevocable type. The seller has a contract right. Hence it may be possible to relax somewhat the strictness of the conditions.<sup>179</sup> The condition is precedent to performance on the part of the writer, and a number of things may make it inequitable for the writer to insist on the condition.<sup>180</sup> But the purchaser as offeree has no contract right. The condition as to him is precedent to the formation of the contract. The strictest compliance will be required,<sup>181</sup> and inequitable conduct of the writer is of no moment. If the condition becomes impossible of performance no contract can arise.

### 3. Conduct of the Buyer

Insolvency of the buyer and consequent failure of consideration,<sup>182</sup> and the state of accounts between the bank and the buyer<sup>183</sup> are no defenses to the letter of credit against the seller<sup>184</sup> or against

<sup>177</sup> *Lamborn v. Lake Shore Banking & Trust Co.*, 196 App. Div. 504, 188 N. Y. Supp. 162 (1921).

<sup>178</sup> *International Banking Corporation v. Irving National Bank*, 274 Fed. 122 (1921); *People's Savings Bank & Trust Co. v. Landstreet*, 87 So. 227 (Fla., 1920); *Burke v. Utah National Bank*, 47 Neb. 247, 66 N. W. 295 (1896); *Chartered Bank of India, Australia & China v. Macfayden & Co.*, 64 L. J. Q. B. 367 (1895); *First National Bank v. Fiske*, 133 Pa. St. 241, 19 Atl. 554 (1890); *Lindley v. First National Bank*, 76 Iowa, 629, 41 N. W. 381 (1889); *Brown v. Ambler*, 66 Md. 391, 7 Atl. 903 (1887); *Germania National Bank v. Taaks*, 101 N. Y. 442, 5 N. E. 76 (1886); *First National Bank v. Bensley*, 2 Fed. 609 (1880); *Brinkman v. Hunter*, 73 Mo. 172 (1880); *Lockwood v. Brownson*, 53 Texas, 523 (1880); *Brazilian & Portuguese Bank v. British & American Exchange Banking Corporation*, 18 L. T. R. 823 (1868); *Michigan State Bank v. Estate of Leavenworth*, 28 Vt. 209 (1855); *Murdock v. Mills*, 11 Metc. (Mass.) 5 (1846); *Ulster County Bank v. McFarlan*, 3 Den. (N. Y.) 553 (1846). But see *Parker v. Greele*, 5 Wend. (N. Y.) 414 (1830).

<sup>179</sup> See *Krakauer v. Chapman*, 16 App. Div. 115, 45 N. Y. Supp. 127 (1897).

<sup>180</sup> See *Friedlander v. Bank of Australasia*, 8 C. L. R. 85 (H. C. Australia, 1909).

<sup>181</sup> *Lindley v. First National Bank*, 76 Iowa, 629, 41 N. W. 381 (1889); *Brinkman v. Hunter*, 73 Mo. 172 (1880); *Lienow v. Pitcairn*, Fed. Cas. No. 8341 (1832). See *First National Bank v. Clark*, 61 Md. 400 (1883).

<sup>182</sup> *In re Agra & Masterman's Bank, Ex parte Asiatic Banking Corporation*, L. R. 2 Ch. App. 391 (1867); *Russell v. Wiggin*, 2 Story, 213 (1842). But see *contra*, *Duncan v. Edgerton*, 19 N. Y. Super. Ct. 36 (1860) (*semble*).

<sup>183</sup> *American Steel Co. v. Irving National Bank*, 266 Fed. 41 (1920); *In re Agra & Masterman's Bank, Ex parte Asiatic Banking Corporation*, L. R. 2 Ch. App. 391 (1867).

<sup>184</sup> *American Steel Co. v. Irving National Bank*, 266 Fed. 41 (1920).

the purchaser.<sup>185</sup> Nor is the state of accounts between the buyer and the seller a defense to the buyer against the bank.<sup>186</sup> The letter of credit is an independent contract between the issuing and drawee banks and the seller.

The effect of fraud on the part of the buyer in procuring the letter of credit has already been discussed under the rights of the seller against the issuing and drawee banks.<sup>187</sup>

Where the commission has not been paid in advance, as soon as the drafts are negotiated the right of the issuing bank to commissions arises, although the buyer should afterwards settle with the seller and with the purchasing bank and destroy the drafts. The commission is for the risks.<sup>188</sup>

Where the buyer by his conduct makes performance by the seller of a condition precedent to the letter of credit impossible, the bank, having waived the condition, may recover from the buyer.<sup>189</sup> This result must be explained on the ground that the buyer has rendered the condition precedent to his own agreement to reimburse impossible of performance. This is another indication of the general tendency to treat the transaction which gives rise to a letter of credit as a contract between the bank, the seller, and the buyer, for if the buyer's promise were a mere conditional offer, his conduct in preventing the condition from being performed could be of no moment. The offer would simply be impossible of acceptance.

#### 4. Conduct of the Seller

The issuing bank may recover from the buyer if it strictly complies with its contract.<sup>190</sup> What amounts to compliance? The alleged improper performance of the sales contract is no defense

<sup>185</sup> *Miltenberger v. Cooke*, 18 Wall. (U. S.) 241 (1873); *In re Agra & Masterman's Bank, Ex parte Asiatic Banking Corporation*, L. R. 2 Ch. App. 391 (1867).

<sup>186</sup> *Palmer v. Rice*, 36 Neb. 844, 55 N. W. 256 (1893).

<sup>187</sup> See 35 HARV. L. REV. 569, 573, 579-581, 583 (March, 1922).

<sup>188</sup> *Baring v. Lyman*, Fed. Cas. No. 983 (1841).

<sup>189</sup> *Friedlander v. Bank of Australasia*, 8 C. L. R. 85 (H. C. Australia, 1909).

<sup>190</sup> *Munroe v. Bonanno*, 16 App. Div. 421, 45 N. Y. Supp. 61 (1897) (mistake); *Bank of Montreal v. Recknagel*, 109 N. Y. 482, 17 N. E. 217 (1888); *Gelpcke v. Quentell*, 74 N. Y. 599 (1878); *Johnson v. Blakemore*, 28 La. Ann. 140 (1876); *Ulster Bank v. Synnott*, I. R. 5 Eq. 595 (1871); *Ex parte Agra Bank, In re Barber & Co.*, L. R. 9 Eq. 725 (1870); *De Tastett v. Crousillat*, Fed. Cas. No. 3828 (1807). For a case involving the relation between the issuing bank and the drawee bank see *National Bank of Egypt v. Hannevig's Bank, Ltd.*, 1 Lloyd's List Law Rep. 69 (C. A. 1919).

to the issuing or drawee banks or to the buyer unless the performance is an express condition precedent of the letter of credit. But active misconduct of the seller in forging or altering bills of lading or other shipping documents is not so easily disposed of. The buyer's agreement to reimburse the issuing bank usually contains an express provision that the bank shall be under no liability in respect to goods or shipping documents.<sup>191</sup> Even in the absence of such provision it is held that the bank assumes no responsibility in respect to forged<sup>192</sup> or altered<sup>193</sup> bills of lading, or other shipping documents,<sup>194</sup> or defects in quality<sup>195</sup> or quantity of the goods.<sup>196</sup> That the bank is not legally responsible for defects in quality and quantity of the goods seems plain. Actual shipment of specified goods may of course be made a condition precedent of the buyer's agreement to reimburse,<sup>197</sup> or of the letter of credit,<sup>198</sup> and the promisor may insist upon strict compliance. Where there is such a condition, the purchasing, issuing, and drawee banks may not rely simply on the documents. They act at their own risk that the condition has been performed. In the usual case, however, where there is no such condition the issuing and drawee banks' undertaking is to accept and pay specified drafts with specified shipping documents attached, and the banks may therefore rely on the face of the documents.<sup>199</sup> The case of forged documents

<sup>191</sup> For a case where the express provision had a legal effect different from the effect if there had been no provision, and an effect contrary to the intention of the parties, see *Borthwick v. Bank of New Zealand*, 17 T. L. R. 2 (1900).

<sup>192</sup> *Ulster Bank v. Synnott*, I. R. 5 Eq. 595 (1871); *Craig v. Sibbett*, 15 Pa. St. 238 (1850). See *Guaranty Trust Co. v. Hannay*, [1918] 2 K. B. 623 (C. A.); *Woods v. Thiedemann*, 1 H. & C. 478 (1862). Compare *Allen v. Hornor*, 2 McGloin (La.) 177 (1884).

<sup>193</sup> *Young v. Lehman*, 63 Ala. 519 (1879).

<sup>194</sup> *Basse and Selve v. Bank of Australasia*, 90 L. T. R. 618 (K. B. 1904).

<sup>195</sup> *Bank of Plant City v. Canal-Commercial Trust & Savings Bank*, 270 Fed. 477 (1921); *American National Bank of Macon, Georgia v. Pillman*, 176 Mo. App. 430, 158 S. W. 433 (1913); *Benecke v. Haebler*, 38 App. Div. 344, 166 N. Y. Supp. 631 (1899).

<sup>196</sup> *Lemon Importing Co. v. Garfield Savings Bank*, 105 Misc. 627, 173 N. Y. Supp. 551 (1919); *Borthwick v. Bank of New Zealand*, 17 T. L. R. 2 (1900).

<sup>197</sup> *Bank of Montreal v. Recknagel*, 109 N. Y. 482, 17 N. E. 217 (1888).

<sup>198</sup> *Bank of Montreal v. Recknagel*, 109 N. Y. 482, 17 N. E. 217 (1888); *Allen v. Hornor*, 2 McGloin (La.) 177 (1884).

<sup>199</sup> *International Banking Corporation v. Irving National Bank*, 274 Fed. 122 (1921); *Bank of Plant City v. Canal-Commercial Trust & Savings Bank*, 270 Fed. 477 (1921); *Young v. Lehman*, 63 Ala. 519 (1879); *Ulster Bank v. Synnot*, I. R. 5 Eq. 595 (1871).

is not so plain. The issuing and drawee banks, having accepted or paid, a forged draft under a letter of credit cannot charge the buyer.<sup>200</sup> And it may be argued that the same result should follow where the shipping documents are forged, that the agreements of the banks and of the buyer are to pay drafts accompanied by genuine shipping documents, and that consequently where the shipping documents are forged neither the issuing nor the drawee banks can be held by the purchasing bank, nor can the buyer be held by the issuing bank, and that if the buyer or the issuing and purchasing banks pay in ignorance of the forgery they may respectively recover back the money so paid as money paid under an essential error. But the great weight of authority is to the effect that the ultimate risk in respect to forged shipping documents is on the buyer. The purchasing, issuing, and drawee banks are not selling goods or shipping documents but are surrendering security. The purchasing bank, having in good faith taken the shipping documents, which purport to be genuine and are regular on their face, may recover from the issuing and drawee banks,<sup>201</sup> and the issuing bank may recover from the buyer.<sup>202</sup> This result has been explained on the ground that the buyer, having selected his seller, should be responsible for his acts in respect to shipping documents;<sup>203</sup> and that, when the money has been paid under mistake as to genuineness of shipping documents, the error is collateral and not essential.<sup>204</sup> The better reason is that the exigencies of commerce demand that the loss should not fall on the banks. Any other result would unduly hamper business.<sup>205</sup>

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<sup>200</sup> *British Linen Co. v. Caledonian Insurance Co.*, 4 Macq. 107 (1861); *Orr & Barber v. Union Bank of Scotland*, 1 Macq. 513 (1854).

<sup>201</sup> *Bank of Plant City v. Canal-Commercial Trust & Savings Bank*, 270 Fed. 477 (1921); *First National Bank v. Fiske*, 133 Pa. St. 241, 19 Atl. 554 (1890); *Brown v. Ambler*, 66 Md. 391, 7 Atl. 903 (1887); *Young v. Lehman*, 63 Ala. 519 (1879); *Craig v. Sibbett*, 15 Pa. St. 238 (1850). See WILLISTON, *SALES*, § 435 (1909).

<sup>202</sup> *Basse and Selve v. Bank of Australasia*, 90 L. T. R. 618 (K. B. 1904).

<sup>203</sup> *Basse and Selve v. Bank of Australasia*, 90 L. T. R. 618 (K. B. 1904); *Ulster Bank v. Synnott*, I. R. 5 Eq. 595 (1871). Compare with the question of the effect of fraud of the buyer in procuring the letter of credit.

<sup>204</sup> *Springs v. Hanover National Bank*, 145 App. Div. 188, 130 N. Y. Supp. 87 (1911).

<sup>205</sup> *Young v. Lehman*, 63 Ala. 519 (1879).

5. *Right to the Goods*

The sales contract and the letter of credit may provide that the goods shall be shipped on bills of lading to the order of the buyer, or to the order of the seller and indorsed in blank, or to the order of the issuing bank. Generally it is provided that the bills of lading shall be made to the order of the issuing bank. Prior to acceptance, the purchasing bank, in such a case, has a pledgee's right to the goods represented by the shipping documents. After acceptance, the shipping documents do not follow the draft. The issuing bank has the right to the goods. If the drawee bank should become insolvent the purchasing bank's only right is on the bill of exchange. The goods are not held in trust for holders of the drafts. A letter of credit account is in no respects a trust account.<sup>208</sup>

After acceptance, what is the relation in respect to the goods between the issuing bank and the buyer? The buyer's agreement with the bank provides that legal title shall remain in the issuing bank until the buyer puts the bank in funds to meet the drafts drawn under the letter of credit. As between the buyer and the issuing bank, the buyer is in reality beneficial owner and the issuing bank has only a bare legal title for security. The relation is essentially that of mortgagor and mortgagee. The bank may insist on holding the goods until the buyer carries out his agreement. But such insistence is to the interest of neither the buyer nor the bank. It is therefore the usual practice for the issuing bank, as soon as the goods arrive, to deliver them to the buyer on a bailee (more properly agency) receipt or on a trust receipt. If a bailee or agency receipt is employed, the buyer is simply bailee with a power of sale who has undertaken to remit proceeds to the bailor as fast as the goods are sold. If a trust receipt is employed, the buyer is given legal title as trustee with power to sell and hold the proceeds in trust for the bank. In either case, if the transaction is given effect according to its purport the bank is protected if the buyer should become insolvent. But in essence the transaction is a mortgage with the mortgagor in possession. At common law the bank is protected. The transaction should however be within

<sup>208</sup> *Ex parte Dever*, 13 Q. B. D. 766 (C. A. 1884); *In re Barned's Banking Co.*, *Banner & Young v. Johnston*, L. R. 5 H. L. 157 (1871); *In re Barned's Banking Co.*, *Coupland's Claim*, L. R. 5 Ch. App. 167 (1869).

the chattel mortgage recording acts, and if unrecorded, the bank should be allowed to file a claim against the buyer only as a general creditor.<sup>207</sup> The tendency of the courts, however, is to consider the issuing bank as full beneficial and legal owner of the goods, with a contract right in the buyer, and therefore to give effect to the transaction as a bailment or a trust.<sup>208</sup>

## V

### THE SURETYSHIP ELEMENT IN THE LETTER OF CREDIT TRANSACTION

If one or more of the banks become insolvent, or if there is an extension of time, or a release of securities, or an attempted assignment of the letter of credit, it may be important to determine whether there is a suretyship relation between the parties.

It is arguable that when the sales contract provides that the buyer shall procure a letter of credit the seller agrees to accept payment exclusively in that manner. The contract right against the bank is payment. The seller henceforth looks only to the bank, and the bank looks to the buyer.<sup>209</sup> If this explanation of the transaction is correct, the issuing and drawee banks would not be sureties for the buyer in any sense. If, however, the seller has a right to proceed against the buyer for the purchase price of the goods, there is between the bank and the buyer suretyship in its broad sense. Both are liable for the same debt. As between the buyer and the issuing bank the buyer should ultimately pay. The buyer is therefore principal, and the issuing bank is surety. But when the buyer pays the purchase price to the issuing bank the bank becomes principal and the buyer is surety. That the bank is not a guarantor,

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<sup>207</sup> *In re Bettman-Johnson Co.*, Petition of Goldman, Sachs & Co., 250 Fed. 657 (1918). See WILLISTON, SALES, § 437 (1909), for the buyer's power to deal with documents and with goods entrusted to him under a trust receipt, and the probable effect of the Uniform Sales Act thereon.

<sup>208</sup> *Vaughan v. Massachusetts Hide Corporation*, 209 Fed. 667 (1913); *Moors v. Drury*, 186 Mass. 424, 71 N. E. 810 (1904); *Mershon v. Moors*, 76 Wis. 502, 45 N. W. 95 (1890); *New Haven Wire Co. Cases*, 57 Conn. 352, 18 Atl. 266 (1889); *Moors v. Wyman*, 146 Mass. 60, 15 N. E. 104 (1888); *Moors v. Kidder*, 106 N. Y. 32, 12 N. E. 818 (1887).

<sup>209</sup> See *Hindley & Co. v. Tothill, Watson & Co.*, 13 N. Z. L. R. 13 (C. A. 1894); *contra*, *Bell v. Moss*, 5 Whart. (Pa.) 189 (1839); *Birckhead v. Brown*, 5 Hill (N. Y.) 634 (1843).



or surety in the narrow sense, is clear. Its obligation is primary and not secondary, even though the word *guaranty* is used.<sup>210</sup>

Whatever may be the situation between the buyer and the banks, it is clear that under the indirect import and the direct export letters of credit there is a suretyship relation between the issuing and drawee banks. If no relation of principal and agent exists between them, but nevertheless the drawee bank issues its own irrevocable or confirmed letter of credit, the seller has two rights prior to acceptance and payment: one against the drawee bank, and the other against the issuing or credit-opening bank. The obligation of the issuing bank is in the nature of a secondary or conditional obligation, and the obligation of the drawee bank is in the nature of a primary or unconditional obligation. As between themselves the issuing bank is principal and the drawee bank is surety. If in issuing the indirect import letter of credit the issuing bank acts as agent for the drawee bank, the drawee bank is principal and the issuing bank is guarantor in the narrow sense. If there is also an obligation running from the buyer to the seller, and if no relation of principal and agent exists between the banks, then as between buyer, issuing bank, and drawee bank, the buyer is principal, the issuing bank is surety, and the drawee bank is surety for the issuing bank or sub-surety and not a co-surety. But if the relation of principal and agent exists, the buyer is principal, the drawee bank is surety, and the issuing bank is guarantor for the drawee bank or a sub-surety and not a co-surety.

The chief importance of a determination of the suretyship element relates to the question of assignability of the letter of credit.

## VI

### ASSIGNABILITY OF THE LETTER OF CREDIT

Story in writing of letters of credit has said:<sup>211</sup>

"In respect to letters of credit, which are in common use in our commerce with foreign countries, it may be stated that a letter of

<sup>210</sup> *Bank of Italy v. Merchants' National Bank*, 113 Misc. 314, 185 N. Y. Supp. 43 (1920); 188 N. Y. Supp. 183 (1921). See *Lafargue v. Harrison*, 70 Cal. 380, 11 Pac. 636 (1886). See also *Lonsdale v. Lafayette Bank*, 18 Ohio, 126 (1849). A sales contract may of course be guaranteed by a bank. *Moers v. Den Norske Handelsbank*, 191 App. Div. 114, 180 N. Y. Supp. 743 (1920). For clear cases of offers for guaranties see *Holmes v. Schwab & Sons*, 141 Ga. 44, 80 S. E. 313 (1913); *Adams v. Jones*, 12 Pet. (U. S.) 207 (1838); *Douglass v. Reynolds*, 7 Pet. (U. S.) 113 (1833).

<sup>211</sup> STORY, *BILLS OF EXCHANGE*, 3 ed., § 459 (1853).

credit (sometimes called a bill of credit) is an open letter of request, whereby one person (usually a merchant or a banker) requests some other person or persons to advance monies, or give credit, to a third person, named therein, for a certain amount, and promises that he will repay the same to the person advancing the same, or accept bills drawn upon himself, for the like amount. It is called a general letter of credit when it is addressed to all merchants, or other persons in general, requesting such advance to a third person; and it is called a special letter of credit, when it is addressed to a particular person by name, requesting him to make such advance to a third person."

Daniel adds:<sup>212</sup>

"Letters of credit are instruments of frequent use in commerce, and while not possessing all the characteristics of negotiability which pertain to bills and notes, partake of them to such an extent as to be necessarily classed as negotiable instruments."

This definition and classification of letters of credit, in common with all such definitions and classifications, is concerned only with the second aspect of the letter of credit: the relation between the writer of the letter and the accrediting party. If the promise to purchasers of drafts drawn by the accredited party is a general or open promise, any person may accept the offer and enter into contractual relations with the writer. It is in this sense that Daniel and Story used the term *negotiable*.<sup>213</sup> A letter of credit is in no proper sense a negotiable instrument.

If A writes: "To whom it may concern: Please sell goods to B (or purchase his drafts on me) and I will pay," the letter is termed a general letter of credit. Any person who sells goods to B or purchases B's drafts on A on the faith of the letter can maintain an action against A. It is a general offer.

If A writes: "To S: Please sell B goods which he may desire and I will pay" (or "To P: S is authorized to draw on me. Please purchase his draft and I will honor it") the letter is termed a special letter of credit. No one but the person addressed can recover. The reason which is most often given is that the letter constitutes a guaranty and the guarantor cannot be held unless the terms of the guaranty are strictly complied with. The true explanation

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<sup>212</sup> 2 DANIEL, NEGOTIABLE INSTRUMENTS, 6 ed., §§ 1790-1800 (1914).

<sup>213</sup> See STORY, BILLS OF EXCHANGE, 3 ed., § 461 (1853).

is that such a letter is an offer directed to a specific offeree. No one but the offeree addressed can accept the offer.

If A writes: "To S: You are authorized to draw bills on me, and I promise to honor them," the law was for a time puzzled whether to class the letter as a special or a general letter of credit. It is addressed to a specific person but this person is the accredited party. The essential inquiry is, Who is the accrediting party addressed? And so it became settled that this is a general letter of credit. It is a general offer which may be accepted by any one.

*Special* and *general* are words applicable only to the accrediting party and not to the accredited party. They relate only to the character of the offer. They have no reference to the question of assignment of an existing legal right. If some one other than the offeree seeks to accept the offer no legal right arises.<sup>214</sup> The question, Can a letter of credit be assigned? is a totally different question. It is concerned with the first aspect of the letter of credit, with the right of the accredited party.

In the case of the modern types of letters of credit those which are offers to the seller clearly cannot be taken advantage of by one other than the offeree. Where the letter is of the irrevocable type and confers a contract right upon the seller to draw bills on the writer, the seller has a right *in praesenti*, subject to certain conditions precedent. The seller's right is freely assignable<sup>215</sup> as long as the conditions are performed, and are capable of being performed by one other than the seller, or, in other words, as long as the conditions are not personal. But it must be admitted that an assign-

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<sup>214</sup> Such is the explanation of the following cases, some of which state that a letter of credit is not assignable: *Fletcher Guano Co. v. Burnside*, 142 Ga. 803, 83 S. E. 935 (1914); *Lyon v. Van Raden*, 126 Mich. 259, 85 N. W. 727 (1901); *Crane Co. v. Specht*, 39 Neb. 123, 57 N. W. 1015 (1894); *State National Bank v. Young*, 14 Fed. 889 (1883); *Evansville National Bank v. Kaufmann*, 93 N. Y. 273 (1883); *First National Bank v. Bensley*, 2 Fed. 609 (1880); *Johnson v. Brown*, 51 Ga. 498 (1874); *Smith v. Montgomery*, 3 Tex. 199 (1848); *Taylor v. Wetmore*, 10 Ohio, 490 (1841); *Dickins v. Beal*, 10 Pet. (U. S.) 572 (1836); *Sollee v. Meugy*, 1 Bailey Law (S. C.) 620 (1830); *Walsh and Beekman v. Bailie*, 10 Johns. (N. Y.) 180 (1813); *Robbins v. Bingham*, 4 Johns. (N. Y.) 476 (1809); *Grant v. Naylor*, 4 Cranch (U. S.) 224 (1808). See *Burke v. Utah National Bank*, 47 Neb. 247, 66 N. W. 295 (1896); *McLaren v. Watson*, 26 Wend. (N. Y.) 425 (1841). Compare *Wilson & Co. v. Niffenegger*, 211 Mich. 311, 178 N. W. 667 (1920).

<sup>215</sup> See *Evansville National Bank v. Kaufmann*, 93 N. Y. 273 (1883).

ment would destroy the usefulness of a letter of credit. No purchaser would discount drafts drawn by some one other than the seller, because he would not be accepting the writer's offer. This objection would not apply to the cash credit. But as between the seller and the writer there are difficulties. One purpose of the letter of credit is to assure the buyer that the goods have been shipped. The issuing bank cannot charge the buyer unless it adheres strictly to the letter of credit contract. If the bills of lading have been taken out or if drafts have been drawn by one other than the seller, the issuing bank would refuse to take the risk that it could recover from the buyer. And it should be permitted to take this position. This does not however affect the assignability of rights under the letter of credit transaction. If the sales contract can be assigned so as to confer rights against the buyer, then the right to draw under the letter of credit should also be assignable. To this extent the sales contract has an important connection with the letter of credit. The bank should be allowed to insist for its own protection upon being assured that the sales contract has been so assigned, and was capable of being so assigned. Although the bank may be justified in refusing to accept drafts drawn by one other than the seller, or bills of lading showing shipment by one other than the seller, because it may be assuming too great a risk, this does not affect the assignee's right in equity against the bank if all the parties to the letter of credit are made parties to the suit, and the assignability of the sales contract is established. The same result should follow even if the bank is a surety. It can make no difference to the surety who his creditor is. But as a practical matter there are so many difficulties and inconveniences involved that an ordinary letter of credit would be assigned only with the intention of giving the assignee a security interest against the assignor. Since the letter must by its terms be presented for the negotiation or acceptance of drafts, its possession is a thing of value in the hands of an assignee. Further affirmative rights would necessarily have to be left to a court of equity to determine. In order to make an assignment a practical matter, the letter should have a provision in reference to assignment. Some letters do have the express provision that they are assignable if written notice is given to the issuing bank by the seller or by the buyer.<sup>216</sup>

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<sup>216</sup> See *Duncan v. Edgerton*, 19 N. Y. Super. Ct. (6 Bosw.) 36 (1860).

## VII

## CONCLUSION

At the present time there exists a considerable body of law on commercial letters of credit. There have been decided about two hundred cases which deal with different problems connected with these letters. About twenty-five of these cases are English, Scotch, Irish, and British Colonial cases. The rest are American decisions. About fifty of the two hundred deal with the modern letter of credit transaction as it appears in international trade. Most of the cases have arisen in connection with the direct and indirect types of letters of credit. The advices of credit opened have been very little litigated. Most of the cases are concerned with rights of purchasers of drafts drawn under the letter. Comparatively few deal with the rights of the seller. It has been sought, in the footnotes to this article, to classify the most important of these cases in reference not only to the legal problem involved, but also to the type of letter of credit which was under discussion.

The most important question connected with commercial letters of credit is the nature of the right of the seller as the accredited party. This has not been definitely worked out, but the American law seems to be crystallizing. Upon other questions the law is clearer. The rights of the purchaser of drafts, as the accrediting party, the rights of the issuing and drawee banks, the relation of the sales contract to the letter of credit, the effect to be given to conditions of the letter of credit, the effect of insolvency of the buyer, of fraud of the seller, and the relation between the issuing bank and the buyer in respect to the goods seem to be settled. The two interesting problems connected with commercial letters of credit in reference to which there has been as yet no judicial determination are the problem of the effect of the fraud of the buyer in procuring the letter and the problem of assignment.

*William E. McCurdy.*

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EDWARD BRINLEY ADAMS, Librarian of the Law School, died suddenly at his home in Cambridge on March 24. The Library was to Mr. Adams, as a colleague has said, a romantic passion. To his broad scholarship, to his fine appreciation of the possible influences of a library on the changing substance of the law, to his intense devotion, the library owes much of its preëminent position. In his death the school and the profession have suffered a deep and irreparable loss. The Review, of which Mr. Adams was a former editor, mourns in him one of its most loyal and steadfast supporters. To those who were privileged to know him there has been in addition the loss of a gentle and charming friend.

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THE EFFECT OF FEDERAL ADMIRALTY JURISDICTION ON WORKMEN'S COMPENSATION ACTS. — In *Southern Pacific Company v. Jensen*,<sup>1</sup> the United States Supreme Court held that the New York Workmen's Compensation Act did not apply to a stevedore injured on a ship. In this case two circumstances existed: (1) the employee's contract was

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<sup>1</sup> 244 U. S. 205 (1917). Subsequent to this decision a federal statute was passed, "saving to claimants the rights and remedies of the workmen's compensation law of any state." This statute was held unconstitutional. *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149 (1920).

maritime, and (2) his injury was maritime in nature.<sup>2</sup> In *Grant Smith-Porter Co. v. Rhode*,<sup>3</sup> on the other hand, where the contract of employment was non-maritime, and the injury was maritime, the Supreme Court held that the Oregon Workmen's Compensation Act<sup>4</sup> was applicable. Aside from the question of the soundness of these decisions, it is highly desirable to determine the principles of distinction involved so as to ascertain just what cases are excluded from the operation of the various compensation statutes by the federal grant of admiralty power.

The Workmen's Compensation Acts may be roughly divided into those which are compulsory upon the employer and employee, and those which are elective.<sup>5</sup> When the parties elect to come under the provisions of the latter type of statute, it is generally held that its provisions become a term of the contract of employment and recovery for the injury is accordingly on the basis of contract.<sup>6</sup> Under the compulsory statute, it might reasonably be argued that since the parties can exercise no option whether or not to come under the provisions of the act, liability is on the basis of tort.<sup>7</sup> But in New York and California it is held that recovery, under their compulsory statutes, while not strictly contractual, is based on a duty attaching to the relation which arises from the contract and is accordingly "*quasi ex contractu*."<sup>8</sup> The effect of the *Jensen* and *Rhode* decisions on cases arising under each of these types of statutes must be considered.

The *ratio decidendi* of the *Jensen* decision was that "no such legislation

<sup>2</sup> In subsequent cases similar circumstances existed. See *Clyde S. Co. v. Walker*, 244 U. S. 255 (1917); *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372 (1918); *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149 (1920).

<sup>3</sup> U. S. Sup. Ct., Oct. Term, 1921, No. 35. For the facts of this case see RECKERT CASES, *infra*, p. 762.

<sup>4</sup> See 1920 OLSON'S OREGON LAWS, § 6605; OREG. LAWS 1913, c. 112.

<sup>5</sup> Elective acts are in force in 31 states and Alaska; compulsory acts are in force in 12 states, Hawaii and Porto Rico. For an analysis of the principal features of these statutes, see BULLETIN OF UNITED STATES BUREAU OF LABOR STATISTICS, No. 272, pp. 27-68.

<sup>6</sup> See 1 BRADBURY, WORKMEN'S COMPENSATION, 3 ed., 86-97; E. Angell, "Recovery under Workmen's Compensation for Injury Abroad," 31 HARV. L. REV. 619. This question generally arises in connection with the extraterritorial effect of the statutes. In the following cases it was held that the basis of recovery was contractual and hence that recovery could be had for injuries suffered without the state. *Grinnell v. Wilkinson*, 39 R. I. 447, 98 Atl. 103 (1916); *Foughty v. Ott*, 80 W. Va. 88, 92 S. E. 143 (1917); *Hagenbeck & Great Wallace Shows Co. v. Leppert*, 66 Ind. App. 261, 117 N. E. 531 (1917); *Anderson v. Miller Scrap Iron Co.*, 169 Wisc. 106, 170 N. W. 275 (1919). In *Gould v. Sturtevant*, 215 Mass. 480, 102 N. E. 993 (1913), it was held that the statute had no extraterritorial effect but the court did not decide whether recovery under the statute was on the basis of tort or of contract. See BRADBURY, *op. cit.* p. 88. Even though the statute be construed as giving contractual recovery, it may be limited to injuries within the state. See *Union Bridge & Construction Co. v. Industrial Comm.*, 287 Ill. 396, 122 N. E. 609 (1919).

<sup>7</sup> As used in this note the term "tort" includes any recovery which is not contractual or quasi-contractual. Recovery under the so-called Employers' Liability Acts may properly be considered of this nature. See *Baltimore & O. S. W. Ry. Co. v. Read*, 158 Ind. 25, 62 N. E. 488 (1902); *Alabama G. S. R. Co. v. Carroll*, 97 Ala. 126, 11 So. 803 (1892); see E. Angell, *supra*, 31 HARV. L. REV. 632.

<sup>8</sup> See *Smith v. Heine Safety Boiler Co.*, 224 N. Y. 9, 119 N. E. 878; *Quong Ham Wah Co. v. Industrial Accident Commission*, 192 Pac. 1021 (Cal. 1920). Cf. *Post v. Burger & Gohlke*, 216 N. Y. 544, 111 N. E. 351 (1916). See E. Angell, *supra*, 31 HARV. L. REV. 635.

is valid if it . . . works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations."<sup>9</sup> If the statute imposes a tort liability it is clear that in its application to non-maritime injuries, it does not fall within this inhibition, since the right to legislate concerning such injuries is not included in the federal grant of admiralty jurisdiction. But the trend of the decisions in the state courts<sup>10</sup> and the reasoning of the *Jensen* case<sup>11</sup> indicate that such a statute cannot apply to maritime injuries. Here then the outcome depends upon the *situs* of the injury.

In the great majority of cases, however, the statute operates as an incident of the contract of employment. Should a distinction be made where this incident is voluntarily assumed under an elective, and where it is imposed under a compulsory, statute? It is arguable that under the former type of statute, the state has not changed admiralty law but the parties have themselves voluntarily relinquished maritime rights and remedies and substituted those provided by the statute. But the argument that there has been no interference by the state is considerably weakened not only by the fact that usually the parties are bound unless there is an affirmative rejection, but especially by the fact that the statutes provide as an alternative to acceptance by the employer a threatened deprivation of defenses, to some of which he is clearly entitled by admiralty law.<sup>12</sup> At any rate the courts have regarded as immaterial the fact that the statute is elective rather than compulsory.<sup>13</sup> Nor did the court lay stress on the elective feature of the statute in the *Rhode* case. This as a possible distinction between it and the *Jensen* case must therefore be discarded.

The proper criterion to be applied under the statutes allowing contractual recovery seems to be the nature of the contract entered into by the parties. The contract on which recovery was allowed in the *Rhode* case was non-maritime. There was no basis for the argument, therefore, that the statute imposed new and burdensome obligations on a mari-

<sup>9</sup> 244 U. S. 205, 216.

<sup>10</sup> See *Rorvick v. No. Pacific Lbr. Co.*, 99 Oreg. 59, 190 Pac. 331, 195 Pac. 163 (1921). Under the Washington compulsory Workmen's Compensation Act, recovery is apparently allowed for all non-maritime injuries but not for maritime injuries. See BULLETIN INDUSTRIAL INSURANCE DEPARTMENT, WASH., May, 1920, p. 2; BULLETIN DEPARTMENT OF LABOR & INDUSTRIES, WASH., May, 1921, p. 4.

<sup>11</sup> The court did not decide whether the Workmen's Compensation Act involved allowed recovery on the basis of contract or of tort, but held it inapplicable since both the contract of employment and the injury were maritime.

Many statutes of the type here under consideration would not have the disturbing effect on navigation which seemed to influence the court in the *Jensen* case. See 244 U. S. 217. But the important consideration in these cases seems to be not the effect of the statute on navigation but its effect on maritime law. Thus a state statute creating a lien on a vessel enforceable *in rem* in a state court is valid if the cause of action is non-maritime. The *Winnebago*, 205 U. S. 354 (1907); *Cordrey v. The Bee*, 201 Pac. 202 (Oreg. 1921). See 35 HARV. L. REV. 613.

<sup>12</sup> See *Kennedy v. Cunard S. S. Co.*, 197 App. Div. 459, 189 N. Y. Supp. 402 (1921).

<sup>13</sup> See *Duart v. Simmons*, 231 Mass. 313, 121 N. E. 10 (1918); *Soderstrom v. Curry & Whyte*, 143 Minn. 154, 173 N. W. 649 (1919); *O'Brien v. The Scandinavian Line*, 94 N. J. L. 244, 109 Atl. 517 (1920); *Lawson v. N. Y. & P. R. S. S. Co.*, 148 La. 290, 86 So. 815 (1921); *Berry v. Donovan & Sons, Inc.*, *infra*, note 15, *contra*.



time contract.<sup>14</sup> The rights and remedies existing under the various compensation acts are admittedly not uniform throughout the United States. If the statutes carry this lack of uniformity into admiralty law, the result is considered objectionable whether recovery be on the basis of tort or of contract. If they do not, there can be no objection. Hence if the rights arise from a non-maritime contract and are accordingly enforceable only in common law courts or statutory commissions, the statute may properly apply.<sup>15</sup> It is true that in this case as well as in the case of a maritime contract the statute may deprive the injured workman of a maritime tort claim. The result of the *Rhode* case is, therefore, to sanction such a deprivation in the case of non-maritime contracts.

It may happen that the workman although employed under a non-maritime contract is, at the time of the injury, actually performing maritime labor.<sup>16</sup> But since the nature of the contract is decisive, it follows that this, as well as the fact that his injury itself may be maritime,<sup>17</sup> is immaterial. Conversely, if the contract of employment is maritime no recovery may be had under the act, even though the type of work being performed at the time of the injury, or even the injury itself,<sup>18</sup> is non-maritime. It may be objected that this latter proposition results in the doctrine that the federal grant of admiralty jurisdiction prevents the states from changing the law relating to non-maritime torts. But the statute held inapplicable is *ex hypothesi* regulating not the law of torts, but the rights and obligations arising from a maritime contract of employment. The distinction drawn by the court between statutory regulation of such a contract and of a non-maritime contract as in the *Rhode* case is therefore justifiable; though as an original question the soundness of the decision in the *Jensen* case may well be questioned.

<sup>14</sup> See *So. Pac. Co. v. Jensen*, *supra*, at p. 217. This would also dispose of the second objection to recovery in the *Jensen* case: *vis.*, that recovery in a state court on a maritime cause of action must be such as "the common law is competent to give." See 244 U. S. 218.

<sup>15</sup> The Supreme Court of Maine by an ingenious line of reasoning recently reached the result that under its elective statute recovery is always under a non-maritime contract. *Berry v. Donovan & Sons, Inc.*, 115 Atl. 250 (Me. 1921). See RECENT CASES, *infra*, p. 762. The court reasoned that even though the contract of employment is maritime, the election to come under the statute results in the creation of a separate contract, non-maritime in nature. The better view seems to be, however, that there is but one contract in which the provisions of the statute are implied. See cases cited in notes 6 and 13, *supra*.

<sup>16</sup> Thus a laborer may be hired to work generally on land but occasionally as part of his employment to aid in loading or unloading a vessel. See J. P. Chamberlain, "Legislation Now Needed to Restore Compensation to Longshoremen," 10 AM. LABOR LEGIS. REV. 242, where, however, it is assumed that the nature of the work actually being done at the time of the injury is decisive.

<sup>17</sup> See *McBride v. Standard Oil Co. of N.Y.*, 196 App. Div. 822, 188 N.Y. Supp. 90 (1921); *Riedel v. Mallory S.S. Co.*, 196 App. Div. 794, 188 N.Y. Supp. 649 (1921). A contract is non-maritime if the greater part of the service to be performed is non-maritime in nature. *Riedel v. Mallory*, *supra*; *The Pennsylvania*, 154 Fed. 9 (2nd. Circ., 1907).

<sup>18</sup> *Gray v. New Orleans Dry Dock & Shipbuilding Co.*, 146 La. 826, 84 So. 109 (1920); *Sullivan v. Hudson Navigation Co.*, 182 App. Div. 152, 169 N. Y. Supp. 645 (1918). (Affirmed, *sub. nom.* *Anderson v. Johnson Lighterage Co.*, 224 N. Y. 539, 120 N. E. 55; *Keator v. Rock Plaster Mfg. Co.*, 224 N. Y. 540, 120 N. E. 56 (1918); *certiorari* denied by the United States Supreme Court, 248 U. S. 574). Cf. *Klamath S. S. Co.*

**LIABILITY OF A COMMON CARRIER FOR INJURY TO GOODS ACCOMPANIED BY THE OWNER.** — The liability, which the law has normally imposed on the common carrier of goods, has been, since *Forward v. Pittard*<sup>1</sup> at least, the so-called liability of an insurer.<sup>2</sup> Whatever may be the historical explanation<sup>3</sup> of the imposition of this extraordinary liability it is clear that it arose as an incident to the law of bailments; the carrier is a bailee for hire.<sup>4</sup> Hence in determining whether or not the insurer's liability has attached with respect to any given shipment the first step in the inquiry is to see whether there has been a delivery to the carrier *qua* carrier.<sup>5</sup> Unfortunately it has been thought that this is the sole inquiry and that when the carrier has undertaken to transport goods in the ordinary course of his business the insurer's liability at once attaches.<sup>6</sup> Usually this is true.<sup>7</sup> But where the goods are accompanied by their owner the problem is by no means so simple.

It is conceded on the one hand that the owner may keep such exclusive control of his goods that the duty of the carrier is only that owed to a passenger.<sup>8</sup> On the other hand the mere fact that the owner is on the conveyance that is carrying his goods will not relieve the carrier of its "absolute" duty toward the goods.<sup>9</sup> To try the intermediate cases by seeking to determine whether or not there has been a bailment overlooks entirely the rational basis of the carrier's extraordinary liability, and begets the issue with innumerable questions as to the nature of possession,

9. Industrial Accident Commission, 177 Cal. 767, 177 Pac. 848, and the *dicta* in *Rorvick v. North Pac. Lbr. Co.*, 99 Oreg. 59, 75, 87, 190 Pac. 331, 336, 195 Pac. 163, 165 (1921).

<sup>1</sup> 1 T. R. 27 (1785).

<sup>2</sup> The only exceptions to an absolute liability for all accidents at first recognized were the cases of injury from acts of God and the King's enemies. See *Forward v. Pittard*, note 1, *supra*. To this have been added acts of public officials, acts of the owner, and injury arising from the inherent nature of the goods. See THOMPSON, NEGLIGENCE, 2 ed., § 6451 *et seq.*; Edwin C. Goddard, "Liability of the Common Carrier," 15 COL. L. REV. 399, 400. Compare ELLIOTT, RAILROADS, 3 ed., § 2201.

<sup>3</sup> For various historical explanations of the insurer's liability of the common carrier see HOLMES, THE COMMON LAW, 180, *et seq.*; Joseph H. Beale, "The Carrier's Liability: Its History," 11 HARV. L. REV. 158; opinion of Brett, J., in *Nugent v. Smith*, 1 C. P. D. 19, 28 (1875); opinion of Cockburn, C. J., in *Nugent v. Smith*, 1 C. P. D. 423, 428 (1876).

<sup>4</sup> See HOLMES, *supra*; Joseph H. Beale, "The Carrier's Liability," *supra*.

<sup>5</sup> See Joseph H. Beale, "The Beginning of Liability of a Carrier of Goods," 15 YALE L. J. 207.

<sup>6</sup> That one is a common carrier means only that he is in the business of carriage. See Edward A. Adler, "Business Jurisprudence," 28 HARV. L. REV. 135. Some courts have failed to recognize that it does not follow from the mere fact of being a common carrier of goods, irrespective of the circumstances of carriage, that the carrier is under an insurer's liability. See HOLMES, *op. cit.*, 204. For cases that seem to have failed to see this distinction between the function of the common carrier and its liability see *Whitmore v. Bowman*, 4 Green (Iowa) 148 (1853); *Wilson v. Hamilton*, 4 Ohio St. 722 (1855); *Pomeroy v. Donaldson*, 5 Mo. 36 (1837). In none of these cases was the discussion of absolute liability necessary to the decision of the case. *Bean v. Hinson*, 235 S. W. 327 (Tex. Civ. App., 1921). For the facts of this case see RECENT CASES, *infra*, p. 764. Cf. *Richards v. Fuqua's Adm'rs*, 28 Miss. 792 (1855); *Willoughby v. Horridge*, 12 C. B. 742 (1852).

<sup>7</sup> See Joseph H. Beale, "The Beginning of Liability of a Carrier of Goods," note 5, *supra*.

<sup>8</sup> *Evans v. Rudy*, 34 Ark. 383 (1879). See *Harvey v. Rose*, 26 Ark. 3 (1870); *Great Western Ry. Co. v. Bunch*, 13 A. C. 31 (1889).

<sup>9</sup> *Hannibal R. v. Swift*, 12 Wall. (U. S.) 262 (1870).

and the technical requirements of a bailment, which not only are unnecessary<sup>10</sup> but may lead to irrational results.<sup>11</sup>

The carrier of passengers is held only for the results of its negligence.<sup>12</sup> The only argument that can be made for making its duty stricter is that in this way losses which individuals can ill afford to suffer and for which the carrier would not otherwise be liable will be shifted to the community.<sup>13</sup> Such a method of shifting loss can work effectively only with the larger carriers. Moreover the carrier must be allowed to charge rates that will compensate it for the insurance service that it has been forced to provide. On a true insurance basis this rate must be determined from the probability of future accidents, which in turn depends on the number of accidents that have happened. If the number of accidents per year increases, the rate must increase correspondingly.<sup>14</sup> Protected thus from the results of accidents the carrier will have no economic pressure put upon it to prevent them. Though the individual is protected society is not.<sup>15</sup> Society's interest is in the conservation of life and property. To protect this interest liability for fault must be kept sharply distinct from and unaffected by any insurance provisions which are considered in fixing rates.<sup>16</sup> The present duty of the carrier seems best to attain this result, rates being fixed on a basis that excludes allowance for accidents. If insurance is desired it should be effected through some independent agency, which being subrogated to the rights of the injured could hold the carrier to account when it has been at fault.

The interests that are seeking protection in the case of the carrier of goods are analogous to those seeking protection in the case of the carrier

<sup>10</sup> In endeavoring to apply such a test it has been held, to avoid trouble arising from dual control of the goods, that the owner was the agent of the carrier. *Fisher v. Clisbee*, 12 Ill. 344 (1851). This reasoning is not generally accepted. See *Wilson v. Hamilton*, 4 Ohio St. 722 (1855); *Wyckoff v. Queens County Ferry Co.*, 52 N. Y. 32 (1873). That the question does not turn on the sole question of whether or not there has been a bailment of property is illustrated by the refusal to impose the insurer's liability in the case of transportation of slaves. *Boyce v. Anderson*, 2 Pet. (U. S.) 150 (1829).

<sup>11</sup> Thus A having two suit-cases might enter a train, carrying one suit-case himself, the other being carried by a porter. The suit-cases might be put down side by side. If the duty of the carrier with respect to these suit-cases is to be tested by the fact of bailment or no bailment its duty toward one may be a duty of care and toward the other absolute. See *Le Couteur v. London, etc. Ry. Co.*, 6 B. & S. 961 (1865). Cf. *Talley v. Great Western Ry. Co.*, L. R. 6 C. P. 44 (1870). If the carrier's duty were founded on contract there would be nothing strange in this. But the carrier's duty is one imposed by law because of considerations of policy. *Marshall v. York, etc. Ry. Co.*, 11 C. B. 555 (1851). See 28 HARV. L. REV. 620.

<sup>12</sup> *Christie v. Griggs*, 2 Campb. 79 (1809); *Ingalls v. Bills*, 9 Metc. (Mass.) 1 (1845). For a definition of the care for which the carrier is liable see *Louisville, etc. Ry. Co. v. Snyder*, 117 Ind. 435, 20 N. E. 284 (1889).

<sup>13</sup> See Arthur A. Ballantine, "Railway Accident Claims," 29 HARV. L. REV. 705.

<sup>14</sup> It is obvious in view of the constantly changing methods of transportation that no rate that could be fixed upon would do for all time. In fact to set a rate which should never be changed would in effect increase the compensation of the carriers because of the constant stream of safety appliances that are being added to those now in use.

<sup>15</sup> It must be remembered that no scheme of insurance can protect society — it can merely spread the loss over a greater number of individuals.

<sup>16</sup> Theoretically it is possible to make the carrier an insurer and still permit only those losses not caused by its negligence to enter as an element in rate fixing. But this would add great administrative difficulties to the already sufficiently arduous task of fixing rates.

of passengers.<sup>17</sup> But there is a real difference in the way in which the two businesses are carried on. The carrier of goods usually handles them out of the sight of their owner. There is a danger that some fraud may be practiced on the latter. If there is an accident he is ignorant of the facts — he cannot easily sustain the burden of proving the carrier's negligence. These are the only rational considerations which warrant the imposing of a more onerous burden on the carrier of goods than on the carrier of passengers.<sup>18</sup> Where, then, the owner is present, these considerations are neutralized and the rule that the carrier is subject to an insurer's liability is totally without logical foundation.<sup>19</sup> This is as a fact true, when the owner accompanies his goods, and in such cases the carrier should be liable only for the results of its negligence. The cases, however, while recognizing that the rigor of the carrier's liability as an insurer should be relaxed in some cases in which the carrier does not have the exclusive control of the goods<sup>20</sup> have been unwilling to go so far.<sup>21</sup> On the other hand it should be noted that in many of the cases in which the courts purport to hold the carrier strictly to an insurer's liability the carrier was in reality liable in any event because of its negligence.<sup>22</sup>

ALTERATION, CERTIFICATION, AND SUBSEQUENT *BONA FIDE* PURCHASE UNDER THE NEGOTIABLE INSTRUMENTS LAW. — A recent Illinois decision makes an important contribution to the interpretation of the Uniform Negotiable Instruments Law. A St. Louis bank drew

<sup>17</sup> Briefly these interests are on the one hand the interest of the operators of the carrier in obtaining a fair return on their investment and for their efforts, and the social interest in having them receive a fair return so that there will be an incentive to undertake to fill the social need for transportation facilities, and on the other hand the interest of those employing the carrier in the security of their persons — or in the case of carriage of goods in the security of their acquisitions — and the social interest in the preservation of the lives and health of the members of society — or in the case of goods in the conservation of economic wealth. As far as is possible the law tries to protect all of these interests. See Roscoe Pound, "Interests of Personality," 28 HARV. L. REV. 343.

<sup>18</sup> How weak these considerations are is illustrated by the fact that a contract that a carrier shall be liable only for the results of its negligence is valid. *Southern Ry. Co. v. Tollerson*, 135 Ga. 74, 68 S. E. 798 (1910). But the policy underlying the rule that the carrier is liable for negligence is so strong that the parties cannot contract out of the duty to use due care. *Railroad Co. v. Lockwood*, 17 Wall. (U. S.) 357 (1873). But see Edwin C. Goddard, "Liability of the Common Carrier," note 2, *supra*.

<sup>19</sup> The result of the shipper's presence has the effect of lessening the carrier's burden in another class of cases. If there is a contract which relieves the carrier from its absolute liability, in the case of injury to goods unaccompanied by the owner, the carrier has the burden of showing facts that will bring it within one of the exceptions of the contract. See *Terre Haute & L. R. Co. v. Sherwood*, 132 Ind. 129, 31 N. E. 781 (1892). Where the owner accompanies the goods, the burden of showing negligence is thrown on him. *Zimmerman v. Northern Pac. Ry. Co.*, 140 Minn. 212, 167 N. W. 546 (1918); *Colsch v. Chicago, etc. Ry. Co.*, 149 Iowa 176, 127 N. W. 198 (1910); *St. Louis, etc. Ry. Co. v. Weakly*, 50 Ark. 397, 8 S. W. 134 (1888).

<sup>20</sup> *Yerkes v. Sabin*, 97 Ind. 141 (1884); *White v. Winnisimmet Co.*, 7 Cush. (Mass.) 155 (1851). See *Bean v. Hinson*, note 6, *supra*; *Fierston v. Frazier*, 142 Ala. 232, 37 So. 825 (1904); *Sturgis v. Kountz*, 165 Pa. St. 358, 30 Atl. 976 (1895). See HUTCHINSON, CARRIERS, 3 ed., § 1264. But see *Hannibal R. v. Swift*, note 9, *supra*.

<sup>21</sup> See cases cited, notes 6 and 20, *supra*. The English rule on the whole would seem to be stricter than that of most of the American cases. *Great Western Ry. Co. v. Bunch*, note 8, *supra*; *Talley v. Great Western Ry. Co.*, note 11, *supra*; *Le Couteur v. London, etc. Ry. Co.*, note 11, *supra*.

<sup>22</sup> See *Bean v. Hinson*, note 6, *supra*.

a draft on a Chicago bank, payable to a Pittsburgh manufacturer. The draft was stolen from the mails by one Manning, who skilfully erased the name of the payee, inserted his own, and indorsed the instrument. He tendered the draft in payment for some diamonds which he purchased; a certification was secured, and the jewels were thereupon turned over to him. The jeweler deposited the draft with the defendant bank; it was paid through the clearing house, and the drawee, having discovered the forgery, sought to recover the money paid. The Supreme Court of Illinois denied recovery.<sup>1</sup>

The act makes it clear that certification is in all respects equivalent to acceptance.<sup>2</sup> With that point settled, the common-law authorities, though not entirely clear, seem to have held that a *bona fide* purchaser of an accepted bill was protected, though the amount were altered before acceptance.<sup>3</sup> Is the result the same under the Negotiable Instruments Law? Under § 62 "the acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance." It would seem that the drawee accepted no other instrument than the one presented to him, — the altered form, — and that it, if any, is the instrument he engages to pay.<sup>4</sup> This engagement, it is true, was obtained through mistake and fraud; but these facts, under § 55, merely created defects in the title which are unavailing against a holder in due course.<sup>5</sup> But here arise two puzzling questions. First, has the drawee "accepted" so as to give rise to an engagement to pay? Acceptance, says the act, "is the signification by the drawee of his assent to the order of the drawer."<sup>6</sup> Second, when the name of the payee has been altered, and the indorsement is in the altered form, is the purchaser a holder in due course? The answers to both of these questions depend upon whether that which the drawee has certified and authenticated is the old instrument in an altered form, or a new instrument drawn by the forger. If it is a new instrument, the drawee has accepted by assenting to the order of the new drawer — the forger; and the purchaser is a holder in due course of the accepted instrument. If it is not a new instrument, that to which the drawee has assented is not the order of the drawer; nor is the purchaser a holder in due course, since he is not the indorsee of the original payee or his order. There can hardly be a new instrument while the old one is still subsisting. Hence the argument for the new instrument is that the old one was destroyed by the alteration; for by § 124, "where a negotiable instrument is materially altered . . . it is avoided,

<sup>1</sup> National City Bank of Chicago v. National Bank of the Republic of Chicago, 300 Ill. 103, 132 N. E. 832 (1921). For the facts of this case see RECENT CASES, *supra*, p. 763.

<sup>2</sup> N. I. L., § 187.

<sup>3</sup> Langton v. Lazarus, 5 M. & W. 620 (1839); Louisiana Nat. Bank v. Citizens Bank, 28 La. Ann. 189 (1876); Ward v. Allen, 2 Metc. (Mass.) 53 (1840). Cases often cited to the contrary are, upon analysis, only decisions to the effect that a certification does not amount to an acceptance. See Marine Nat. Bank v. National City Bank, 59 N. Y. 67 (1874). Professor Melville M. Bigelow, in an article on "Alteration of Negotiable Instruments," 7 HARV. L. REV. 1, 7, 8, suggested that the rule stated in the text was not law, except where, as in Langton v. Lazarus, *supra*, and Ward v. Allen, *supra*, the alteration was made by the drawer. But this does not seem a sound basis for differentiation, when the authorities in the present note are placed on their proper basis.

<sup>4</sup> See BRANNAN, THE NEGOTIABLE INSTRUMENTS LAW, 3 ed., 225.

<sup>5</sup> N. I. L., §§ 57, 58.

<sup>6</sup> N. I. L., § 132.

except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers." This part of the section was copied from the English Bills of Exchange Act, under which, following the English common law, alteration by a stranger destroyed the instrument.<sup>7</sup> The argument *contra* cites the second paragraph of § 124, by which "when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor." This, it may be urged, embodies the American common law, by which alteration by a stranger did not destroy the instrument, and the holder at the time of alteration was still allowed to recover upon it.<sup>8</sup>

But all these arguments, though properly applicable, seem highly technical in the face of the practical facts that the drawee bank has authenticated an instrument in a certain form, and that commercial policy favors the protection of any one who, in due course, changes his position on the faith of that authentication. Hence the Illinois court, to protect the *bona fide* purchaser, seizes upon subsection 2 of § 62, whereby "the acceptor by accepting the instrument . . . admits . . . 2. The existence of the payee and his then capacity to indorse." This, they say, means the payee named in the altered instrument as presented for certification; and the estoppel — for it is just that — operates in favor of any indorsee of that named payee. But again we run into the technical questions: Has the drawee "accepted"? Does he "admit" to every one, or only to a holder in due course? Is the purchaser a holder in due course? To answer them we must revert to the involved suggestions in the preceding paragraph. To the court, the argument of practical commercial policy was evidently strong enough to absorb the difficulties and resolve the question in favor of the *bona fide* purchaser for value of the certified draft.

It is extremely important to distinguish the case outlined above from one where there has been no negotiation after acceptance — where the person from whom it is sought to recover payment, or against whom it is sought to defend an action on the acceptance, is the one who secured the acceptance or the payment without acceptance. Here there is no *bona fide* purchaser of the accepted instrument to cut off the defects of mistake and fraud. Should the drawee nevertheless be refused recovery of money thus paid under mistake of fact? That opens up the whole of the *Price v. Neal* controversy; the important thing to note is that *National City Bank v. National Bank of the Republic* can hardly be said to settle the effect of the act on the *Price v. Neal* situation, because of the intervention of the *bona fide* purchaser after acceptance. While the dictates of commercial policy may be the same in both situations,<sup>9</sup> they are, for the purposes of the act, distinctly different cases.<sup>10</sup>

<sup>7</sup> *Master v. Miller*, 4 T. R. 320 (1791). See *Davidson v. Cooper*, 13 M. & W. 343 (1844). See James Barr Ames, "The Negotiable Instruments Law — Some Necessary Amendments," 16 HARV. L. REV. 255, 260-261.

<sup>8</sup> *Bigelow v. Stilphen*, 35 Vt. 521 (1863). See *Piersol v. Grimes*, 30 Ind. 129, 130 (1868); *Presbury v. Michael*, 33 Mo. 542, 543 (1863).

<sup>9</sup> See, e.g., 31 YALE L. J. 522, which, attacking the problem from the practical aspect, fails to make any distinction between the two situations. See also 22 COL. L. REV. 260.

<sup>10</sup> It has been suggested that the language of § 62 necessarily abrogates the rule

THE IMMUNITY OF CONSULS FROM THE PROCESS OF STATE COURTS. — International law gives to consuls, unlike diplomats,<sup>1</sup> no immunity from civil<sup>2</sup> or criminal<sup>3</sup> process. Although a consul is employed by a foreign power much as is a diplomat, yet he is not, on the one hand, as important a figure in international political relations; and he is more apt, on the other hand, to be concerned primarily with private transactions; so that it is convenient to subject him to the jurisdiction of local courts.<sup>4</sup> Nevertheless, a somewhat questionable policy of showing a certain peculiar respect<sup>5</sup> to consuls has led to the constitutional provision giving the Supreme Court original jurisdiction in cases affecting them.<sup>6</sup> This policy appears again in the statute<sup>7</sup> giving federal courts exclusive jurisdiction in proceedings, civil<sup>8</sup> and criminal,<sup>9</sup> against diplomats and

of the American common law, that the drawee who accepted a raised check was not liable thereupon, or could recover the money paid to an innocent purchaser. See James Barr Ames, "The Doctrine of *Price v. Neal*," 4 HARV. L. REV. 287, 306; BRANNAN, THE NEGOTIABLE INSTRUMENTS LAW, 3 ed., 225; 2 WILLISTON, CONTRACTS, § 1160. But the authorities have not been favorable to this view. McClendon v. Bank of Advance, 188 Mo. App. 417, 174 S. W. 203 (1915); Interstate Trust Co. v. United States Nat. Bank, 67 Colo. 6, 185 Pac. 260 (1919); National Reserve Bank v. Corn Exchange Bank, 157 N. Y. Supp. 316 (App. Div., 1916). National City Bank v. National Bank of the Republic, *supra*, is not necessarily contrary to these authorities, since it extends the estoppel of § 62, subsection 2, no further than to one who gives value, without notice, on the faith of the certification.

<sup>1</sup> See HERSHEY, DIPLOMATIC AGENTS AND IMMUNITIES, 102-165. For the difference between the two classes of representatives, see *In re Baiz*, 135 U. S. 403 (1890). The immunities of consuls in non-Christian countries are often, by treaty, much like those of diplomats in countries subject to our system of international law. See *Mahoney v. United States*, 10 Wall. (U. S.) 62, 66 (1869). See HALL, INTERNATIONAL LAW, 7 ed., 332 n.

<sup>2</sup> *In re Baiz*, *supra*. A consul acting as judge has, of course, judicial immunities. *Haggard v. Pelicier*, [1892] A. C. 61.

<sup>3</sup> *The United States v. Ravara*, 2 Dall. (U. S.) 297 (1793).

<sup>4</sup> See STOWELL, LE CONSUL, 177-180.

<sup>5</sup> See HALL, INTERNATIONAL LAW, 7 ed., 329-332; 1 OPPENHEIM, INTERNATIONAL LAW, §§ 434, 435. But see 8 OPINIONS OF THE ATTORNEY GENERAL, 169-175. In accord with this policy, particular immunities have been granted by the powers in treaties. *In re Dillon*, 7 Sawy. (U. S.) 561 (D. Cal., 1854) — (immunity from operation of *subpoena duces tecum*); *United States v. Trumbull*, 48 Fed. 94 (S. D. Cal., 1891) — (immunity from duty to testify); *Kessler v. Best*, 121 Fed. 439 (S. D. N. Y., 1903) — (privilege of official archives of consulate). Such immunities are often limited to consuls who are citizens of the countries they represent. See *Börs v. Preston*, 111 U. S. 252, 262-263 (1884).

<sup>6</sup> CONSTITUTION OF THE UNITED STATES, Art. 3, sec. 2.

<sup>7</sup> The provision appeared first in the Judiciary Act of 1789, 1 STAT. AT L. 77; 1875 U. S. REV. STAT., § 711, par. 8. See *Börs v. Preston*, *supra*. It was dropped from the statutes in 1875. 18 STAT. AT L. 318. The state and federal courts then had concurrent jurisdiction of proceedings against consuls. *Wilcox v. Luco*, 118 Cal. 639, 50 Pac. 758 (1897); *Scott v. Hobe*, 108 Wis. 239, 84 N. W. 181 (1900). The provision was reëmbodied in the statutes of 1911. 36 STAT. AT L. 1161.

<sup>8</sup> *Sartori v. Hamilton*, 13 N. J. L. 107 (1832); *Davis v. Packard*, 7 Pet. (U. S.) 276 (1833); 8 Pet. (U. S.) 312 (1834); *Higginson v. Higginson*, 158 N. Y. Supp. 92 (1916). The exemption was held inapplicable to actions *in rem*. *Reclamation District v. Runyon*, 117 Cal. 164, 49 Pac. 131 (1897) — (decided, in fact, when the provision was not in force). It was held inapplicable to a summons of a consul as garnishee. *Kidderlin v. Meyer*, 2 Miles (Pa. Dist. Ct.) 242 (1838). It applied to an attachment against a debtor consul. In the Matter of Aycinena, 1 Sandf. (N. Y.) 690 (1848).

<sup>9</sup> *Commonwealth v. Kosloff*, 5 Serg. & R. (Pa.) 545 (1816). There appears to be no force in the argument that, as there is no federal common law of crimes, the enact-

consuls. As it protects interests of the United States and of foreign governments, a consul cannot waive his immunity from state jurisdiction.<sup>10</sup>

On the termination of a diplomat's official position, his immunities continue for a reasonable period of preparation for departure, and then cease.<sup>11</sup> It is unlikely that the words of the statute would be so liberally construed as to give a consul a similar continuing exemption from state jurisdiction in cases involving his acts after he has ceased to hold his position. But do they give him such exemption in cases involving his unofficial<sup>12</sup> acts while consul? A recent case holds that they do not.<sup>13</sup>

The answer to the question depends on the implications of the statute, which in turn depend on the nature of the policy behind the statute. The provisions dealing with the subject may be regarded as inspired by a proper sense of the respect due consuls and of the danger of international complications<sup>14</sup> resulting from disputes in which they are involved. Congress may have considered it of the utmost importance to keep all proceedings against consuls in the hands of the Federal Government. On this view, the word "consuls" in the statute should be construed broadly. The necessity for respect and the danger of complications do not cease on the revocation of a consul's authority. His immunity from the process of state courts in cases involving his acts while consul ought to continue, at least for a reasonable time, after such a revocation.

On the other hand, it is probable that the legislative conception of the policy behind the inclusion of consuls with diplomats in the laws under discussion was largely the result of a popular confusion of the positions occupied by the two classes of foreign representatives.<sup>15</sup> The absence

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ment could not have been intended to deprive the states of jurisdiction of criminal cases against consuls. Cf. *State v. De La Foret*, 2 Nott & McC. (S. C.) 217 (1820), *contra*. It has been held that the provision did not entitle a consul to be released, on *habeas corpus*, in case of an arrest on a state court's warrant. *In re Iasigi*, 79 Fed. 751 (S. D. N. Y., 1897); *Iasigi v. Van De Car*, 166 U. S. 391 (1897). It has been suggested that the change in the statutes made in 1875 did not restore criminal jurisdiction over consuls to state courts. *In re Iasigi*, *supra*, at pp. 753-754.

<sup>10</sup> *Davis v. Packard*, *supra*; *Durand v. Halbach*, 1 Miles (Pa.) 46 (1835); *Valarino v. Thompson*, 7 N. Y. 576 (1853). See also *Miller v. Van Loben Sells*, 66 Cal. 341, 5 Pac. 512 (1885), where the change in the statutes was apparently overlooked. Cf. *Hall v. Young*, 3 Pick. (Mass.) 80 (1825), *contra*.

<sup>11</sup> See HERSHEY, *DIPLOMATIC AGENTS AND IMMUNITIES*, 199-204; 12 HARV. L. REV. 495.

<sup>12</sup> A consul is, of course, not liable, civilly at least, for acts done in his official capacity. *Jones v. Le Tombe*, 3 Dall. (U. S.) 384 (1798).

<sup>13</sup> *People v. Savitch*, 190 N. Y. Supp. 759 (1921). The consul was held indictable in the state court, after the revocation of his *exequatur* by the President, for crimes committed while consul. For the facts of this case, see RECENT CASES, *infra*, p. 763. For the effect of the revocation of an *exequatur*, see *Coppell v. Hall*, 7 Wall. (U. S.) 542, 553 (1868); *Seidel v. Peschkaw*, 27 N. J. L. 427, 430 (1859). See 1 OPPENHEIM, *op. cit.*, § 436. The recall of a consul ought to have no different effect in this respect from that of the revocation of an *exequatur*; except that it perhaps more clearly terminates a consul's claim to special consideration.

<sup>14</sup> See *In re Dillon*, *supra*. For an account of the difficulties in which this case involved the government, see 5 MOORE, *INTERNATIONAL LAW DIGEST*, 78-81. See also the first set of cases in note 8, *supra*.

<sup>15</sup> The misconception in question was strengthened and perhaps originated by some often quoted statements of Vattel. See VATTIEL, *LAW OF NATIONS*, Bk. II, Ch. II, § 34.



of any discussion of the question, either in the Constitutional Convention or in Congress, would lend support to this view.<sup>16</sup> The actual position of consuls makes it unlikely that a legislature would deliberately extend to them any considerable immunities. They have no great international political importance. They are often nationals of the country to which they are representatives. Scattered in large numbers over the land, they are frequently engaged in a variety of private enterprises. The uncompensated inconvenience which the assertion of consuls' immunities may involve thus becomes a strong argument for a literal interpretation of the words of the statute creating them.<sup>17</sup> On such an interpretation, a consul's loss of his authority involves also a loss of all immunity from suit or prosecution in state courts.

THE MEANING OF "CLEAN HANDS" IN EQUITY — When may a defendant in equity, without a defense upon the merits, appeal to the doctrine of "clean hands" to put his opponent out of court? Courts have long agreed that the plaintiff's alleged misconduct must have reference to the very matters in controversy,<sup>18</sup> but beyond this vague generalization, decisions offer no consistent guide. The demand for predicability in judicial decisions requires that the Chancellor's discretion be controlled by some more clear and definite principle. Situations may be classified as: (1) cases where the plaintiff is engaged in a continuing course of fraudulent or illegal conduct, more or less closely connected with the subject-matter of the suit; and (2) cases where the plaintiff's misconduct is at an end, and he seeks restoration of the *status quo*, or other affirmative relief.

In the first type, if the desired relief would further the wrongdoing, no matter against whom the latter is directed, it obviously ought to be denied. One need not here be concerned over the defendant's unearned victory. Justice is not served by substituting an injury to a third party for an injury to the plaintiff. Whether the judicial aid invoked will assist in effectuating a wrong may often be a question of degree, analo-

<sup>16</sup> See FARRAND, THE RECORDS OF THE FEDERAL CONVENTION, Vol. II, 173, 186, 424, 432-433, 576, 600-601, 661; Vol. III, 220; THE FEDERALIST, No. 80. The only reported reference to the matter in the debates on the original bill was made by Mr. Smith of South Carolina, in the House of Representatives. He expressed an intention to move to strike out the provision giving the district courts exclusive jurisdiction over consuls and vice-consuls. Nothing more is said of this motion. The bill passed containing the provision. See 1 ANNALS OF CONGRESS, 799. See 46 CONGRESSIONAL RECORD, 308, 1538, 3216-3220, 3760-3764, 3853, 3998-4008, 4012.

<sup>17</sup> See Valarino v. Thompson, *supra*; Iasigi v. Van De Car, *supra*. The inconveniences may arise in civil or criminal proceedings; they may be produced by mistakes of fact or of law; they may or may not be aggravated by a delay in claiming immunity until the outcome of a preliminary trial.

<sup>18</sup> "He who comes into equity must come with clean hands," see 1 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 399. Sometimes phrased, "He that hath committed iniquity shall not have equity," see FRANCIS, MAXIMS OF EQUITY, 5. For the sources of maxims in our law, see Roscoe Pound, "The Maxims of Equity," 34 HARV. L. REV. 809, 827-836.

<sup>19</sup> Lewis' Appeal, 67 Pa. St. 153 (1870); Kinner v. Lake Shore Ry. Co., 69 Ohio St. 339, 69 N. E. 614 (1903). See 1 POMEROY, *op. cit.*, § 399; BISPHAM, PRINCIPLES OF EQUITY, 9 ed., § 42.

gous to the difficult problem at law of when a contract becomes unenforceable by reason of its relation to a crime.<sup>3</sup> The decisions on this point seem very satisfactory. Thus protection is refused for a trade-name which is in itself misleading.<sup>4</sup> The court will not lend its aid to a continuing fraud on the public.<sup>5</sup> On the other hand, protection will not be denied to an honest label because others used by the complainant are objectionable.<sup>6</sup> Nor will participation in a restraint of trade debar a plaintiff from preventing infringement of his trade-mark rights,<sup>7</sup> or from enjoining trespass by strikers.<sup>8</sup>

In the second type of case, where the plaintiff seeks property wrongfully withheld by the defendant, or such other relief as would *prima facie* be proper as between the parties, equity cannot in justice say, "the right on which your claim for relief is based involves past injustice to a third party, therefore we refuse to protect you." A sweeping rule to this effect would indeed be to some extent a deterrent to illegal projects. But only when such a deterrent is most clearly demanded by public welfare—as perhaps in the classic case of grave and heinous crime, where one conspirator demands from another his share of the booty<sup>9</sup>—can equity justifiably leave parties exposed to indiscriminate plunder. Any general rule debarring a plaintiff because of past illegal transactions with reference to the subject matter of the suit encourages the unscrupulous to take advantage of persons whose rights, they believe, will not bear rigid scrutiny.<sup>10</sup> It also means that in any equitable proceeding endless collateral and irrelevant issues must be tried out at the instance of a defendant without merits of his own.<sup>11</sup> It leads in short to the conclusion that the Chancellor, since he cannot, *ex hypothesi*, do full justice, not having the injured outsider before the court, must therefore refuse to do justice as between the parties. That this is actually the result of many cases<sup>12</sup> seems due chiefly to the use of the maxim as if it were a self-explanatory rule of decision. From other cases,<sup>13</sup> however, it is clear that the maxim, despite its misleading wording,<sup>14</sup> is not aimed at any such personal disqualification of the plaintiff. If the maxim were phrased "he who comes into equity must come with clean demands," it would more plainly disclose its rationale.

<sup>3</sup> "It may be that as in the case of attempts, the line of proximity will vary somewhat according to the gravity of the evil apprehended, and in different courts with regard to the same or similar matters." Per Holmes, C. J., in *Graves v. Johnson*, 179 Mass. 53, 58, 60 N. E. 383, 383, (1901).

<sup>4</sup> *Worden v. California Fig Syrup Co.*, 187 U. S. 516 (1903).

<sup>5</sup> See 31 HARV. L. REV. 889.

<sup>6</sup> *Shaver v. Heller & Merz Co.*, 108 Fed. 821 (8th Circ., 1901).

<sup>7</sup> *General Electric Co. v. Re-New Lamp Co.*, 128 Fed. 154 (D. Mass., 1904).

<sup>8</sup> *Coeur D'Alene, etc. Co. v. Miners' Union*, 51 Fed. 260 (D. Idaho, 1892).

<sup>9</sup> *Everet v. Williams*, See 9 LAW QUART. REV. 197.

<sup>10</sup> See John H. Wigmore, "A Summary of Quasi-Contracts," 25 AM. L. REV. 695, 712 (k).

<sup>11</sup> See *Langley v. Devlin*, 95 Wash. 171, 188, 163 Pac. 395, 401 (1917).

<sup>12</sup> *Herman v. Jeuchner*, 15 Q. B. D. 561 (1885); *Dent v. Ferguson*, 132 U. S. 50 (1889).

<sup>13</sup> See *infra*, notes 18, 22, 24, 26, 28.

<sup>14</sup> That the literal import of the maxim is no safe guide is apparent from the fact that immorality and degraded character have long been held not to make a plaintiff's hands unclean. *Dering v. Earl of Winchelsea*, 1 Cox Eq. 318 (1787); *Wright v. Wright*, 51 N. J. Eq. 475, 26 Atl. 166 (1893).

Courts have generally agreed that a party to an illegal executory contract may rescind and recover for benefits conferred.<sup>16</sup> To this rule the law of quasi-contracts makes an exception in the case of *mala in se*, thus in effect recognizing the paramount policy in favor of every possible deterrent to very serious crime.<sup>16</sup> It has been assumed that the law as to fraudulent conveyances which in some jurisdictions permits a repentant grantor to recover back the property is only for the benefit of creditors.<sup>17</sup> Yet courts of high authority have held that when the grantor shows any independent ground for equitable relief, as for instance that a deed absolute was in fact a mortgage, he does not lose his rights as against the grantee because the transaction also was a fraud on creditors.<sup>18</sup> Where an express trust for an illegal purpose has failed, a resulting trust arises for the benefit of the settlor's heirs or next of kin.<sup>19</sup> But as to whether, after the accomplishment or failure of the illegal purpose, the settlor himself may insist upon a reconveyance from the trustee, there is disagreement.<sup>20</sup> In a case involving an advance of money to create a fictitious appearance of financial trustworthiness, it has been held in England that he cannot.<sup>21</sup> This decision is not easily reconcilable with certain prior English cases which had refused to find in past misconduct a bar to equitable relief.<sup>22</sup> The same considerations must govern the exercise of jurisdiction in the frequent case where a partner in a firm which was organized for, or engaged in, illegal business asks an accounting. Although the prevailing rule would deny relief as to all property wrongfully acquired,<sup>23</sup> yet courts, including the United States Supreme Court, have seized upon slight — and it is believed inconsequential — distinctions by which to escape the supposed necessity of applying the maxim. Thus where the property has been converted into a new form,<sup>24</sup> or where after its acquisition there has been an account stated,<sup>25</sup> or where it has been transferred to a third party in trust for the plaintiff,<sup>26</sup> the latter's hands are considered sufficiently "cleansed."

The majority of recent cases show a wholesome tendency to grant

<sup>16</sup> *McCall v. Whaley*, 52 Tex. Civ. App. 646, 115 S. W. 658 (1909); *Deaton v. Lawton*, 40 Wash. 486, 82 Pac. 879 (1905).

<sup>17</sup> See KEENER, *QUASI-CONTRACTS*, 259.

<sup>18</sup> *Carll v. Emery*, 148 Mass. 32, 18 N. E. 574 (1888); *Symes v. Hughes*, L. R. 9 Eq. 475 (1870).

<sup>19</sup> *Livingston v. Ives*, 35 Minn. 55, 27 N. W. 74 (1885); *Halloran v. Halloran*, 137 Ill. 100, 27 N. E. 82 (1890); *Harvey v. Varney*, 98 Mass. 118 (1867); *Nichols v. Patten*, 18 Me. 231 (1841); *Clemens v. Clemens*, 28 Wis. 637 (1871).

<sup>20</sup> See 3 POMEROY, *EQUITY JURISPRUDENCE*, 3 ed., § 1032. See SCOTT, *CASES ON TRUSTS*, 366, n. 1.

<sup>21</sup> *Cf. Pawson v. Brown*, L. R. 13 Ch. Div. 202 (1878); *Stevens v. Ely*, 1 Dev. Eq. (N. C.) 493 (1830); *Lemmond v. Peoples*, 6 Ired. Eq. (N. C.) 137 (1849). See 1 PERRY, *TRUSTS*, 5 ed. § 21.

<sup>22</sup> *In re Great Berlin Steamboat Co.*, 26 Ch. D. 616 (1884).

<sup>23</sup> *Cf. Faikney v. Reynous*, 4 Burr. 2069 (1767). See English cases cited in note 26 *infra*.

<sup>24</sup> See LINDLEY, *PARTNERSHIP*, 7 ed., 118-125. For a review of authorities *contra* see *McDonald v. Lund*, 13 Wash. 412, 43 Pac. 348 (1896).

<sup>25</sup> *Brooks v. Martin*, 2 Wall. (U. S.) 70 (1863). But see *McMullen v. Hoffman*, 174 U. S. 639, 666 (1899).

<sup>26</sup> *McDonald v. Lund*, *supra*, note 23. See *Leonard v. Poole*, 114 N. Y. 371, 379, 21 N. E. 707, 709 (1889).

<sup>27</sup> A line of English cases establish the general principle that where a contract as

equitable relief, where proper as between the parties, very much as a matter of course,<sup>27</sup> and without inquisition into the merits and demerits of the transactions through which the plaintiff derives his rights.<sup>28</sup> Thus, where title to public land had been granted to the defendant under misinterpretation of a statute, a state court imposed upon him a constructive trust in favor of the plaintiff whose claim, though superior to that of the defendant, was secured from their common grantor by fraud.<sup>29</sup> At about the same time, however, a federal court denied protection to an infant who had repudiated her professional contract as against the co-contractor who was using the defunct contract to hinder the infant plaintiff from securing employment elsewhere.<sup>30</sup> It will scarcely be urged that the policy against infants repudiating their agreements is stronger than against grantees securing property rights by fraud. One is forced to the conclusion that in the case of the infant, the judge laid hold of the maxim, as a means to punish the plaintiff—a function which equity did not assume even in the days when the Chancellor, as an ecclesiastic, might have been pardoned for more strenuous insistence upon his tribunal as a “court of conscience.”<sup>31</sup>

**RESCISSION OF A CONTRACT FOR A MUTUAL MISTAKE OF FACT.**—“To formulate an accurate and practically applicable definition of the mistake of fact which will warrant rescission of a contract, has been apparently well nigh the despair of law writers.”<sup>1</sup> If text writers and court are unable to agree even on what a mistake is,<sup>2</sup> such confusion and uncer-

between the parties A and B is illegal and unenforceable, yet if A in pursuance of it transfers property to a third person in trust for B, B may recover the property. *Tenant v. Elliott*, 1 Bos. & P. 3 (1797); *Farmer v. Russell*, 1 Bos. & P. 296 (1798); *Worthington v. Curtis*, L. R. 1 Ch. Div. 419 (1875). See also *Sharp v. Taylor*, 2 Phill. Ch. 801 (1848), criticized, however, in *Sykes v. Beadon*, L. R. 11 Ch. Div. 170, (1879). It is generally held that as agent must account for money received in his principal's illegal business. *Baldwin v. Potter*, 46 Vt. 402 (1874); *Planters' Bank v. Union Bank*, 16 Wall. (U. S.) 483 (1872); *Murray v. Vanderbilt*, 39 Barb. (N. Y.) 140 (1863); *Wilson v. Owen*, 30 Mich. 474 (1874). For a discussion and criticism of these cases, see 3 WILLISTON, CONTRACTS, §§ 1785-1786.

<sup>27</sup> See F. Pollock, “The Expansion of The Common Law,” 4 COL. L. REV. 12, 27.

<sup>28</sup> *American Ass'n, Ltd. v. Innis*, 109 Ky. 595, 60 S. W. 388 (1901); *Cochran Timber Co. v. Fisher*, 100 Mich. 478, 157 N. W. 282 (1916); *Warfield v. Adams*, 215 Mass. 506, 102 N. E. 706 (1913); *Ely v. King-Richardson Co.*, 265 Ill. 148, 106 N. E. 619 (1914); *Langley v. Devlin*, *supra*, n. 11; *Mo. Fidelity & Casualty Co. v. Art Metal Const. Co.*, 242 Fed. 630 (8th Circ. 1917).

<sup>29</sup> *Everett v. Wallin*, 184 N. W. 958 (Minn. 1921). For the facts of this case see RECENT CASES, *infra*, p. 774.

<sup>30</sup> *Carmen v. Fox Film Corp.*, 269 Fed. 928 (2nd Circ., 1920). See 30 YALE L. J. 522.

<sup>31</sup> In *Ward v. Lant*, Prec. Ch. 182, 183 (1701) there is a *dictum* that where a person has executed a voluntary deed “to screen himself from taxes” he may nevertheless have relief concerning it in equity.

“This court is not a Court of Conscience,”—per Buckley, J., in *In re Telescriptor Syndicate*, (1903) 2 Ch. 174, 195.

<sup>1</sup> *Per Dodge, J.*, in *Kowalke v. Milwaukee Electric Lt. & Ry. Co.*, 103 Wis. 472, 473, 79 N. W. 762, 763 (1899). See W. W. Kerr, “The Equitable Doctrine as to Mistake,” 3 JURID. SOC. PAP. 173; Roland R. Foulke, “Mistake in the Formation and Performance of Contracts,” 11 COL. L. REV. 197.

<sup>2</sup> Thus mistake as “some unintentional act, or omission or error,” as defined by Mr. Justice Story in his EQUITY JURISPRUDENCE, 14 ed., § 156, is criticized by Mr. Pomeroy as a description of the effects of mistake, or the consequences arising therefrom,

tainty as to its legal consequences are to be expected. The situation is aggravated by a failure to realize that results under the subjective theory of contracts, where great importance is placed upon the meeting of the minds of the parties, will be materially different from results under the objective theory, which emphasizes their expressions.<sup>3</sup> Further confusion arises when mutual misunderstandings,<sup>4</sup> where there is no contract at all — since both parties are justified in reasonably construing the offer to refer to a different matter — are classified as cases of mutual mistakes of fact; or when no distinction is drawn between the cases where the mistake is set up as a defense to a suit for specific performance,<sup>5</sup> and as a ground for rescinding the whole transaction.

Suppose there has been an expression of agreement, and the agreement does conform to the intention of the parties,<sup>6</sup> but both parties have made a mistake as to the way their agreement would apply to existing facts.<sup>7</sup> In such a case when will relief be given?<sup>8</sup> While numerous tests<sup>9</sup> have been laid down to guide the courts, there seem to be two generally recognized theories of which various other suggestions are

rather than its essential features, which he regards as "an erroneous conviction, — a mental condition." See 2 POMEROY, EQUITY JURISPRUDENCE, 4 ed., § 839; 3 WILLISTON, CONTRACTS, § 1535; Roland R. Foulke, *op. cit.*, 199.

<sup>3</sup> Under the subjective theory any material mistake would be fatal unless an estoppel were made out. See 3 WILLISTON, CONTRACTS, § 1546. Consequently the Civil Law was liberal in its relief. See CLARK, EQUITY, § 370; POUND, READINGS IN ROMAN LAW, 2 ed., 39.

<sup>4</sup> *Raffles v. Wichelous*, 2 H. & C. 906 (1864); *Crowe v. Lewin*, 95 N. Y. 423 (1884). See CLARK, EQUITY, § 370; 1 WILLISTON, CONTRACTS, §§ 20, 94, 95a. A situation where A is mistaken as to a fact, and B is not; but B is mistaken in that he erroneously believes that A is not mistaken as to that fact, is a case of two different mistakes but not a mutual mistake. For a clear analysis of just what the nature of a mutual mistake is, see Edwin H. Abbot, Jr., "Mistake of Fact As a Ground For Affirmative Equitable Relief," 23 HARV. L. REV. 608.

<sup>5</sup> The remedy of specific performance is said to be discretionary. *Hess v. Bowen*, 241 Fed. 659 (8th Circ., 1917). A mistake which will justify a denial of specific performance need not be as strong as that requisite for rescission, which has the effect of doing away with the entire bargain. Thus a unilateral mistake has not infrequently been held sufficient excuse for the court's denial of specific performance. *Rushton v. Thompson*, 35 Fed. 635 (D. Neb., 1888); *Mansfield v. Sherman*, 81 Me. 365, 17 Atl. 300 (1889). See CLARK, EQUITY, § 356; 3 WILLISTON, CONTRACTS, §§ 1427, 1542. But see *contra*, 2 ILL. L. REV. 267.

<sup>6</sup> Where the written agreement does not correctly express the agreement of the parties the remedy is reformation. *Philippine Sugar Co. v. Govt. of the Philippine Is.*, 247 U. S. 385 (1917); *Gaylord v. Pelland*, 169 Mass. 356, 47 N. E. 1019 (1897).

The quantum of error necessary for reformation as in defense to specific performance need not be so great as for rescission, as the parties are still left with a contract. See note 5, *supra*.

<sup>7</sup> For a discussion of the legal consequences of a mistake of law, which is beyond the scope of this note, see 3 WILLISTON, CONTRACTS, § 1581; 2 POMEROY, EQ. JUR. 4 ed., § 840; CLARK, EQUITY, § 370. See also 38 AM. L. REG. 89; 14 VA. L. REG. 136. As to when rescission will be allowed for a unilateral mistake see Roland R. Foulke, *op. cit.*, 197, 224; 3 WILLISTON, *op. cit.*, § 1573.

<sup>8</sup> The Statute of Frauds interposes no obstacle to the remedy of rescission. *Davis v. Ely*, 104 N. C. 16, 10 S. E. 138 (1889).

<sup>9</sup> For an able discussion of the question of error and the basic fact test, although the writer gives it a questionable terminology, see Edwin H. Abbot, Jr., *op. cit.*, 23 HARV. L. REV. 608. See also a rather ingenious but hardly tenable analysis, L. L. Leonard, "An Analysis of the Law of Mistake of Fact As Applied in the Avoidance of Contracts," 64 ALB. L. J. 148. And see 3 CORNELL L. Q. 142; 2 POMEROY, *op. cit.*, § 856.

merely ramifications: (1) the identity of subject matter test; and (2) the basic fact test.<sup>10</sup>

A common instance where under either test relief will always be granted is where there is a mistake as to the existence of the subject matter of the bargain,<sup>11</sup> — unless the parties bargain for a risk.<sup>12</sup> On the other hand, in case of speculative contracts<sup>13</sup> courts should never interfere in the absence of special circumstances. Thus in transactions on the exchange or where there is a compromise settlement<sup>14</sup> the parties are dealing with their eyes open, and with a view either to taking a risk

<sup>10</sup> The German Civil Code provides: "If the declarant was at the time of the declaration (of will) mistaken as to the substance of the same or did not at all intend to make such a declaration he may contest the same, when it is to be assumed that he would not have made it, had he known the facts and had he considered the matter advisedly. A mistake relating to such qualities of persons or things, which in ordinary dealings are considered material, shall be regarded as a mistake as to the substance of the declaration." See GERM. CIV. CODE, § 119. This section is sometimes quoted as "not greatly differing" from the basic fact test. See 3 WILLISTON, CONTRACTS, § 1546. It is submitted that this position might be questioned. The first part of this section is beyond that to which most Anglo-American courts would go, as we do not have the policy of the Civil Law that the declarant, if he is to be given relief, must compensate the one who relies upon his declaration. See GERM. CIV. CODE, § 122. On the other hand, the last part of section 119 would limit the relief to cases where the subject matter was affected, which is a doctrine narrower than the one here advocated but broader than the old test of identity.

An illustration will bring out the distinctions. (1) A and B contract for the sale of a certain shipload of sugar. The ship, unknown to the parties, has been sunk and the sugar destroyed at the time the bargain was made. Relief would be given under the identity test, the German Code and the basic fact test. See note 11, *infra*. (2) If the sugar were in existence, but only badly spoiled, at the time of the bargain, or of a much inferior quality, there should be no relief under the identity test. See note 24, *infra*. But there would be ground for relief under either of the other two theories. See note 27, *infra*. (3) If the sugar is in existence and the quality as agreed, but the parties had taken as the fundamental basis of their agreement that the government had fixed the price at a certain point, and had contracted on that assumption, and that assumption was erroneous, then relief could be given only under the basic fact test.

<sup>11</sup> *Hastie v. Couturier*, 9 Exch. 102 (1853); *Clifford v. Watts*, L. R. 5 C. P. 577 (1870); *Scott v. Coulson*, [1903] 2 Ch. 249; *Gibson v. Pelkie*, 37 Mich. 380 (1877); *Reigel v. American Life Ins. Co.*, 140 Pa. 193, 21 Atl. 392 (1891).

The decision in *Scott v. Coulson*, *supra*, has been criticized on the ground that the mistake was only collateral and did not go to identity — the subject matter being an insurance policy (held by the beneficiary) and the mistake being as to the existence of the insured. See 47 SOL. J. 313. The general principle, however, is quite well established. See ANSON, *op. cit.*, § 187; 3 WILLISTON, CONTRACTS, § 1561; UNIFORM SALES ACT, §§ 7, 8.

There is an analogy between the defense of mistake and the misnamed defense of impossibility. In their essential nature they are both the same. In the one case the mistake is as to an existing subject matter, or means of performance, or a fact which the parties take as the fundamental basis of their agreement; and in the other, it is as to the future existence of the subject matter or means of performance. See 3 WILLISTON, *op. cit.*, § 1937.

<sup>12</sup> *Butte v. Thompson*, 13 M. & W. 487 (1844); *Lehigh Zinc & Iron Co. v. Bamford*, 150 U. S. 665 (1893); *Valley City Milling Co. v. Prange*, 123 Mich. 211, 81 N. W. 1074 (1900). In case of doubt the court favors a construction not imposing a risk. *Virginia Iron Co. v. Graham*, 124 Va. 692, 98 S. E. 659 (1919).

<sup>13</sup> In the absence of fraud or bad faith no relief will be granted on the ground of mistake in speculative contracts. *Jefferys v. Fairs*, L. R. 4 Ch. Div. 448 (1876); *Bell v. Lawrence's Admns.*, 51 Ala. 160 (1874); *Chicago & N. W. Ry. Co. v. Wilcox*, 116 Fed. 913 (8th Cir., 1902). See 2 POMEROY, EQ. JUR. 4 ed., § 855.

<sup>14</sup> *Sears v. Leland*, 145 Mass. 277 (1887). In these cases the parties make a settle-

or closing up the matter. For a court here to go into the question of error would be unwise and contrary to business understanding.

It is the intermediate class of cases which raises the difficulty. Under the first test the mistake of the parties is no ground for relief unless the identity of the subject matter is so affected that what the parties are getting is not the *thing* for which they bargained. Accordingly, courts acting on this basis have denied relief to a purchaser of a note from a broker, where unknown to the parties the maker had already made an assignment for the benefit of his creditors;<sup>15</sup> and to the seller of a rough diamond which the parties had mistakenly thought to be a "stone."<sup>16</sup> And a settlement by a woman under the erroneous idea that she was not pregnant was not set aside when she was found to be with child.<sup>17</sup> Under this identity test it is difficult to support the classical case of *Sherwood v. Walker*,<sup>18</sup> where parties contracted to buy and sell a cow thinking her barren and relief was granted when she was found to be otherwise. Similarly, the intervention of the courts where land is found to be without timber<sup>19</sup> or ore<sup>20</sup> contrary to the expectations and belief of the parties; or the setting aside of a conveyance where the parties were under the mutually mistaken belief that the county seat had been moved;<sup>21</sup> or the granting of relief in those cases where there was some error in the means or measure on which the parties relied to determine the quantity, quality, or value of the subject matter of their bargain,<sup>22</sup> seems inconsistent with the identity test. The holding of a recent Washington case<sup>23</sup> that the buyer of a large number of shares of stock in a bank could rescind on the ground that the transaction had been entered

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ment of a claim, the validity of which depends on a fact unknown to them. This is not a case of mistake at all, — but conscious ignorance. The case of *Kowalke v. Milwaukee Elect. Lt. & Ry. Co.*, *supra*, might be explained on this ground. See *Anson, op. cit.*, § 187, note 1.

<sup>15</sup> *Hecht v. Batcheller*, 147 Mass. 335, 17 N. E. 651 (1888); *Bicknell v. Waterman*, 5 R. I. 43 (1857); *Dambmann v. Schulting*, 75 N. Y. 55 (1878).

<sup>16</sup> *Wood v. Boynton*, 64 Wis. 265, 25 N. W. 42 (1885).

<sup>17</sup> *Kowalke v. Milwaukee Electric Light & Ry. Co.*, 103 Wis. 472, 79 N. W. 762 (1899).

<sup>18</sup> 66 Mich. 568, 33 N. W. 919 (1887).

<sup>19</sup> *Thwing v. Hall Lbr. Co.*, 40 Minn. 184, 41 N. W. 815 (1889); *Blygh v. Samson*, 137 Pa. 368, 20 Atl. 996 (1891).

<sup>20</sup> *Dale v. Roosevelt*, 5 Johns. Ch. (N. Y.) 174 (1821).

<sup>21</sup> *Griffith v. Sebastian Co.*, 49 Ark. 24, 3 S. W. 886 (1887).

<sup>22</sup> Relief was granted where a survey was made the basis of the bargain. *McMahon v. Terkhorn*, 116 N. E. 327 (Ind. 1917); *Gilroy v. Alis*, 22 Ia. 174 (1867); *Coon v. Smith*, 29 N. Y. 392 (1864); so also appraisement, *Freeman v. Jeffries*, L. R. 4 Ex. 189 (1869); inventory, *Spaulding v. American Wood Board Co.*, 26 Hun. (N. Y.) 237 (1898); or assay, *Cox v. Prentice*, 3 M. & S. 344 (1815).

<sup>23</sup> *Lindeberg v. Murray*, 201 Pac. 759, (Wash. 1921). For the facts of this case, see *RECENT CASES, infra*, p. 765.

It is easier to support the result in this case on the construction of the contract held by the dissenting judges than under that of the majority. Under the dissenting view that the contracts were dependent, the rescission of the contract between the two banks would clearly have been a ground for relieving the plaintiff from his contract dependent thereon. Whereas, under the construction given to the transaction by the majority of the court, that the contract between the plaintiff and the defendant was separate and not dependent on the contract between the two banks, rescission by the plaintiff would be permitted only if the fundamental basis of the contract was that the corporation assets were as the books indicated them to be.

into under a mutual mistake as to the assets of the corporation, not only flies in the face of the supposedly accepted note case of *Hecht v. Batcheller*,<sup>24</sup> but is also contrary to a square decision on similar facts in an earlier Minnesota case.<sup>25</sup> All these cases may, however, be explained on the basic fact test, *viz.*, that "where the parties assumed a certain state of facts to exist, and contracted on the faith of that assumption, they should be relieved from their bargain if that assumption (which was made by them the fundamental basis of their agreement) was erroneous."<sup>26</sup> In all these intermediate cases the parties have received the *thing* for which they bargained. There is no question of identity of subject matter. The error goes clearly to a fact which may be called collateral, or extrinsic;<sup>27</sup> but since that fact was taken by the parties as the fundamental basis of their agreement relief should be granted.

The attempt to reduce the question to a hard and fast rule of identity of subject matter, while it has the advantage of ease of application, has not worked out in practice; and the injustice its strict application would cause in some cases has led to ingenious but unsubstantial distinctions.<sup>28</sup> Whether the basis for the relief granted by the courts is the general feeling that a person should not be compelled to give up his property for much less than it is really worth, and that is inequitable for the other party to retain the fruits of an honest error;<sup>29</sup> or that there is a substantial failure of consideration, in that one party because of a mistake going to the essence is not really getting what the parties thought he was going to receive;<sup>30</sup> or that where both parties, though literally agreeing to the terms of the bargain, are grossly unaware of the actual facts, for the law to hold them to their obligations would be perpetrating an injustice almost as great as though they had never really assented to its terms—in any case the law is protecting an individual from the loss of his property through a transaction based on a fundamental assumption which is discovered to have been erroneous. The basic fact test seems to be sound. True, the rule is not easy of application; but it is the one which best carries out the intention of the parties, the understanding of merchants, and the interests of justice.

## RECENT CASES

ADMINISTRATIVE LAW — JUDICIAL REVIEW — CONCLUSIVENESS OF FINDINGS OF FACT BY WORKMEN'S COMPENSATION COMMISSION UNDER DUE PROCESS CLAUSE. — In a proceeding under a Workmen's Compensation Act, the defense

<sup>24</sup> 147 Mass. 335, 17 N. E. 651 (1888). See note 15, *supra*.

Sample v. Bridgforth, 72 Miss. 293, 16 So. 876 (1894); Kennedy v. Panama Mail Co., L. R. 2 Q. B. 580 (1867). See Roland R. Foulke, *op. cit.*, 197; STORY, *op. cit.*, § 219.

<sup>25</sup> Costello v. Sykes, 143 Minn. 109, 172 N. W. 907 (1919). But see St. Nicholas Church v. Kropp, 135 Minn. 115, 160 N. W. 500 (1916), where relief was given from a unilateral mistake of same kind.

<sup>26</sup> See 3 WILLISTON, CONTRACTS, § 1544.

<sup>27</sup> See ANSON, CONTRACTS, Corbin's ed., § 187, note 1; CLARK, EQUITY, § 356.

<sup>28</sup> See Cotter v. Luckie, 1918 N. Zeal. L. R. 811; Gardner v. Lane, 12 Allen (Mass.) 39 (1866). And also 3 WILLISTON, CONTRACTS, § 1569.

<sup>29</sup> See Roland R. Foulke, *op. cit.*, 223; W. W. Kerr, *op. cit.*, 3 JURID. SOC. PAP. 173.

<sup>30</sup> See 3 WILLISTON, CONTRACTS, § 1544; 38 AM. L. REV. 334, 346.



was that the injury had existed before the commencement of the employment. After a hearing before the arbitration committee and a review of its findings by the Arbitration Commissioner, compensation was refused. The plaintiff appealed to the district court, which, on the evidence taken before the committee and the Commissioner, reversed the decision of the Commissioner. The defendant appealed on the ground that, since the evidence was conflicting, the findings of the Commissioner on questions of fact were conclusive. *Held*, that the judgment of the district court be reversed. *Hughes v. Cudahy Packing Co.*, 185 N.W. 614 (Iowa).

The decision in the principal case is in accord with the majority of state decisions relative to the conclusiveness of administrative findings of fact in workmen's compensation cases. But the Supreme Court has not decided whether such procedure affords due process. See, however, *Hawkins v. Bleakly* 243 U.S. 210, 214-216. In cases involving postal privileges, the issue of land patents, and taxation, administrative findings of fact may be made conclusive in the absence of arbitrariness. *Bates and Guild Co. v. Payne*, 194 U.S. 106; *Johnson v. Drew*, 171 U.S. 93; *Hilton v. Merritt*, 110 U.S. 97. Cf. *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94. See E. F. Albertsworth, "Judicial Review of Administrative Action," 35 HARV. L. REV. 127, 136-143. It has even been held that the findings of immigration officials, when the fact in question is United States citizenship, may be final. *Ju Toy v. United States*, 198 U.S. 253. This position is extreme, however, and later utterances of the Court indicate that it will be astute to find any element of arbitrariness in the course of the proceedings. *Kwock Jan Fat v. White*, 253 U.S. 454; *Chin Yow v. United States*, 208 U.S. 8, 12. See Nathan Isaacs, "Judicial Review of Administrative Findings," 30 YALE L. J. 781. On the other hand, in proceedings regarding rate regulation there must be review by a court exercising "independent judgment." *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287. See L. Curtis, 2nd, "Judicial Review of Commission Rate Regulation," 34 HARV. L. REV. 862; T. P. Hardman, "Judicial Review as a Requirement of Due Process," 30 YALE L. J. 681. Judicial review of findings of fact in workmen's compensation cases would tend to defeat one of the principal objects of the acts, the furnishing of a cheap and speedy procedure, which, though perhaps rough, has been deemed more socially desirable than the more refined but, in practice, inadequate relief afforded by judicial justice. See Thomas R. Powell, "The Workmen's Compensation Cases," 32 POL. SCI. QUART. 542, 551-560. The need is obvious, and the Court will probably uphold this legislative conception of due process. See *Gundling v. Chicago*, 177 U.S. 183, 188; *Holden v. Hardy*, 169 U.S. 366.

ADMIRALTY — JURISDICTION — STATE WORKMEN'S COMPENSATION ACTS AS APPLIED TO MARITIME ACCIDENTS. — A carpenter, aiding in the construction of a vessel which had previously been launched on a river within the Federal admiralty jurisdiction, was accidentally injured in the course of his employment. He had previously accepted the provisions of a state Workmen's Compensation Act which provided an exclusive remedy. (1920 OREGON'S OREGON LAWS, § 6605; [1913 OREG. LAWS,] c. 112.) He brings a libel in admiralty on the theory of maritime tort. *Held*, that the libelant do not recover. *Grant Smith-Porter Ship Co. v. Rhode*, U.S. Sup. Ct., October Term, 1921, No. 35.

A stevedore was injured in the course of his employment while standing on a wharf. He seeks to recover under an elective Workmen's Compensation Act. (1919 ME. LAWS, c. 238.) *Held*, that the plaintiff recover. *Berry v. M. F. Donovan & Sons, Inc.* 115 Atl. 250 (Me.).

For a discussion of the principles involved, see NOTES, *supra*, p. 743.

ADVERSE POSSESSION — AGAINST WHOM TITLE MAY BE GAINED — MUNICIPALITY — ADVERSE POSSESSION OF "ABANDONED" HIGHWAY. — The de-

fendant legally established a highway on the land in question in 1871. The plaintiff fenced the ground, and remained in possession for fifty years. The defendant now seeks to open the highway; and the plaintiff, claiming abandonment by the county, sues for an injunction. *Held*, that the injunction be granted. *Arthur v. Wright County*, 185 N. W. 602 (Iowa).

As a result of the wide distribution of public lands, and the necessity of protecting the rights of the public against the negligence of public officials, the ancient rule that adverse possession cannot defeat the title of the sovereign still persists. *Wagon v. Fairbanks*, 105 Ala. 527, 17 So. 20. See 15 HARV. L. REV. 146; 23 HARV. L. REV. 555. But since a municipality is more compact than a state, and has, therefore, less excuse for overlooking adverse possessors, some courts allow acquisition of title by adverse possession against a municipality. *Ft. Smith v. McKibbin*, 41 Ark. 45; *Meyer v. Lincoln*, 33 Neb. 566, 50 N. W. 763. Most jurisdictions reject this distinction on the ground that the same reasoning used in the case of states applies, though to a less degree, in the case of municipalities. *Ralston v. Weston*, 46 W. Va. 544, 33 S. E. 326; *Kopf v. Utter*, 101 Pa. St. 27. See also 3 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 1193. The rule is inapplicable as to public property devoted to quasi-private uses. *Mowry v. Providence*, 10 R. I. 52. See 15 HARV. L. REV. 846; 3 DILLON, *op. cit.*, § 1188; ELLIOTT, ROADS AND STREETS, 2 ed., §§ 882, 883. And some authorities would allow title to be acquired in any case of great hardship, on a theory of "estoppel." See *Heddeleston v. Hendricks*, 52 Ohio St. 460, 465, 40 N. E. 408, 409. See 3 DILLON, *op. cit.*, § 1194. But see *Ralston v. Weston*, *supra*, at 555. The principal case suggests another limitation, whereby property "abandoned" by the municipality may vest in adverse possessors. See *accord*, *Weber v. Iowa City*, 119 Iowa, 633, 93 N. W. 637; *Webber v. Chapman*, 42 N. H. 326. *Cf. Collett v. Board Com'rs County of Vanderburgh*, 119 Ind. 27, 21 N. E. 329. See also 3 McQUILLAN, MUNICIPAL CORPORATIONS, § 1399, note 84. The Iowa position is virtually a repudiation of the general doctrine, for the distinction between "abandonment" and non-user is practically illusory. *Cf. ELLIOTT, op. cit.*, § 885. Certainly public highways should be protected from adverse possessors. See 2 TIFFANY, REAL PROPERTY, 2 ed., § 417. Statutes reach this result in some jurisdictions. See 1920 OREG. LAWS, § 4704, 4705; 1917 UTAH COMP. LAWS, § 6457.

**AMBASSADORS AND CONSULS — IMMUNITY OF CONSULS FROM PROSECUTION IN STATE COURTS.** — The defendant, a consul general, was indicted in a state court after the revocation of his *exequatur* by the President, for crimes committed while he was consul. A statute provides that the jurisdiction of the Federal courts shall be exclusive of the state courts in "suits and proceedings . . . against consuls or vice consuls" (36 STAT. AT L. 1160). The defendant moved that the indictment be dismissed. *Held*, that the motion be denied. *People v. Savitch*, 190 N. Y. Supp. 759 (Gen. Sessions, N. Y. Co.).

For a discussion of the principles involved, see NOTES, *supra*, p. 752.

**BILLS AND NOTES — PURCHASERS FOR VALUE WITHOUT NOTICE — ALTERATION, CERTIFICATION, AND SUBSEQUENT BONA FIDE PURCHASE — NEGOTIABLE INSTRUMENTS LAW, § 62.** — A St. Louis bank drew a draft on a Chicago bank, and mailed it to the payee in Pittsburgh. The draft was stolen from the mails. The thief erased the name of the payee, skilfully inserted his own name, indorsed the instrument, and presented it in payment for some diamonds; a certification was secured, and the jewels were thereupon turned over to him. The jeweller deposited the draft in the defendant bank; the plaintiff, the drawee bank, paid it through the clearing house, and, having discovered the forgery, sought to recover the money so paid. *Held*, that it cannot recover.

*National City Bank of Chicago v. National Bank of the Republic of Chicago*, 300 Ill. 103, 132 N. E. 832.

For a discussion of the principles involved, see NOTES, *supra*, p. 749.

**CARRIERS — INJURY TO GOODS — LIABILITY WHEN GOODS ARE ACCOMPANIED BY OWNER.** — The defendant operated a ferry for hire, holding himself out to serve everyone who should desire to make use of the facilities he offered. The boat he used was not equipped with chains, bumpers, or end-gates. The plaintiff drove his team of mules and wagon on the boat to be ferried. Shortly after the boat left the landing the mules for some unknown reason backed so that the hind wheels of the wagon hung in the water. The plaintiff undertook to make the mules pull the wagon back on the boat. The wagon, however, dragged the mules into the water and they were drowned. The trial court, without jury, gave judgment for the plaintiff. The defendant appeals, assigning as error that the court had concluded as a matter of law that the defendant was liable by reason of negligence and that as a matter of law the defendant was liable as an insurer of goods. *Held*, that the judgment be affirmed. *Bean v. Hinson*, 235 S. W. 327 (Tex. App.).

For a discussion of the principles involved, see NOTES, *supra*, p. 747.

**CONFLICT OF LAWS — DOMICIL — EFFICACY OF INTENT TO RETAIN ORIGINAL DOMICIL WHEN OLD HOME IS ABANDONED AND NEW ONE ESTABLISHED.** — In a transfer tax proceeding it became necessary to determine the decedent's domicil. His domicil of origin was Connecticut, where he married and raised a family. When sixty years of age, he, with his family, moved to New York. It seems, from the facts and their treatment by the court, that the decedent abandoned his Connecticut home and established a new home in New York; but he unequivocally declared that "he had no intention of changing his legal residence." He died in New York twenty years later. A statute imposed on the decedent's executor the burden of proving that the decedent was not domiciled in New York. (1916 N. Y. LAWS, c. 551, § 1; TAX LAW, § 243.) *Held*, that the decedent was domiciled in Connecticut at the time of his death. *Matter of Lyon*, 191 N. Y. Supp. 260 (Surr. Ct.).

It was at one time thought that the *animus* necessary for a change of domicil was an intent to acquire a new civil status. See *Att'y Gen'l v. Countess de Wahlstatt*, 3 H. & C. 374, 387. See 23 HARV. L. REV. 211. But this has probably never been, and certainly is not now, the accepted common-law doctrine. *Douglas v. Douglas*, L. R. 12 Eq. Cas. 617. See 35 HARV. L. REV. 189, 191. On the contrary, if one goes to another jurisdiction with the intention merely of becoming subject to the personal law of that jurisdiction, but with no intent to make his home there, he does not acquire a new domicil. *Kerby v. Charlestown*, 78 N. H. 301, 99 Atl. 835; *Chaine v. Wilson*, 1 Bosw. (N. Y. Super. Ct.) 673. See *Semple v. Commonwealth*, 181 Ky. 675, 679, 205 S. W. 789, 791. But see *Matter of Newcomb*, 192 N. Y. 238, 84 N. E. 950; *Winsor's Estate*, 264 Pa. St. 552, 107 Atl. 888; 33 HARV. L. REV. 863. The *animus* necessary for the acquisition of a new domicil is an intent to establish a new home. Not only is this necessary, but, combined with presence, it is conclusive of a change of domicil. The principal case, holding that an intent not to change the domicil controls, seems wrong. *In re Steer*, 3 H. & N. 594; *Buller v. Hopper*, 1 Wash. Circ. Ct. 499 (D. Pa.); *Buller v. Farnsworth*, 4 Wash. Circ. Ct. 101 (D. Pa.); *Lyman v. Fiske*, 17 Pick. (Mass.) 231; *Dickinson v. Brookline*, 181 Mass. 195, 63 N. E. 331; *Matter of Rooney*, 172 App. Div. 274, 169 N. Y. Supp. 132; *Turner v. Turner*, 87 Vt. 65, 88 Atl. 3. See JACOBS, DOMICIL, §§ 148-149. Cf. *In re Paullin's Will*, 113 Atl. 240 (N. J.). Domicil is merely a legal consequence of the establishment of a home; given that fact, the result should be independent of the will of the party. See DICEY, DOMICIL, 85. See also

Joseph H. Beale, "The Progress of the Law: The Conflict of Laws," 34 HARV. L. REV. 50, 52. But see 20 COL. L. REV. 87. An intent to retain an abandoned domicile should have no more effect than an intent to create a new one.

**CONTRACTS — RESCISSION FOR MUTUAL MISTAKE OF FACT.** — The defunct B bank entered into a contract with the S bank whereby the S bank agreed to take over the assets and assume all the liabilities of the B bank, and to hold the stockholders of the B bank harmless; and M, a principal stockholder in the B bank, agreed to buy some of its fixed assets from the S bank. After this agreement between the banks was made, L, an officer of the S bank, entered into a contract with M to buy all of his stock in the B bank. Unknown to all the parties a defalcation had occurred, and the assets of the B bank were really only about 50% of the amount represented by its books. The S bank refused to proceed with its contract, and a new one was executed in which the stockholders of the B bank agreed to an assessment on their stock to make up the deficiency. L brought suit to rescind his contract with M. *Held*, that the relief be granted. *Lindeberg v. Murray*, 201 Pac. 759 (Wash.).

For a discussion of the principles involved, see NOTES, *supra*, p. 757.

**CORPORATIONS — PROMOTERS — LIABILITY OF PROMOTER TO CORPORATION PROMOTED ON ISSUE OF STOCK FOR OVERVALUED PROPERTY.** — In preparation for the organization of the A Corporation, X, the promoter, entered into contracts with the stockholders of B Corporation whereby they agreed to receive for each share of B stock one share of A stock, upon the formation of A Corporation. Unknown to the B stockholders, X obtained an option from Y to purchase, for \$50000 of A stock, the secret formulae owned by Y and used in the business of the B Corporation. Later, the A Corporation, with X in complete control through the use of dummy directors, was organized with a capital stock of \$500000. X caused \$15000 capital stock of A Corporation to be issued to the B stockholders in accordance with the above agreement. X also caused \$300000 capital stock of A Corporation to be issued to Y, who held this stock for the benefit of X. X sold this stock to innocent purchasers and kept the proceeds. The A Corporation sues X, alleging the above facts and that the formulae were of no value. *Held*, that a demurrer to the complaint be overruled. *American Barley Co. v. McCourtie*, 185 N. W. 506 (Minn.).

With a laudable desire to redress a palpable fraud, judges are too apt blindly to permit a corporation to recover "secret profits" from its promoters, regardless of whether or not the corporation has been damaged. It is submitted that, in situations where corporate creditors are not involved, the cases should be divided into two classes. Where the corporation conveys its assets or executes its obligation in return for overvalued property sold to it by promoters, the corporation (unless it has acted through an independent and informed board of directors) can obtain redress for the wrong done it. *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218; *Davis v. Las Ovas Co.*, 227 U. S. 80; *South Joplin Land Co. v. Case*, 104 Mo. 572, 16 S. W. 390. See 1 MORAWETZ, PRIVATE CORPORATIONS, 2 ed., §§ 291-292. But where, as in the principal case, all that the corporation did was to issue its stock for the promoters' property, the corporation has not been damaged; for a share of stock is not an asset or an obligation of the corporation issuing it — it is merely the holder's fractional interest in the corporation. See R. D. Weston, "Promoters' Liability: Old Dominion v. Bigelow," 30 HARV. L. REV. 39. Cf. *Old Dominion Copper Co. v. Lewisohn*, 210 U. S. 206. *Contra*, *Old Dominion Copper Co. v. Bigelow*, 203 Mass. 159, 89 N. E. 193; *Pietsch v. Milbrath*, 123 Wis. 647, 101 N. W. 388, 102 N. W. 342. See also 22 HARV. L. REV. 48; 58 UNIV. OF PA. L. REV. 226. It has been suggested that the repentant corporation might sue the promoters and recover as trustee for those actually damaged. Cf.

*Hyde Park Terrace Co. v. Jackson Bros. Realty Co.*, 161 App. Div. 699, 14 N. Y. Supp. 1037. But this crude procedural device seems unnecessary, particularly under modern statutes allowing liberal joinder of parties plaintiff. The remedy for the promoters' wrong should be extended only to those individual shareholders who have been damaged thereby, and only to the extent to which each has been so damaged. See *Blum v. Whitney*, 185 N. Y. 232, 77 N. E. 1159. Cf. 8 COL. L. REV. 567.

**CRIMINAL LAW — APPEAL — RIGHT OF ONE WHO HAS SERVED SENTENCE TO APPEAL.** — The appellant, sentenced to imprisonment for a misdemeanor, after serving the sentence prosecuted an appeal within due time. *Held*, that the appeal be dismissed. *State v. Cohen*, 201 Pac. 1027 (Nev.).

An appeal after the payment of a fine imposed in a criminal action is generally denied as moot. *State v. Wells*, 127 Minn. 252, 149 N. W. 286; *State v. Westfall*, 37 Iowa, 575; *Batesburg v. Mitchell*, 58 S. C. 564, 37 S. E. 36. *Contra*, *Commonwealth v. Fleckner*, 167 Mass. 13, 44 N. E. 1053; *Johnson v. State*, 172 Ala. 424, 55 So. 226. It is arguable that the fine might be repaid, on a reversal, as money paid under corporal duress; in such a case an appeal would not be moot. But if the punishment is a sentence of imprisonment and sentence has been served, a reversal can give the accused no legal benefit. The stigma upon his name forms no part of the legal punishment intended; an appeal to remove it, therefore, involves no legal question and is moot. *Contra*, *Roby v. State*, 96 Wis. 667, 71 N. W. 1046. But should an appeal be dismissed on such technical grounds? The administration of justice must conform in some degree to the popular conception of what justice is. Courts sometimes do entertain moot appeals. See 34 HARV. L. REV. 416, 418. A wise rule would leave the allowing of such an appeal to the sound discretion of the court. And the result might well depend upon whether the defendant had availed himself of an opportunity to stay execution pending appeal. See 1912 NEV. REV. LAWS, § 7294.

**DIVORCE — PROOF OF ADULTERY — PRESUMPTION OF CHILD'S LEGITIMACY.** — 331 days after intercourse between husband and wife, the wife gave birth to a child. The husband sued for divorce on the ground of adultery, introducing no evidence except the unusually long period between intercourse and birth. It appeared by the testimony of experts that, although almost unprecedented, 331 days could not be called an impossible period of gestation. *Held*, that the petition be dismissed. *Gaskill v. Gaskill*, [1921] P. 425.

Where, as in the principal case, the fact of a child's illegitimacy must be proved as a necessary step in the proof of adultery, the courts, without inquiring whether they are justified in so doing, adopt the presumptions in favor of legitimacy which are applied in cases where the legitimacy is directly in issue. *Gordon v. Gordon*, [1903] P. 141; *Wallace v. Wallace*, 73 N. J. Eq. 403, 67 Atl. 612. One of these presumptions is that, if intercourse between husband and wife is proved or admitted, a child born to the wife is the husband's child, unless the husband is impotent or the spouses white and the child a mulatto. See *Gordon v. Gordon*, *supra*; *Estate of Walker*, 180 Cal. 478, 181 Pac. 792; *Estate of McNamara*, 181 Cal. 82, 183 Pac. 552. If the child is born within a normal period of gestation, the presumption is conclusive. When the interval is beyond the normal gestation period, the presumption would seem to lose its conclusive character, and the more abnormal the period the weaker should be the presumption. See HUBBACK, EVIDENCE OF SUCCESSION, 413. But there is no evidence to rebut such a presumption in the principal case, and if the presumption can properly be applied in such cases, the decree is correct. The presumption has no basis in logic. See *Estate of McNamara*, *supra*. It is justified by a policy to protect the inheritance of property, the integrity of the

family relation, and the personality of the child. See *Matter of Matthews*, 153 N. Y. 443, 47 N. E. 901; *Powell v. State*, 84 Ohio St. 165, 95 N. E. 660; Melvin J., dissenting, in *Estate of McNamara*, *supra*. While the child's rights of substance are not directly involved in the principal case, it would seem proper to apply the presumption for the protection of the child's interests of personality.

**EASEMENTS — EXTENT OF USER — ORDER TO COMPEL CLOSING OF GATE.** — A had a right of way over B's land. In order to confine his live-stock, B fenced his land, leaving a gate to preserve the way. A refusing to close the gate, B brought a bill to compel A to do so. *Held*, that A must close the gate. *Geohagan v. Henry*, 55 Ir. L. J. Rep. 190.

The owner of the servient tenement may maintain gates across a way created by grant, if they are necessary to a reasonable enjoyment of his property and do not unduly interfere with the easement granted. *Green v. Goff*, 153 Ill. 534, 39 N. E. 975; *Blais v. Clare*, 207 Mass. 67, 92 N. E. 1009. See JONES, EASEMENTS, §§ 400-407. The right may, however, be expressly or impliedly negatived in the grant of the easement. See *Flaherty v. Fleming*, 58 W. Va. 669, 52 S. E. 857; *Dickinson v. Whiting*, 141 Mass. 414, 6 N. E. 92. The same rule should apply when the easement is acquired by prescription, though the way was totally unobstructed during the prescriptive period. The nature of the easement gained should govern, rather than the particular manner of use by which it was gained. *Luster v. Garner*, 128 Tenn. 160, 159 S. W. 604; *Ames v. Shaw*, 82 Me. 379, 19 Atl. 856. *Contra*, *Shivers v. Shivers*, 32 N. J. Eq. 578; *Fankboner v. Corder*, 127 Ind. 164, 26 N. E. 766. If it is once admitted that the maintenance of gates is reasonable under the circumstances, the owner of the easement must close them. *Mendelson v. McCabe*, 144 Cal. 230, 77 Pac. 915; *Griffin v. Gilchrist*, 29 R. I. 200, 69 Atl. 683; *Helwig v. Miller*, 47 Pa. Super. Ct. 171. Failure to do so is an abuse of his right, the repetition of which will be enjoined in order to prevent a multiplicity of petty actions at law.

**EXECUTORS — LIABILITY TO ACCOUNT FOR PROFITS INDIRECTLY DERIVED FROM CONTROL OVER THE ESTATE.** — The defendant Trusts Corporation held as executor a controlling interest in the stock, and thereby "carried on the business," of the W Corporation. The latter corporation, having a large sum on hand, deposited it with the defendant upon terms which "it was admitted were more profitable [to the W Corporation] than any that could have been made with a bank." The beneficiaries of the estate brought this bill, charging *inter alios* that the defendant would make a profit out of the deposit and because of its fiduciary position ought to have to account for it. *Held*, that this portion of the bill be dismissed. *Woods v. Toronto General Trusts Corporation*, 20 Ont. Weekly Notes, 431.

A trustee or other fiduciary may not retain any profit derived from dealings with the trust estate. *Magruder v. Drury*, 235 U. S. 106; SCOTT, CASES ON TRUSTS, 501; *Skinnell v. Mahoney*, 197 App. Div. 808, 189 N. Y. Supp. 845. See *Hand v. Allen*, 128 N. E. 305, 312 (Ill.). Nor may he keep profits derived immediately from his own property if they are obtained indirectly by virtue of some advantage given by his holding of the trust *res*. *Bay State Gas Co. v. Rogers*, 147 Fed. 557 (Circ. Ct., D. Mass.). See 20 HARV L. REV. 337. The rule is one of precaution and is applied stringently because of the otherwise great possibility of abuse. Since in the principal case the stock in the W Corporation gave the defendant a potential control of the corporation's money, a decision for the plaintiff might upon the authorities have been expected. But it may be that the corporation was governed by a board of directors not subservient to the defendant. If that was so, the decision may be supported on the ground that, so long as it acts in good faith and not to the positive

detriment of the estate, such a directorate insulates the liability of the fiduciary. Thus promoters, although standing in a fiduciary relationship, may deal with their corporation to their own advantage if they furnish it with an independent directorate and make full disclosure of their own interests. See *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 204; *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218, 1236. But, even assuming such a directorate, a decision *contra* to the principal case would not be surprising, and would not require any "disregard of the corporate fiction."

**EXTRADITION — INTERSTATE RENDITION — LIABILITY OF THE SURRENDERED PERSON TO CIVIL ACTION IN THE DEMANDING STATE.** — The defendant was brought into Oregon from Utah by virtue of rendition proceedings, to be tried for a crime. While the prosecution was pending he was personally summoned to answer in a civil action brought in an Oregon state court. Upon his petition the cause was removed to the Federal court. He then moved therein to quash the service of summons. *Held*, that the motion be granted. *Bramwell v. Owen*, 276 Fed. 36 (9th Circ.).

A non-resident voluntarily coming into the state to defend a civil action is exempt from the service of civil process in another action. See *BROWN, COURTS AND THEIR JURISDICTION*, 2 ed., § 42. The rule is based on a public policy to encourage voluntary attendance upon the courts and expedite the administration of justice. Since the reasons for the rule do not exist in the case of a defendant within the jurisdiction under compulsion, exemption from civil process is generally denied him. *Netograph Mfg. Co. v. Scrugham*, 197 N. Y. 377, 90 N. E. 962. On the same ground the exemption is denied by the weight of authority to a defendant involuntarily present in the state by virtue of interstate rendition. *Reid v. Ham*, 54 Minn. 305, 56 N. W. 35; *Rulledge v. Krauss*, 73 N. J. L. 397, 63 Atl. 988. *Contra*, *Moleitor v. Sinnen*, 76 Wis. 308, 44 N. W. 1099. But it is submitted that in this situation good faith on the part of the state requires the exemption. There is no objection to trying the defendant for a crime other than that for which he was surrendered; since if he returns to the surrendering state he can be again extradited. *Lascelles v. Georgia*, 148 U. S. 537. But the Constitution imposes an obligation on the states to surrender fugitives for the purposes of criminal jurisdiction only. See *UNITED STATES CONSTITUTION*, Art. IV, § 2 (2). As to granting civil jurisdiction, the surrendering state stands on the same footing as an independent sovereignty. The rule of international extradition should apply. See *In re Reinits*, 39 Fed. 204 (2d Circ.); *Smith v. Corrigan*, 249 Fed. 273 (5th Circ.). Unless the surrendering state expressly confers civil jurisdiction over the fugitive upon the demanding state it is a breach of good faith for the latter to assert it. See 17 HARV. L. REV. 498.

**INTERNATIONAL LAW — DE FACTO GOVERNMENTS — RUSSIAN SOVIET AS PARTY DEFENDANT.** — The plaintiff brought an action for conversion against the Soviet Government, jurisdiction being based on an attachment of its property. The Soviet Government had not been recognized by the United States. The defendant moved to dismiss the complaint, on the ground that it had no capacity to be sued. *Held*, that the motion be denied. *Wulfsohn v. Russian Soviet Government*, 66 N. Y. L. J. 1711 (Sup. Ct.).

One sovereign state may sue in another state. *United States v. Wagner*, L. R. 2 Ch. App. 582; *Republic of Honduras v. Soto*, 112 N. Y. 310, 19 N. E. 845; *State of Yucatan v. Argumedo*, 92 Misc. 547, 157 N. Y. Supp. 219. But the capacity to be a plaintiff has been denied to an unrecognized government. *Russian Soviet Government v. Cibrario*, 191 N. Y. Supp. 543 (App. Div.); *Russian Soviet Government v. Steamers Pensa and Tobolsk*, 66 N. Y. L. J. 33 (Fed. Dist. Ct., E. D. N. Y.). But see 31 YALE L. J. 534. This case holds such

a government as defendant. There is no inherent reason to refuse judicial cognizance of a *de facto* government as a legal unit. A usurping group may be dealt with as a legal entity in litigation without embarrassing the political departments of the government. Political questions will be involved, if at all, only in the determination of the powers and responsibilities of this legal unit. Where a government is recognized after an action is started, the defendant cannot assert that there was no party plaintiff at the beginning of the action. *State of Yucatan v. Argumedo, supra*. This indirectly assumes that there was a legal unit before recognition, the recognition merely removing political objections to the suit. Though the Soviet Government is a legal unit, the capacity to sue may be denied because of political considerations. But there should be no rule of thumb as suggested in the *Cibario* case; rather such capacity should depend upon the political ramifications of the particular litigation. The principal case involved no political objections, which is the normal situation where the *de facto* government is the defendant. Obviously this defendant is not protected by the usual immunity of foreign states based upon comity. *Kingdom of Roumania v. Guaranty Trust Co.*, 250 Fed. 341 (2d Circ.).

**INTERSTATE COMMERCE — CONTROL BY CONGRESS — RESPONSIBILITY FOR DISCRIMINATION UNDER § 3 OF THE INTERSTATE COMMERCE ACT.** — Certain southern and midwestern carriers, with whom the plaintiffs had through routes and joint rates, allowed the privilege of creosoting-in-transit to creosoting companies on their lines. The plaintiff carriers refused to grant this privilege to the X Company, a competing creosoting company, and the only one on the plaintiffs' lines. On petition of the X Company, the Interstate Commerce Commission found that the denial of this privilege was not unjust or unreasonable under § 1 (6) but did subject the company to unjust discrimination under § 3 of the Interstate Commerce Act. (24 STAT. AT. L. 379, 380.) It ordered the plaintiffs to remove this undue discrimination. (*American Creosoting Co. v. Director General*, 61 I. C. C. 145.) The plaintiffs applied for a preliminary injunction to prevent the enforcement of this order. The application was denied. Held, that the decree be reversed. *Central R. R. of N. J. v. United States*, U. S. Sup. Ct., Oct. Term, 1921, No. 436.

Whether or not discrimination exists in a given case is a question of fact. *Interstate Commerce Commission v. Alabama Midland Ry.*, 168 U. S. 144. The findings of the Interstate Commerce Commission in this respect are conclusive, unless arbitrary. *Manufacturers Ry. Co. v. United States*, 246 U. S. 457. But in the principal case there is a question of law: whether the discrimination found was attributable to the plaintiffs. Such a question is decided *de novo* by the courts. *Texas & Pacific Ry. v. Interstate Commerce Commission*, 162 U. S. 197. It is an eminently proper construction of § 3 that it prohibits only discrimination by a carrier between shippers on its own lines, or by several carriers "if each carrier has participated in some way in that which causes the unjust discrimination." Cf. *Penn. Refining Co. v. Western N. Y. & Pa. R. R. Co.*, 208 U. S. 208; *Phila. & Reading Ry. v. United States*, 240 U. S. 334. The hardship to the X Company was caused by the distant carriers independently granting the privilege to its competitors. The advisability of such a practice may depend on local conditions. It would be unfortunate if a carrier could be compelled to grant a privilege merely because its connections do so. The X Company's only remedy is to convince the Commission that denial of the privilege is unreasonable under § 1 (6) of the Act.

**INJUNCTIONS — NATURE AND SCOPE OF REMEDY — RELIEF AGAINST FRAUDULENT SUBSTITUTIONS OF THE DEFENDANT'S PRODUCT FOR THE PLAINTIFF'S.** — The complainant prepared a medicine called Coco-Quinine, colored and flavored with chocolate. Its merits were explained to physicians who prescribed



it for patients. The complainant sold the medicine to druggists who retailed it to the patients. The defendant prepared a medicine, also flavored with chocolate, looking and tasting like Coco-Quinine, which it called Quin-Coco. The defendant induced druggists to substitute Quin-Coco in filling prescriptions for Coco-Quinine. *Held*, that the defendant be enjoined from using chocolate in the preparation of Quin-Coco. *Eli Lilly & Co. v. Wm. R. Warner & Co.*, 275 Fed. 752 (3rd circ.).

The court assumed that anyone, if not fraudulent, might use chocolate in such a preparation. It follows from the court's assumption that the plaintiff had no substantive right against the use of chocolate by the defendant. It is submitted that the defendant's fraud is not a sufficient basis for the creation of a new substantive right in the plaintiff. The plaintiff is entitled only to the enforcement of such rights as it already has. *Mayor etc. of Baltimore v. Sackett*, 135 Md. 56, 107 Atl. 557; *Pierce v. Stablemen's Union*, 156 Cal. 70, 103 Pac. 324; *Cronin v. Bloemke*, 58 N. J. Eq. 313, 43 Atl. 605; *Chamberlain v. Douglas*, 24 App. Div. 582, 48 N. Y. Supp. 710; *Snyder v. Hopkins*, 31 Kan. 557, 3 Pac. 367. *Contra*, *Taylor Iron & Steel Co. v. Nichols*, 70 N. J. Eq. 541, 61 Atl. 946. See 19 HARV. L. REV. 537. The language of the opinion indicates that the court was influenced by the fact that the defendant was a "bad man." But it is unwise for equity to punish wrongdoing, since it does not afford the guaranties against arbitrariness given in a criminal prosecution. See *N. Y., N. H. & H. R. R. Co. v. Interstate Com. Com.*, 200 U. S. 361, 404. If, as the court held, the only element of unfair competition was the fraudulent substitution, only that substitution should have been enjoined. *Weber Medical Tea Co. v. Kirschstein*, 101 Fed. 580 (S. D. N. Y.). Cf. *Saxlehner v. Eisner & Mendelson Co.*, 88 Fed. 61, 70 (S. D. N. Y.). But it might well have been held that it was unfair competition for the defendant to imitate the complainant's medicine. If that is so, the defendant might be ordered to change the appearance and taste of its product. See NIMS, UNFAIR COMPETITION AND TRADE MARKS, 2 ed., § 135. And this might be done by prohibiting the use of a similar flavoring medium.

**PARTNERSHIP — RIGHTS AND REMEDIES OF CREDITORS — RIGHT AGAINST DISSENTING PARTNER.** — A and B were partners. It was customary for them to give promissory notes for advances made to the firm. The plaintiff, a third party, made advances to A for the partnership, after notice from B that he would not be bound by the transaction. B is sued on the notes. *Held*, that the plaintiff recover. *Canadian Bank of Commerce v. Patricia Syndicate*, 20 Ont. Weekly Notes, 529.

The weight of authority is *contra*. *Willis v. Dyson*, 1 Stark. 164; *Knox v. Buffington*, 50 Ia. 320; *St. Louis Brewing Ass'n v. Elmer*, 189 Mo. App. 197, 175 S. W. 102; *Bank of Bellbuckle v. Mason*, 139 Tenn. 659, 202 S. W. 931. But see *Campbell v. Bowen*, 49 Ga. 417; *Johnston v. Bernheim*, 86 N. C. 339. The courts argue from principles of agency. See PARSONS, PARTNERSHIP, 4 (Beale's) ed., § 84, note (v). But the law of partnership does not follow necessarily from the law of agency. Under the common-law theory of partnership, the better view is that each partner gives to a majority irrevocable power to act for him in carrying on the business in the usual way until dissolution. *Johnston v. Dutton's Adm'r*, 27 Ala. 245. See *Staples v. Sprague*, 75 Me. 458, 460; *Nolan v. Lovelock*, 1 Mont. 224, 227. See also STORY, PARTNERSHIP, 7 ed., § 123. *Contra*, *Galway v. Matthew*, 1 Camp. 403; 5 C. 10 East, 264; *Matthews v. Dare*, 20 Md. 248, 273; *Feigley v. Sponeberger*, 5 W. & S. (Pa.) 564. And it may be argued that when there are only two partners each gives the other such authority. Under the mercantile view, if the firm has acted all members are bound regardless of dissent. The difficult question is whether one should require action by the firm to restrict the authority of a member or action by the

firm to enter into the contemplated contract. It is submitted that the former is the correct view, since from the mere relation of partnership there arises a power in each partner to act for the firm in the course of its business. But see *GEORGE, PARTNERSHIP*, § 103; *BURDICK, PARTNERSHIP*, 3 ed., 231-234. See also J. A. Crane, "The Uniform Partnership Act — A Criticism," 28 *HARV. L. REV.* 762, 781; W. D. Lewis, "The Uniform Partnership Act — A Reply to Mr. Crane's Criticism," 29 *HARV. L. REV.* 291, 302. This power may, therefore, be revoked or restricted only by action of the firm. A dissent by a majority of the partners is an act of the entity. See *LINDLEY, PARTNERSHIP*, 8 ed., 255. See *UNIFORM PARTNERSHIP ACT*, §§ 9(1), 18(h), 9(4); 1920 *ONT. STAT.*, c. 41, §§ 7, 25 (8), 10. But a dissent by one of two partners is not.

**PRIZE LAW — CAPTOR'S DUTY TO USE DUE CARE — LIABILITY FOR FAILURE TO INSURE.** — Certain goods were seized by the English authorities as prize. The goods were forwarded by rail to be examined, but were burned in transit, through causes unknown. The captors had failed to insure the goods. It having appeared that the goods were not lawful prize, the foreign owners seek to recover for the failure to insure. *Held*, that they cannot recover. *The New Sweden*, 126 L. T. R. 31 (P.).

It is well settled that the captor of goods seized as prize, like any other bailee, must use due care in handling such goods. *The William*, 6 C. Rob. 316. See 3 *PHILLIMORE, INTERNATIONAL LAW*, 683. The question here is whether that duty of care involves a duty to insure. The precise point seems not to have arisen before. If the captor insures for his own benefit, since there is no obligation to turn the proceeds over to the owner of the goods it is clear that the owner need not reimburse the captor for the cost of such insurance. *The Cairnsmore*, [1921] 1 A. C. 439; *The Catherine and Anna*, 4 C. Rob. 39. But the English court has recently held that where the captor effects insurance for the benefit of the owner, he is entitled to reimbursement. *The United States*, [1920] P. 430. While it does not necessarily follow from the last case that the captor must insure, yet this would be a desirable extension of the decision. In the business world of today, the insurance of cargoes is regarded as an essential expenditure; and the effecting of insurance might well be held to constitute an indispensable element of due care on the part of the captor. See *LUSHINGTON, NAVAL PRIZE LAW*, § 83. It is to be hoped that the principal case will not be followed.

**PROXIMATE CAUSE — FORESEEABILITY AS AN ELEMENT OF CAUSATION.** — The plaintiff was a passenger on the defendant's train. Through the negligence of the defendant's servants the train struck an automobile, throwing it forward against a switch handle so as to open the switch. The train ran onto a side track where it collided with a cut of cars. The plaintiff was hurled from her seat by the impact, and injured. The lower court directed a verdict for the defendant on the ground that the negligence was not a proximate cause of the injury. The plaintiff's motion for a new trial was overruled, and the plaintiff appeals. *Held*, that the judgment be affirmed. *Engle v. Director General of Railroads*, 133 N. E. 138 (Ind.).

A result, however unforeseeable, produced by a force directly or by a series of forces each acting directly on the next in sequence, is proximately caused by the first force. *In re Polemis and Furness, Witby & Co.*, [1921] 3 K. B. 560. *Mathews v. Kansas City Railways*, 104 Kan. 92, 178 Pac. 252. It is arguable that the train's running onto the side track should be considered a continuation of the original force, and that the case should be treated as one of direct causation. But even if this view is rejected, the new alignment of the track was certainly a proximate result of the negligence. This result was a passive condition. If a passive condition risks another force acting upon it so as to directly produce injury, that injury is a proximate result of the force which

produced the passive condition. *Zollman v. Baltimore & Ohio S. W. Ry.*, 121 N. E. 135 (Ind. App.); *Burk v. Creamery P. M. Co.*, 126 Iowa, 730, 102 N. W. 793. See Joseph H. Beale, "The Proximate Consequences of an Act," 33 HARV. L. REV. 633, 650. Whether or not a risk is created involves the foreseeability of the intervening force. This is the only circumstance in which foreseeability is a factor in determining proximate causation. Considering the oncoming train as an intervening force, its intervention was clearly risked by the condition proximately caused by the defendant. On either view the causation was proximate. The decision is wrong.

**RESTRAINT OF TRADE — FEDERAL TRADE COMMISSION — RESTRICTIONS AND RESTRICTIVE AGREEMENTS AS TO USE OF PROPERTY — ENFORCING RE-SALES AT FIXED PRICES.** — A corporation engaged in manufacturing "branded" food products sought to fix resale prices of wholesalers, jobbers, and retailers. The company refused to sell to those distributors who resold at other than the stated prices, or who sold to others who did so. To effectuate its purpose, the company inaugurated a plan of tracing sales, marking packages, reporting infractions, and listing distributors. The case was heard before the Federal Trade Commission on an agreed statement of facts stating that no contract, express or implied, for maintaining resale prices existed. The Commission condemned the plan as an unfair method of competition under § 5 of the Federal Trade Commission Act (38 STAT. AT L. 719). The Circuit Court of Appeals for the 2nd Circuit set aside the order of the Commission. *Held*, that the judgment be reversed. *Federal Trade Commission v. Beech-Nut Packing Co.*, U. S. Sup. Ct., Oct. Term, 1921. No. 47.

It is the accepted doctrine of the United States Supreme Court that contracts between manufacturers of "branded" or "specialty" products and the wholesalers or retailers through whom they distribute, fixing resale prices, are illegal under the Sherman Act. *Dr. Miles Medical Co. v. Park & Sons*, 220 U. S. 373; *United States v. A. Schwader's Sons, Inc.*, 252 U. S. 85. This doctrine has aroused much criticism, deservedly so, it is believed. See KALES, CONTRACTS AND COMBINATIONS IN RESTRAINT OF TRADE, c. 4. See Gilbert H. Montague, "Should the Manufacturer Have the Right to Fix Selling Prices?", 63 ANNALS AM. ACAD. POL. AND SOC. SCI., 55. See 33 HARV. L. REV. 966. But, somewhat illogically, it was held legal for a manufacturer to refuse to sell to any who did not resell at fixed prices, thus achieving the same business result as he would have through contracts. *United States v. Colgate & Co.*, 250 U. S. 300. Though the principal case arises under the Federal Trade Commission Act and not under the Sherman Act, the test of illegality under either should be the same. See KALES, *op. cit.*, c. 12. See Cornelius Lynde, "The Federal Trade Commission and Its Relation to the Courts," 63 ANNALS AM. ACAD. POL. AND SOC. SCI., 24. No weight is given, on review, to the Commission's conclusions of law. See *Federal Trade Commission v. Gratz*, 253 U. S. 421, 427; *National Harness Mfrs. Ass'n v. Federal Trade Commission*, 268 Fed. 705, 707. The court in the principal case purports to save the rule of the *Colgate* case. But the practical effect of its decision is necessarily otherwise. While not in terms denying the right to refuse to sell to those who do not comply with the restrictions, it denies the right to use any means of discovering non-compliance. In effect, the court has nullified a desirable exception to a questionable rule.

**STATUTE OF FRAUDS — SALES OF GOODS, WARES AND MERCHANDISE — CONTRACT TO ESTABLISH CREDIT BY CABLE TRANSFER.** — A bank in New York orally contracted to "... deliver to defendant ... a cable transfer of exchange ...", i. e. to make available to a customer, by cable, a credit of £20,000 in London, at any time within four months, at the customer's

option. As a defense to an action by the bank on this agreement, the customer pleaded the Statute of Frauds. (1911 N. Y. Laws, c. 571, § 4; CONSOL. LAWS, c. 41, § 85.) *Held*, that the plaintiff's demurrer to the answer be sustained. *Equitable Trust Co. v. Keene*, 66 N. Y. L. J. 1463 (C. A.).

The court interprets the pleadings as describing a contract for future action, and hence not a sale of any existing thing. Accordingly, it says, the Statute of Frauds is not applicable. But does that follow? The provisions of the statute apply to contracts for the future sale of goods not yet in existence, unless such goods are "to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business." See SALES ACT, § 4 (2); 1911 N. Y. LAWS, c. 571, § 4 (2); CONSOL. LAWS, c. 41, § 85 (2). See 1 WILLISTON, CONTRACTS, §§ 506-509, 521. The opinion leaves undiscussed the question whether the agreement contemplated the future sale of a chose in action yet to be created, and, if it did, whether such chose would be within the statutory exception quoted. Doubtless the court found what its language does not make clear: that the contract was not for any sale at any time, but for the mere doing of an act, the payment of money in London. The result seems correct; and it is, moreover, in accord with business practice. Various aspects of this and similar commercial transactions have received learned attention of late. See Osmond K. Fraenkel, "Some Aspects of the Law Relating to Foreign Exchange," 20 COL. L. REV. 832; Harlan F. Stone, "Some Legal Problems Involved in the Transmission of Funds," 21 COL. L. REV. 507; William E. McCurdy, "Commercial Letters of Credit," 35 HARV. L. REV. 539. See also 31 YALE L. J. 416.

**TAXATION — TRANSFER TAX — CREATION BY DEED OF REMAINDER VESTING IN POSSESSION AFTER DEATH OF GRANTOR.** — A statute taxed transfers "intended to take effect in possession or enjoyment at or after" the death of the transferor. (1909 N. Y. CONSOL. LAWS, c. 62, § 220 (4)). A, reserving a power of revocation, settled the income of a trust fund on B for life, with remainders over. A did not revoke. *Held*, that the transfer is not taxable. *Matter of Cochrane*, 190 N. Y. Supp. 895 (Surr. Ct.).

A, reserving a power of revocation, settled the income of a trust fund on B for life; on B's death the principal to be transferred to A; and in the event of A's prior death, to those persons who would then be his next of kin. A did not revoke and predeceased B. *Held*, that the transfer is not taxable. *Matter of Wing*, 190 N. Y. Supp. 998 (Surr. Ct.).

The holding of both cases that the reservation of a power of revocation does not *ipso facto* render the transfer taxable under the statute is sound. *People v. Northern Trust Co.*, 289 Ill. 475, 124 N. E. 662; *Matter of Masury*, 28 App. Div. 580, 51 N. Y. Supp. 331, *aff'd*, 159 N. Y. 532, 53 N. E. 1127. *Cf. Matter of Bostwick*, 160 N. Y. 489, 55 N. E. 208; *Matter of Miller*, 109 Misc. 267, 178 N. Y. Supp. 554. The result of the second case, however, seems untenable. It is not clear whether the next of kin were to be determined at the death of the donor or at the time of the distribution of the fund. (1) If the former, the property goes as by intestacy, and the transfer should be held taxable. (2) If the latter, it is submitted that it is, on authority, taxable. The mere fact that a gift *inter vivos* will, in the ordinary course of events, take effect after the donor's death does not make it taxable. *In re Bell's Estate*, 150 Iowa, 725, 130 N. W. 798. But a transfer is taxable which by the terms of the deed must necessarily take effect at the donor's death; as where the donor reserves to himself a life estate. *In re Murphy's Estate*, 182 Cal. 740, 190 Pac. 46; *Matter of Brandreth*, 169 N. Y. 437, 62 N. E. 563; *Lines's Estate*, 155 Pa. St. 378, 26 Atl. 728. This result has been reached even though the person who is to take the *corpus* of the gift at the death of the donor is given the enjoyment of the income meanwhile. *State Street Trust Co. v. Treasurer*

& *Receiver General*, 209 Mass. 373, 95 N. E. 851; *Matter of Cruger*, 54 App. Div. 405, 66 N. Y. Supp. 636, aff'd, 166 N. Y. 602, 59 N. E. 1121. It may be argued that the construction of the statute in the last-cited cases was unsound. See *Matter of Keeney*, 194 N. Y. 281, 286-287, 87 N. E. 428, 429. But if these cases are to be followed, *Matter of Wing* seems wrong, for it is obviously immaterial, under the statute, whether the gift by its terms takes effect "at" or "after" the donor's death.

TRUSTS — CONSTRUCTIVE TRUST — RIGHT OF ASSIGNEE OF FRAUDULENT GRANTEE, WITH NOTICE, TO EQUITABLE RELIEF. — The plaintiff took an assignment of E's rights as entryman upon public lands, with knowledge of E's fraud in obtaining those rights. The government not having set aside the entry during the statutory two-year period, nor contested it judicially thereafter, the plaintiff asserts his legal right to a patent, giving him title (1918 U. S. COMP. STAT. § 5113), and seeks to have a constructive trust imposed upon the defendant, to whom in the meantime the patent had been improperly issued. The latter resists on the ground that the plaintiff does not come into equity with clean hands. *Held*, that the trust be imposed, and that the defendant convey to the plaintiff. *Everett v. Wallin*, 184 N. W. 958 (Minn.).

For a discussion of the principles involved, see NOTES, *supra*, p. 754.

## BOOK REVIEWS

OUTLINES OF HISTORICAL JURISPRUDENCE. By Sir Paul Vinogradoff. Volume I. Introduction: Tribal Law. New York: Oxford University Press. 1920. pp. ix, 428.

Historical jurisprudence is a creature of the nineteenth century, which in law as in everything else is the "century of history." In the eighteenth century all writing and thinking about law presupposed philosophy. In the nineteenth century, more and more they came to rest on history, until the historical school became dominant in jurisprudence almost everywhere. Moreover the legal history of the last century had a different purpose from that of the past. The sketch of Roman legal history by Pomponius in the Digest is no more than a preface to a dogmatic outline of the law. The preface with which Gaius begins his exposition of the Twelve Tables expressly justifies a preliminary historical survey on rhetorical and philosophical grounds. Rhetorically an exordium was demanded. Philosophically the ideal exposition must include history because a thing is perfect only when complete in all its parts and the beginning is an essential part. The legal history of Cujas was a Humanist reconstruction of classical antiquity, not an attempt to find universal principles or even general principles by means of history and make them the basis of a theory of the nature or the authority or the development of law. The historical research of Conring sought only the negative result of removing the basis of authority on which law had rested, in order that it might rest for the future upon a philosophical foundation. English writing of legal history before the nineteenth century had the immediate practical purpose of demonstrating the immemorial antiquity of the common law as the custom of Englishmen and thus setting up a basis of authority for the legal order. Fortescue sought to show that England had been governed by the same customs since pre-Roman Britain. Coke sought to make out the case of the common-law courts against the Stuart kings by finding the immemorial common-law rights of Englishmen, merely declared by Magna Charta, by a long succession of statutes, and by a long and continuous succession of judicial decisions. Hale also begins with the propo-

sition that the origins of English legal precepts are undiscoverable. Blackstone, in an age of philosophical science of law, adopts the theory of immemorial custom but regards that custom as declaratory of a law of nature, conformity whereto gives it its ultimate validity.

Nineteenth-century study of legal history was for a radically different purpose. History replaced philosophy as in the sixteenth century philosophy had replaced authority. The unchallengeable basis of the legal order was to be found not in the authority of Justinian nor in the authority of immemorial antiquity, not in conformity to principles of reason derived from the nature of man, but in universal principles of law or of growth or progress of law discovered by human experience of administering justice and human experience of intercourse in civilized society. Thus in one aspect the theory of law became historical. But in another aspect it became metaphysical. For the universal principles discovered by history were conceived to be realizations of an idea which was unfolding in human experience and in the development of institutions. History and metaphysics were complementary. The former discovered, the latter demonstrated; or, if one preferred, the latter demonstrated, and the former verified.

Down to the last century the science of law had but one method. From the twelfth to the sixteenth century jurisprudence is logical and its method is one of interpretation. For the rest philosophical theology is relied upon to bolster up the authority of the precepts that are interpreted. In the seventeenth and eighteenth centuries it is creative and its method is rational. In the nineteenth century it is systematic. It seeks to organize and systematize, whether by principles derived analytically from the legal materials themselves, or by principles derived historically from the legal materials by study of their development, or by principles derived metaphysically. Thus historical jurisprudence was one of three forms of the science of law in the last century, each of which for a time conceived of itself as possessed of the one sound method and as the whole of jurisprudence.

To Savigny law was a realizing of Kant's formula of justice. To the first phase of his school historical jurisprudence was the discovery through historical research of an ethical idea of individual freedom as right and of the manifestations of this idea as realized in human experience of the administration of justice and given form by jurist and judge and lawmaker. To Maine it was essentially the same. A more concrete political idea had already been put in place of the ethical idea. Maine conceived the realization of this idea concretely as a progress from status to contract and employed a comparative historical research to the extent of investigating the beginnings of legal institutions among Aryan peoples. Admitting that "Ancient Law" shows the influence of Savigny, Vinogradoff emphasizes the nationalist character of Savigny's school and on this basis claims a break with Savigny in Maine's later writings. But is it a break with Savigny or a carrying him forward? Note Vinogradoff's own words. He speaks (p. 140) of Maine's seeking "to impress on his readers the idea of a constantly recurring combination . . . produced by an undeveloped sense of individual right and natural union among the members of a village settlement." In other words, the idea of freedom realizing itself in an undeveloped sense of right is manifest in a constantly recurring combination. We have here the idealistic interpretation as we find it, for instance, in Puchta. What Maine did, besides putting the process of realization concretely, was to seek an Aryan basis in place of a nationalist basis. He sought for the realizations of the idea in the experience of Aryan peoples, not in the experience of this or that people of today. The real break is between Maine and Vinogradoff and is nothing less than the break which divides twentieth-century from nineteenth-century jurisprudence. In place of the simple idea of freedom,

giving us, as Vinogradoff shows, an interpretation of all law in terms of the individualistic society of the immediate past, and in place of the complex idea with a growing content (civilization) which Kohler had put in its stead, he finds as it were a series of ideas in social organization, which may be connected ultimately, perhaps, by philosophy or social science, but for jurisprudence stand as the foundations of successive types of legal order. Legal history is chronological. Historical jurisprudence is ideological. But it is not tied to one idea. There are "ideal lines." There is no universal ideal line. When the metaphysical foundation of the nineteenth-century historical school gave way, the attempt to provide a broader basis through a comparative method led some to positivism. It led others to a neo-Hegelian social-philosophical jurisprudence. It has led Vinogradoff to an idealistic pluralism.

To Vinogradoff, then, historical jurisprudence is the construction of a series of theories of law on the basis of historical types. With respect to each type there are two points of view. On the one hand there is a static point of view. Rules and institutions are to be considered "in a state of logical coherence and harmony" and an "equilibrium between conflicting tendencies" is to be sought by putting some claims as normal and others as exceptional. On the other hand there is a dynamic point of view because "ideas are mobile entities, passing through various stages — indistinct beginnings, gradual differentiation struggles and compromises, growth and decay" (p. 166).

All thinking about law has struggled to reconcile the conflicting demands of the need of stability and of the need of change. The legal order must be both stable and flexible. The social interest in the general security leads us to seek some fixed basis for an absolute ordering of human action whereby to assure a firm and stable social order. Continual changes in the circumstances of human life demand continual adjustments to the pressure of other social interests as well as to new modes of endangering security. The problem has been to unify or reconcile stability and change; to make the legal order appear something fixed and settled and beyond question, while at the same time allowing adaptation to the exigencies of infinite and variable human demands. The solutions thus far have run along three main lines, authority, philosophy and history; the first and third reconciling them in terms of stability and the second reconciling them in terms of change. Thus Vinogradoff's reconciliation of them in terms of a succession of historical types, with historically discoverable fixed lines of development within each type, is significant. In this, as in other respects, the book is representative of twentieth-century juristic thought. Its theory is relativist. Instead of universal ideas we have ideas valid for their type of society; just as Stammler thinks of the social ideal of the time and place, and so of natural law with a changing content, or Kohler of the jural postulates of the civilization of the time and place and a continually changing civilization.

Vinogradoff recognizes creative juristic activity (p. 4), which was taboo to nineteenth-century legal science, while at the same time taking account of the conditions of activity and consequent limitations thereon, which were ignored by the eighteenth century. "Law," as he aptly puts it, "is intended to be a direction of conduct, but in its actual application is a compromise between intentions and circumstances" (Preface). Again, in contrast with the historical school of the past, he recognizes plurality of causation (p. 180) and rejects the conception of a single solving method or formula or theory. He sees "collisions of interests," not conflict of wills (p. 97). He thinks of law as the "product of compromises and agreements which assume the technical shape of rights" (p. 151). He takes account of physical factors in his exposition of social institutions (p. 166). He does not attempt to trace one normal and continuous line of evolution (p. 167). He insists on the complexity of primitive culture, and does not look for a universal idea in primitive institutions as was done so commonly a generation ago under the influence of the biological analogy of

embryology (p. 188). His whole conception of the scope and method of historical jurisprudence is modern and in happy contrast with what we have had from British writers on jurisprudence in the recent past. If there were nothing else, these things would make the book most welcome, since disinclination to read foreign languages has held back Anglo-American legal science much too long.

If we may infer from certain hints, the plan of the work involves a monumental undertaking. Apparently the first volume comprises the introduction and a consideration of two of the six types which will be taken up in the complete work. A second volume on the "jurisprudence of the Greek City," which is promised for early publication, may or may not complete the treatment of the third type. Even then with the two volumes no more than a beginning will have been made. For the fourth, fifth and sixth types are those with which we are immediately concerned today. We are seeking to satisfy human demands in a society of the sixth type, or at least shifting thereto, with legal materials that have come to us from, or that were fashioned in, societies of the fourth and fifth types. All that goes before these is but making straight the way for the real tasks of any theory of law.

In the Introduction there are two parts, entitled respectively "Law and the Sciences" and "Methods and Schools of Jurisprudence." It seems to be the purpose of the first part to show that jurisprudence is necessarily connected with and dependent upon other sciences, something which English analytical jurists of the last century were prone to deny. Accordingly successive chapters are devoted to "Law and Logic," "Law and Psychology," "Law and Social Science" and "Law and Political Theory." In the first, after pointing out that we must study things as they are, to which analytical jurisprudence sought to confine us, and also as we want them to be, in which alone the eighteenth-century philosophical jurisprudence took an interest, he takes up the *role* of logic in law and considers the guarantees of good reasoning through rules of pleading, rules of evidence and canons or methods of interpretation. Undoubtedly the latter function, and are meant to function, as guarantees of good reasoning. Taking interpretation for what it is, not what it purports to be, such guarantees are demanded to maintain the general security. But it must be remembered that the processes of subsumption, generalization and dogmatic construction, as they go on in legal interpretation, are logical in the modern sense that they involve coherent thought. They are not necessarily nor are they actually logical in the older sense of formal logic, that is, of drawing out of legal materials by an exact mechanical process a content which was already there. On the other hand guaranteeing of sound reasoning is the least significant function of rules of pleading. We are told that the rules under the Judicature Act have "loosened the hold of logic upon law" by removing "many of the firm pegs from which compelling deductions could be started" (p. 10). The "pegs" to-day are substantive legal rights, which had not been worked out in any detail when the rules of pleading arose. In the absence of a detailed system of legal rights, a detailed system of pleading served to hold tribunals to impersonal methods. With the development of an elaborate system of substantive law, rules of procedure are needed only to insure an orderly, dignified and deliberate conduct of legal proceedings and to insure that litigants not only have an opportunity to make their own case fully and fairly but also be enabled to know what is urged against them and have reasonable opportunity to meet it. In reality the minute apparatus of substantive rules in the maturity of law affords many more firm pegs for logical deductions than the technical procedure of the strict law.

In connection with "dogmatic construction," the setting up of "complexes of mutually dependent rules" — which, by the way, is usually a putting of system into a mass of rules after the event and then building on the result — he



speaks incidentally of the so-called jurisprudence of conceptions in the last century and of Jhering's critique. But, he tells us, "English law, so conspicuous for its common sense and attention to practical needs, is probably less liable than any other to have its rules perverted by an excess of abstract dialectic" (p. 25). This has been asserted more than once by others. I doubt much, however, if the facts of English law bear it out. Usually the course of decision in the common-law courts has been compared with the doctrinal books of the Continent, which is not a fair comparison. Even so, one may vouch Sir William Erle's remarks about "strong decisions," rendered on logical compulsion in the face of "common sense and common convenience," the decisions on pleading in Meeson and Welsby that carried out legal logic to a point which excluded the merits of causes from judicial consideration, the tendency a generation ago to treat rules of evidence in the same way, the nice logical refinements as to possession and custody in the law of larceny and such cases as *Reg. v. Ashwell*,<sup>1</sup> the decisions as to tacking of encumbrances and the *tabula in naufragio*, in which, it has been said, the courts have exhibited a pride in coming to unhappy results under an appearance of logical compulsion, and a deal of what has been called "technical equity," as for example in applications of the doctrine of clogging the equity of redemption — one may vouch such things and many more like them to show that in its day the jurisprudence of conceptions flourished in England quite as much as anywhere else.

But the main point is that logic is an instrument — an instrument of organizing legal materials to make them "cognoscible" (as Bentham put it) and usable; an instrument of judicial interpretation and application to insure certainty and predicability in judicial action; an instrument of juristic and judicial and legislative creative activity to insure a due balance of stability and change in the finding and making of law. Logic as an instrument is the theme of the first chapter.

Under "Law and Psychology," Vinogradoff points out that the conception of will, which plays so large a part in the law, the doctrine of responsibility in criminal law, the theory and practice of penal treatment, and the questions as to the legal bearing of motives require us to draw upon psychology. It is possible to go much further. Wigmore has shown how much psychology is involved in the law of evidence. And passing to wider problems of jurisprudence one might point out the importance of psychology in study of the nature and basis of the interests which the legal order seeks to secure; the relation of psychology to the process of judicial and juristic reasoning and judicial decision, and especially the unconscious or subconscious elements in these processes and their relation to juridical method; the psychology of rationalizations of what one desires to do and its relation to "logical compulsion" to reach unhappy results; the psychology of repression and the resultant limitations of effective legal action. In fact this chapter no more than scratches the surface of one of the most significant phases of the legal science of to-day.

In the chapter "Law and Social Science" there is a review of Tarde's theory of imitation, a discussion of the dividing line between social science and psychology, and of social psychology, a review of sociology, a brief consideration of statistics, a discussion of the relation of history to social science bringing out the synthetic function of historical thought, a suggested classification of the social sciences and a review of economics. This chapter also is unsatisfying. The task it essays is too much for any but a master of the social sciences and the execution falls down between criticism of transitory phenomena incident to the development of any new subject and sketchy generalization. Thus, social psychology is judged by the large pretensions which some have made for it. When any new subject arose in the last three decades, in reaction

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<sup>1</sup> 16 Cox C. C. 1 (1885).

from the water-tight-compartment learning of the nineteenth century it reached out ambitiously in all directions. Instead of merely trying out its ideas and methods in the no-man's-land about it, it sought to annex all that land and a hinterland of the domain of adjacent sciences. Social psychology only did for a time what all new methods or new organizations of knowledge have been doing. Under the reign of the water-tight-compartment science of the last century no other way of trying itself from the outside was possible. The review of sociology is inadequate even in view of the brief space allotted thereto. It does not get beyond the stage of "applying purposely one-sided theories to the investigation of society" and leaves the stage of unification of the social sciences out of account. The review of economics ends with a brief consideration of economic materialism and the economic interpretation of jurisprudence and of legal history. This is more a fulmination against Marxian socialism than a scientific examination of a juristic doctrine which has no necessary connection with any form of socialism and has obtained adherents among orthodox individualists. Undoubtedly the doctrine has been carried to extravagant lengths. But this is equally true of every interpretation of law that was urged in the last century.

On the other hand, the chapter on "Law and Political Theory" is admirable. Beginning with the thesis that political theory is "indissolubly connected with the operation of law" (p. 84), it takes up the interdependence of state and law, the nature of the state, the question whether the state is to be regarded juristically as person (corporation) or as relation, and the ends of politically organized society. "Law and the state are to that extent interdependent that it would be idle to derive one from the other" (p. 85). As to the interpretation of the state, whether as an embodiment of power or an organic growth or a "juridical arrangement," there are elements of truth in all these interpretations, "although the share to be assigned to each is bound to vary with the epoch and the country" (p. 86). Also, one might say, the validity of such interpretations must be considered with reference to their purposes. It is not necessary to choose once for all and for every purpose between the idea of state as corporation and state as relation. We may use both (p. 90). So as to the ends of political organization. It is more important in English-speaking countries to develop a conception of public law than to go on debating these questions in quest of an absolute and universal answer. We need to make better provision for juristic treatment of the "rights and duties of the various social organizations — municipal, ecclesiastical, professional, educational, literary, etc. — that have stepped in between the individual and the state" (p. 97). Two problems, he says in conclusion, depend upon co-operation between law and political theory — (1) The "relation of state and law to the individual," (2) the "relation of state and law to the various groups in which human solidarity finds expression" (p. 99). Insistence upon the latter point, and upon the need of a conception of public law in Anglo-American legal science which will enable us to deal effectively with such groups or organizations, is a contribution of the first importance.

Part two of the Introduction, "Methods and Schools of Jurisprudence" takes up successively Rationalists, Nationalists, Evolutionists, and Modern Tendencies in Jurisprudence. He considers that legal thinking has followed three main lines "growing out of actual changes in world politics," namely rationalism, romantic reaction, and evolution (p. 104). Rationalism was largely the result of irritation caused by obsolete feudalism (p. 124) and is the background of the utilitarian jurisprudence that has ruled in English law schools (p. 110). He says rightly that in the direction of his mind Austin belongs to the period of rationalistic enlightenment (p. 115). Accordingly he enters upon a critique of the analytical theory of the nature of law, of sanction and of sovereignty, as "rationalistic jurisprudence." Philosophically Austin professed to

be a Benthamite. But so far as his method and system were concerned he might equally have been a Hegelian, discovering manifestations of an idea through analysis of legal rules and legal institutions in their matured forms. Indeed it is significant that the followers of Austin and the followers of Maine, following a hint of Maine himself, had no difficulty in the end in reconciling the respective methods and in regarding the two schools as complementary. One sought analytically in one field what the other sought historically in another field. The law which the analytical school regarded exclusively was but the culmination of a historical development to which the historical school gave exclusive attention. Each kept religiously within the limits of the legal materials. They agreed, for example, in denying any connection of jurisprudence with ethics.

Under Nationalism he considers the historical school built by Savigny against a background of disillusionment after the excesses of the French Revolution (p. 124). But was nationalism a necessary item or the distinctive item in the creed of that school? Savigny's nationalism did not lead him nor the main body of his adherents to reject the reception of Roman law nor to refrain from an attempt to constrain the modern law within historical Roman bounds and to hold it to historical Roman conceptions. His nationalist ideas were partly inherited from the Protestant jurist-theologians of the sixteenth century, reinforced by ideas derived from the rise of strong central governments in the sixteenth and seventeenth centuries. But for the most part it is an incident of the reaction from the juristic notions of the French Revolution. As against the abstract propositions of natural law expressed in algebraic formulas in the Declaration of the Rights of Man, he called for ideas drawn from the very depths of the nation. Like Burke, he protested against importing the abstract ideas and formulas of the French Revolution without ability to import along with them the situations of fact in and out of which they arose. Beyond this Savigny was a Romanist and his faith in the historically discovered Roman idea made his legal science quite as universal as that of the adherents of natural law. Only the Germanists, who sought to find the organizing and directing ideas for the law of western Europe exclusively in the old Germanic materials, were nationalists at bottom, and theirs was often more a racial than a national interpretation of jurisprudence. Savigny's criticism of the provisions of the French Civil Code as to prescriptive acquisition of movables because they were based on misconception of Roman law, and so violate historical continuity, although they declare what had been the customary law of the north of France, represents the attitude of his school toward all the practical problems of the science of law.

When we distinguish methods and schools in jurisprudence everything depends upon the purpose for which we classify. If we look chronologically at the development of legal science in the modern world, we may see a first stage in which there was a philosophico-theological basis of authority coupled with interpretation of authoritative precepts. In a second stage there is a philosophical basis of authority with a rationalist-philosophical critique of legal precepts and construction of new ones. In a third stage (the jurisprudence of the nineteenth century) some seek a metaphysical basis of authority and give us a logical critique of legal precepts by deduction therefrom; some find a historical basis of authority and give us an analytical-historical critique of legal precepts; some find a political basis of authority and give us a purely systematic analytical critique of legal precepts. In a fourth stage the tendency is to find a basis in social philosophy or in a social-philosophical history and give us a functional critique of legal precepts and a social-utilitarian creation of new ones. But these phenomena may be generalized in many other ways. One way is to generalize them on the basis of the philosophical presuppositions of writers, express or implied, as was done by the metaphysical jurists in the last century. Thus in Miller's Lectures on the Philosophy of Law jurists are appor-

tioned among the different philosophical schools of past and present and the utilitarian prologue to Austin's Jurisprudence is taken to be the significant thing. It is possible to generalize them with reference to the method of treating the chief problems of the legal order, whether they are treated philosophically (thus including the scholastic jurists, the law-of-nature school, the metaphysical jurists of the nineteenth century and the social-philosophical jurists of today in one category), historically, analytically by applying a systematic analysis to the materials of legal systems as they are, or sociologically. In such a view we look backward from the standpoint of the legal problems of today. Hence we see the science of law as it developed in the nineteenth century too minutely for purposes other than appraisal of its results in order to construct a science of law for the needs of today. It is quite as possible to look forward to the method of today through a study of the evolution of juristic science and to see as significant modes of thinking the creative rationalism of the seventeenth and eighteenth centuries (regarding the analytical jurists as a continuation of this type into the nineteenth century in which the creative element was lost), the systematizing and stabilizing Hegelian historicism of the fore part of the nineteenth century and the evolutionary theories of the latter part of that century. But in such a view we are too far from the things of moment for the lawyer as in the former we were too near them. We lose sight of the systematizing and stabilizing character of Austin's "necessary" principles without which "a system of law as evolved in a refined community" cannot be conceived. These supposed universal principles have the same function as the universal principles of the "nationalists," discovered by another method. They have the same function also as the universal laws of legal development discovered in a still different way by the positivist evolutionists. For theirs also was a systematizing and stabilizing theory. On the other hand the seventeenth and eighteenth-century law-of-nature theory was a creative theory. Again it is possible to generalize with reference to conceptions of the nature of law, whether as philosophically discovered right or reason, or as historically discovered principles of action or as analytically discovered principles of politically imposed ordering, or as a social product to be understood through some one or through the co-operation of all of the social sciences.

All of the foregoing, and many others that might be suggested, are but attempts to organize the phenomena of juristic thinking for some definite purpose and must be judged with reference to that purpose. The lawyer who is wrestling with the problems of the legal order here and now and the historian of social control from the beginnings of human society to the present cannot use the same measure. Vinogradoff's scheme must be judged with reference to a comprehensive survey of all the types of social organization and an ideological systematizing of the legal institutions and legal precepts of each. With that purpose before him, he sees that an idea of law as a rational product, an idea of law as something drawn from the depths of national life, and an idea of law as an organism may be set off and used to distinguish types of juristic thought.

A chapter on "Modern Tendencies in Jurisprudence" concludes the Introduction. In this chapter he discusses the critical attitude, the constructive point of view (with a good critique of Duguit, pp. 150-152), and the conception of law as a part of the whole process of social control (with a critique of Ehrlich, p. 152). Next he attacks the "general jurisprudence" of the analytical school, showing that so far from being universal it is but "an encyclopaedic survey of the juridical principles of individualistic society" (p. 155). Then, following a suggestion of Weber as to study of types of economic development (p. 156) he proposes an ideological study of types of society and of jurisprudence as related to those types. Six such types are distinguished: (1) Origins in totemic society, (2) tribal law, (3) civic law, *i. e.*, a "type of jurisprudence settled

by the social tie of the city-state" (p. 159), (4) medieval law in its combination as canon and feudal law, (5) individualistic jurisprudence, and (6) the beginnings of socialistic jurisprudence. The last four pages of this chapter deserve to be read and pondered thoroughly. They are a distinct contribution to the science of law.

We come now to the main structure. "Tribal Law," in which the origins in totemic society are treated incidentally, is the subject of the remainder of the volume. It is taken up in three parts and ten chapters, as follows: I, The Elements of the Family, (1) Selection of Mates, (2) The Mother and the Father, (3) Religion and Marriage; II, Aryan Culture, (4) Aryan Origins, (5) The Patriarchal Household, (6) The Joint Family, (7) Succession and Inheritance; III, Clan and Tribe, (8) The Organization of Kinship, (9) Land Tenure, (10) The Law of Tribal Federation. Here the wide learning and synthetic powers of the author have ample scope and combine to give us what from the jurist's standpoint is a classical treatise.

Some points of special interest must be noticed. The survey of tribal law begins and ends with a sociological emphasis: "Historical jurisprudence as well as sociology has to start from the axiom that man is a social animal, i.e., that social intercourse is a necessary attribute of human nature" (p. 163); jurisprudence is historical and must be historical "in so far as it takes stock of the social conditions which call forth legal principles" (p. 368). Accordingly he does not seek to discover and lay out a single rigid scheme of development as the plan of evolution as it must inevitably have taken place. He emphasizes the effects of migration of customs, adaptation and imitation, which make the biological analogy of the development of an organism deceptive when applied to legal institutions. He insists also on the absence of sharp lines, which do not exist in nature but are put in by those who seek to understand nature as a means of comprehending the phenomena which they study. Instead of rigid groups we have types. Certain phenomena recur; certain leading themes, as it were, recur in legal thinking. "As in music, they are not stereotyped in their manifestations; they vary in the course of conflicts and harmonizing attempts, but they are not numerous and are therefore amenable to definite observation and to reflective estimates" (p. 369). The formulations of an analytical survey of primitive forms of marriage (pp. 211-212) and of land tenure (pp. 342-343) are also noteworthy.

In the chapter on Aryan Culture a much-mooted question is discussed with exceptional judgment. He says that the "central fact of Aryan culture is a patriarchal state of society" (p. 224). Traces of "matrilateral arrangements" among Aryan peoples are pre-Aryan. They are due to "contaminations arising from contact between an Aryan patriarchal people and primitive settlers, whose construction of the family was different" (p. 223). Undoubtedly we must construct an Aryan *Utrecht* with caution. "Between the Indians [i.e., British India], Teutons, Celts, etc., there are differences in climate, geography, mixture of races, conquests and other conditions, and therefore their development is bound to proceed on different lines. We cannot expect identical results and we must always take into account special conditions of economic, geographical and political development. The significant fact is that in spite of profound differences in results, we do observe — especially in family law, and in succession and Real Property — principles and rules that are varieties of the same leading ideas" (p. 229).

Not the least important feature is the paragraph on "non-litigious custom" (pp. 368-369). In this brief discussion, deriving in part it is true from Ehrlich, he insists rightly that the proposition, often insisted upon in the last generation, that the judge precedes the law is true only in part. "It is not conflicts that initiate rules of legal observance, but the practices of everyday directed by the give and take considerations of reasonable intercourse and social co-operation.

Neither succession nor possession nor property nor contract started from direct legislation or from direct conflict [i.e., litigation]. Succession has its roots in the necessary arrangements of the household on the death of its manager, property began with occupation, possession is reducible to *de facto* detention, the origins of contract go back to the customs of barter. Disputes as to right in primitive society are pre-eminently disputes as to the application of non-litigious custom" (p. 368). Hence the jurist must study the social conditions out of which non-litigious customs arose in the past and the social conditions out of which they still arise. For all the law is not in the books. He must also study the logical implications of the principles which he finds in the legal materials. He will find principles and conceptions, although the actual rules and doctrines and the actual practice of applying them will not be wholly rational nor entirely reducible to systematic simplicity. At this point philosophical method, which Vinogradoff slights, plays its part. The philosophical jurist sets up an ideal form of the existing type of society, an ideal form of the principles and conceptions found in the existing legal materials, an ideal conception of the end of the legal order, and these are employed both consciously and subconsciously in judicial finding and application of law as well as in legislation and juristic writing. In this admirable paragraph we have the real introduction to historical jurisprudence.

ROSCOE POUND.

A HAND BOOK OF PRACTICE UNDER THE CIVIL PRACTICE ACT OF NEW YORK.

By Carlos C. Alden. New York: Baker, Voorhis & Co. 1921. pp. vi, 340.

Dean Alden of the Law Department of Buffalo University has here sought to present a hand book, primarily for the use of students, of the practice of New York, under the Civil Practice Act which became effective October 1, 1921. The book serves its acknowledged purpose, but, like all outlines of a new system of procedure, its use to the practitioner must be confined to its general suggestions. A change or readjustment of any method of practice immediately becomes the subject of interpretation. A text book which under such circumstances attempts to set forth the practice in detail soon becomes obsolete. The use, however, of this outline, should be helpful to the student. After familiarizing themselves with the general principles of the substantive law, most students regard with confusion the mechanics by which such principles are applied and rights established and enforced. Experience has shown the difficulty of teaching, academically, the technique of procedure. The solution of problems of actual practice, alone, instruct with any degree of thoroughness in the art of the practitioner. A well considered outline containing the organization of the courts, by whom, when and how remedies are employed, should, however, give to the student a general working knowledge of the subject. The usefulness of such a work, especially during a period of transition, is quite apparent.

The plan and scope of Dean Alden's work, as indicated in the table of contents, are limited to presenting in a simple, orderly and logical manner such an outline. The author points out that the present New York system of practice which became effective only last October is the result of a progressive development extending over a period of seventy-five years, and is based substantially upon the former Code of Civil Procedure in a re-arranged form. Into the first Code of Procedure of 1848 and those subsequently enacted, there gradually crept many provisions not procedural in character. By the readjustment, basic matters of civil practice are incorporated into the new "Civil Practice Act" which is supplemented by rules of court known as "Rules of Civil Practice," into which has been placed many of the details of practice heretofore contained

in the code. The provisions relating to the procedure of the Surrogate's Court, Justices' Court, Court of Claims and New York City Court, formerly contained in the old code, are excluded from the new practice act and placed into special acts of their own. As a result, the present act contains about one-half the number of sections of the old code. The present hand book covers only the Civil Practice and Surrogate's acts, although reference to the other acts is made in several of the chapters. Many of the 300 rules of court supply important details and would have justified a fuller consideration than the references made by the author.

The chapter covering the organization and jurisdiction of the civil courts in a few words describes the judicial system. The writer errs in stating (p. 7) that the first department consists of New York County, by failing to mention the County of the Bronx. While the Constitution contains this provision, New York County has been interpreted to mean the territory included in that county at the time the Constitution was adopted. As Bronx County was subsequently created out of New York County, it is and always has been regarded as a part of the first department. The paragraph on the Superior City Courts might have been omitted, as these courts have all been abolished and reference to them is quite unnecessary in a hand book of the practice of today. In the paragraph describing the various branches of the Supreme Court, mention of the Appellate Term could appropriately have been made. In treating of the City Court of the City of New York, the language would indicate that the court's jurisdiction is limited to the Borough of Manhattan, while, in fact, it extends to the territory included in the City of New York before consolidation into the Greater City, which brings the Borough of the Bronx within its jurisdiction.

Chapter V on limitations upon the prosecution of actions occupies only a few pages, yet makes clear the main principles of this ever confusing subject to the student. The author has wisely devoted the greater part of the book to Chapter VI "Procedure in an Action." Starting with the naming of the parties, the subject is considered from the point of obtaining jurisdiction, on to the general principles of pleadings, including instructive illustrations; through the method of testing the sufficiency of pleadings to provisional remedies and the preparation for the trial and the trial itself. The execution of the court's judgment and finally the appeals to the various appellate tribunals conclude the chapter. While some of the subjects could have been considered a little more fully, yet as a primer, it describes logically and plainly the course of litigation. The paragraphs covering the trial are especially useful as they put into a ready and concise form a subject which often unnecessarily perplexes both students and lawyers. The importance of the rules of court is in this chapter emphasized. The author constantly refers to them by number and in one or two instances sets out a rule in full. A fuller consideration could well have been given to the rules themselves, as a familiarity with them is necessary to apply many of the provisions of the new Practice Act.

In Chapter IX the practice of the Surrogates' Court is treated in the same helpful manner as is the subject of general practice in the preceding chapters. Special proceedings and provisions respecting particular actions are explained in conclusion. The hand book succeeds in presenting in an orderly and concise form an outline of the system of procedure of New York. All practice text books are subject to the criticism of incompleteness. The present work does not pretend completeness but does present in a comprehensible manner something of real use to the beginner. Time alone will not alter its usefulness as a general chart of the system, but it will no doubt see many of the details become obsolete by reason of the interpretation of the courts.

MORTIMER BOYLE

CONFLICT OF LAWS. By John B. Tiernan. Chicago: Callaghan & Co. 1921. pp. vii, 122.

It is unfair to expect much from a text essaying to cover so large and complex a field in so small a compass. Perhaps it may enable the hasty student to pick up enough of the time-worn "lingo" to pass an old-fashioned bar examination, but the book makes no contribution to the serious study of the subject.

After the manner of Dicey the author has formulated certain concise rules, which are amplified in the text, with some reference to authorities. Whereas Dicey stated some two hundred rules and sub-rules, the author has to his credit the feat of compressing the subject into thirty-two rules and six exceptions! In general, these so-called "rules," like the diplomatic acceptance of a formula "in principle," only postpone to a later stage the real difficulties. The fight comes in applying them. Of what great value is the agreement that "a penal action must be brought in the state whose law imposes it," if the courts do not agree on what actions are penal?<sup>1</sup> The chapter on "Penal Actions" does not suggest that there is any actual disagreement in the authorities in applying the rule.

The book comprises twelve chapters, entitled, respectively, Comity, Torts, Death Actions, Contracts, Remedies, Interest and Usury, Sales and Chattel Mortgages, Marriage, Legitimacy and Adoption, Wills, Crimes, Penal Actions. Many important topics, such as domicile, foreign judgments, administration of estates, are not discussed. In the chapter on "Comity" we are told that a state may, "as a mere act of courtesy," "waive its own sovereignty" and give effect to rights created under the laws of another state. The superficial chapter on "Contracts" leaves an impression that the cases are all agreed, instead of being in irreconcilable discord.<sup>2</sup> No reference is made in the chapter on marriage to the controversial topic of jurisdiction for divorce. "Wills" is disposed of in six pages. For the rule that the devolution of personality is governed by the law of the domicile no better explanation is given than the fiction that personal property, regardless of its actual situs, is deemed to be located where the owner is domiciled. The difficult topic of powers of appointment is not mentioned. It is stated in a "rule" that "the validity, construction and revocation of a will are regulated by law of testator's domicile if it involves personality; or the law of the location if it involves realty." Testator's domicile, when? Is the validity determined by the law of the domicile at time of executing the will, or at time of death? Is the revocation determined by the law of testator's domicile at the time of the act of revocation, or at the time of death? The text furnishes no answer. Nor will the cases all agree that the construction of a will of realty must be determined by the law of the situs.<sup>3</sup>

Other instances abound in which the book is inadequate or misleading, but these must be left to the curious reader to discover. The author concludes that the "Conflict of Laws is based simply on certain fundamentals, that by careful selection, manifests a symmetry and a consistency and a unity that has no parallel in any other subject of the Law." One may suspect that this "careful selection" consists in ignoring all the cases that do not fit in with the author's simple scheme of things. In important particulars the subject is in a fluid state, and the author's thirty-two rules and six exceptions will not assist in its ultimate crystallization.

CALVERT MAGRUDER.

<sup>1</sup> See, for instance, the conflict as to the statutory liability of corporation directors, 26 HARV. L. REV. 172; and the conflict as to death statutes, *Loucks v. Standard Oil Company*, 224 N. Y. 99.

<sup>2</sup> See Lorenzen, "Validity and Effects of Contracts in the Conflict of Laws," 30 YALE L. J. 565, 655; 31 *ib.* 53; Beale, "What Law Governs the Validity of a Contract?" 23 HARV. L. REV. 79.

<sup>3</sup> See *Stagg v. Atkinson*, 144 Mass. 564; *Keith v. Eaton*, 58 Kan. 732.



**FEDERAL INCOME TAX LAWS CORRELATED AND ANNOTATED.** By Walter E. Barton and Carroll W. Browning. Washington: John Byrne & Co. 1922. pp. xix, 450.

This work is a "compilation and annotation of all Federal income tax laws beginning 1861 and a correlation of all laws beginning 1909." No attempt has been made heretofore to compile the numerous laws into a convenient hand book for ready reference. The Corporation Excise Tax Law of 1909 and the Federal Income Tax Laws of 1913, 1916, 1917, 1918 (Act of February 24, 1919) and 1921 are arranged (Part I) in parallel columns for purposes of comparison. In this correlation it has, of course, been necessary to place some sections and parts thereof out of their statutory order, but the proper sequence of the sections and the parts thereof may be determined by referring to the index.

All Federal income tax laws from 1861 to date are annotated in the footnotes. The annotations are well arranged and numerous, but the citations of cases therein are not exhaustive. Part I also contains a correlation, in parallel columns, with annotations, of the war profits and excess profits tax laws of 1917, 1918 and 1921. Alphabetical and numerical tables of cases are set forth at the beginning of the work.

Part II, which contains Federal income tax acts prior to 1909, with annotations, is interesting historically, but will naturally not be of so great practical utility as the compilation of recent laws.

Part III, "Miscellaneous Acts and Statutes with Annotations," sets forth the Act of September 8, 1916 (with annotations) imposing a tax on manufacturers of munitions; the Act of March 3, 1917, imposing an excess profits tax; the Act of November 23, 1921, imposing a tax on child labor; provisions of the Revised Statutes of the United States (with annotations) applicable to taxation; and the provisions of the Federal Constitution relative to taxation.

The careful indexing of the book is in keeping with the purpose of the authors to present the reader in one volume with a mass of material hitherto obtainable only by reference to many volumes. At the end of the book are well arranged indices to sections of the six recent income tax laws, a comprehensive index to decisions, and an equally comprehensive index of subjects treated in the various Acts.

The work does not purport to be a text book. As a compilation and "source book" it will be useful and valuable to lawyers, accountants, and others interested in Federal taxation.

ROSS W. LYNN.

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## THE JUDICIAL POWER<sup>1</sup>

THE great and sound principle that all governmental power should be separated into executive, legislative and judicial powers,<sup>2</sup> like all other great and sound principles, calls for a practical test occasionally so that we may see what it is and what is left of it. Convenience and practical considerations have an erosive effect upon dogma and theory. The old-time orthodox safeguards of liberty have sometimes been let down under the stress of occasions and causes and in the name of efficient government. We have been reminded that "government is a practical institution adapted to the practical conduct of public affairs."<sup>3</sup> On the other hand the charge has recently been made with much impressiveness by the New York State Judiciary Constitutional Convention of 1921, a body of judges, lawyers and legislators of unusual skill and experience, that "extensive legislative, executive and judicial powers are being vested and combined in administrative bodies in distinct and reckless disregard of the sound principle of the separation of governmental powers, which was deemed so essential to the true protection of individual rights by the wise founders of our republic-

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<sup>1</sup> With diffidence and with full knowledge of the limitations on my ability to state either what the fundamental law of New York is, or what the results of a change in the law may be, the suggestions contained in this article are presented, not *ex cathedra*, but as one lawyer speaking to others on a controverted question in order to widen the discussion rather than to end it. As Chancellor Kent said of his "Battery Opinions," they cost nothing and bind no one.

<sup>2</sup> *Kilbourn v. Thompson*, 103 U. S. 168, 190 (1880).

<sup>3</sup> *Milwaukee Pub. Co. v. Burleson*, 255 U. S. 407, 416 (1921).

can form of state governments." <sup>4</sup> The great learning and unselfish public spirit of Mr. William D. Guthrie, who as chairman of the executive committee drafted the Report, assure us that many of our most intelligent and highly educated citizens regard this tendency as "the great misfortune of the day." <sup>5</sup> The inquiry is timely as to what extent the principle of distribution of powers obtains as a part of our constitutional law and to what extent it is being disregarded.

The theory that the powers of government should be divided into the three classes indicated, to the end that in state and nation we may live under a government of laws rather than of men, <sup>6</sup> is confidently said to have been suggested by Aristotle, developed by Montesquieu and adopted wherever constitutional governments are found. <sup>7</sup> The maxim that the protection of the rights of persons from the evils of despotic forms of government requires the complete separation of governmental powers is, however, applied practically to our institutions only in a limited sense. In its entirety it is at once a seeming paradox and a manifest truism; the perfection of our constitutional system and law taken for granted. Rights rest for their substantial basis on the guarantees of life, liberty and property. The protection of rights causes the division of powers; the division does not create the rights. The separation of powers provides the formidable sanction and the useful working rule of convenience for the maintenance of rights, but it is coupled with all the checks and balances which have been devised to prevent any department of government from exercising its functions without interference from or responsibility to the other departments. <sup>8</sup>

*First.* Political power in a free government rests in the law-making body. All functions and duties of constitutional government there remain until they are otherwise distributed. The objection that a state statute confers upon executive or ministerial

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<sup>4</sup> Report to New York Legislature of Judiciary Constitutional Convention of 1921, Legislative Document (1922) No. 37, p. 11.

<sup>5</sup> Dissenting opinion of Cullen, C. J., *Matter of Hopper v. Britt*, 204 N. Y. 524, 534, 98 N. E. 86 (1912).

<sup>6</sup> Massachusetts Constitution.

<sup>7</sup> BLACK, CONSTITUTIONAL LAW, 3 ed., § 51.

<sup>8</sup> "The usual checks and balances of republican government, in which consists its chief excellence." COOLEY, CONSTIT. LIT., 7. ed., p. 64.

officers powers of a judicial nature presents no question under the Federal Constitution. The threefold distribution of powers is, generally speaking, a necessary incident neither of a republican form of government nor of due process of law.<sup>9</sup>

*Secondly.* Some mingling of such powers is more essential to good government than is a doctrinaire separation of them.

"When we speak of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the *whole power* of one of these departments should not be exercised by the same hands which possess the *whole power* of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution." . . . "Indeed, there is not a single constitution of any State in the Union, which does not practically embrace some acknowledgment of the maxim, and at the same time some admixture of powers constituting an exception to it."<sup>10</sup>

The virtue of the rule lies more in the independence in a general way of the powers one of the other, so that one is not dependent upon nor the creature of another, than in their complete separation.

*Thirdly.* A categorical distinction between legislative and executive and judicial powers cannot in all cases satisfactorily be made. What powers are so inherently legislative or executive or judicial as to preclude their delegation in any degree to another branch of the government? Only the broadest terms may be used with safety in answering the question.<sup>11</sup> The legislative power is

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<sup>9</sup> "The Federal constitution does not inhibit the blending by the States of the powers of two, or even of all three of the great departments of government in the hands of a single officer or a single official body." *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 213 (1908); *Dreyer v. Illinois*, 187 U. S. 71, 83 (1902); *Village of Saratoga Springs v. Saratoga G., etc.*, 191 N. Y. 123, 83 N. E. 693 (1908).

<sup>10</sup> STORY, CONSTITUTION, 5 ed., 393, 395.

<sup>11</sup> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." Holmes, J., in *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 226 (1908). *Lemke v. Homer Farmers' Elevator Co.*, 42 Sup. Ct. Rep. 250 (1922).

the supreme law-making power, but it may delegate certain of its regulative powers to administrative boards appointed by the executive; the judiciary also legislates "incidentally and in a subsidiary way"<sup>12</sup> under the formula of declaring what the law is and forever has been; the executive power enforces the laws, not as a sheriff or a constable does, but as a power that makes rules and orders, both legislative and *quasi-judicial* in character, without which the law-making power would often be ineffective;<sup>13</sup> the judicial power not only interprets and applies the law in controversies between parties, but also makes rules of practice and appoints officers to administer vast undertakings.

*Fourthly.* Notwithstanding the fact that a state may in a limited sense unite legislative and judicial power in the same body, a state without independent courts is a practical everyday impossibility. As we adopt the theory that the constitutions are the supreme law, so judicial power as a check on usurped or arbitrary power must exist in courts. Legislative law must be measured by the standard of the constitutions. England makes the remedy for unconstitutional action exclusively political, but England finds in tradition and custom the check on bad laws which America largely confides to the courts. Even in England, Sir H. H. Cozens-Hardy, Master of the Rolls, is quoted as saying in a speech at the annual dinner of the Fishmongers Company to the Bench and Bar that government by departments by administrative action was "a very bad symptom . . . attended with very great danger"; that it had been and he hoped it always would be the duty of the courts of justice to see as far as possible that the powers entrusted to the other departments of government should be exercised reasonably and to offer the extremest resistance in their power to encroachment by the executive.<sup>14</sup> The protection of individuals from the arbitrary, capricious and unauthorized exercise of power is an essential attribute of free government. The court may not substitute its own judgment for that of the legislature or the administrative board in determining what is fair and reasonable, but it will probably overturn any action, legislative or executive, when clearly of the opinion that such

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<sup>12</sup> THAYER'S PRELIMINARY TREATISE, p. 319.

<sup>13</sup> *Buttfield v. Stranahan*, 192 U. S. 470 (1904); *Bates & Guild Co. v. Payne*, 194 U. S. 106 (1904).

<sup>14</sup> 131 THE LAW TIMES, 22, May 6, 1911.

action is fundamentally or constitutionally wrong, arbitrary, capricious or unauthorized. At least the circumstance that the question is not within the purview of judicial power will be the sole deterrent of judicial relief.<sup>15</sup> Under the Federal Constitution, it has been held that state courts must be given power and a fair opportunity to determine the question of confiscation according to their own independent judgment on the law and the facts when state action, legislative in its character, such as rate regulation by a board, threatens to take property without due process of law. So long as New York has constitutional courts, the Federal Constitution, not the separation of powers merely, prevents legislative power from determining the conclusiveness of its own decisions on such questions. "Due process" implies an independent court, not an executive or legislative board, with power to pass on the constitutionality of such determinations.<sup>16</sup>

If we are to have governmental regulation of public utilities and other corporations, from the nature of things public service commissions, interstate commerce commissions and the like are an indispensable adjunct to such regulation. Grave questions of fact must be tried out before them and on controverted questions arising out of the weight of evidence, judicial review would often be an endless and fruitless task. The legislature cannot and the courts should not be burdened with plenary regulative functions. Absolute and unreviewable legislative power over persons and property has no place in our system of government, but if the legislature itself might make the same determination on the facts presented in each case and might pass a constitutional law to cover them, what then remains for judicial review, however absolute the division of governmental power may be? The problem becomes one of politics, not of law; of men, not of measures.

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<sup>15</sup> *People ex rel. New York & Queens Gas Co. v. McCall*, 219 N. Y. 84, 113 N. E. 795 (1916); affirmed 245 U. S. 345 (1917). "Where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, *although they may have the power, and will occasionally exercise the right of so doing.*" Brown, J., in *Bates & Guild Co. v. Payne*, 194 U. S. 106, 109 (1904).

<sup>16</sup> *Ohio Valley Co. v. Ben Avon Borough*, 253 U. S. 287, 289 (1920).

The criticism on administrative boards which exercise legislative powers, such as rate making, has been stated with force and, it is to be feared, with some degree of justice in the report to the Legislature of the Judiciary Constitutional Convention of 1921, above referred to. The charges thus made against them are in brief that not infrequently they are partisan, untrained and arbitrary; that they act not with "the cold indifference of an impartial judge," but to carry out a declared purpose; that they are an annex to the executive. They are declared to be "frequently utterly ignorant of the most elementary principles of justice"; to decide before hearing the merits of the controversy; to be like the justice of the peace who said at the close of the evidence that he would take the four days allowed by the Code before making the customary decision for the plaintiff. On the other hand it is said that the record of the state judiciary is commendable and generally satisfactory and that the judges as a class have been "scholarly, competent, industrious, impartial and incorruptible."

Although such a sweeping condemnation probably does injustice to individuals whose integrity and ability cannot be questioned, so long as such boards, commissions and bureaus are closely connected with the executive, concerned in carrying out its policies and subject to constant legislative interference, we may expect to find in their determinations the faults and weaknesses thus indicated, coupled with the advantages, either theoretical or practical, of expert knowledge and prompt and efficient action. But their functions are legislative rather than judicial and the courts may not do what they undertake to do, *i. e.*, fix a rate or make a service regulation. The extent of judicial power in such cases is to decide whether the board had or had not the legislative power it sought to exercise.<sup>17</sup>

The New York Constitution, says the Report, opens the door of danger to the evil of vesting judicial power in executive bureaus. A peculiarity of the New York Constitution is that, while the legislative power is vested in the legislature and the executive power is vested in a governor, the judicial power is not, as in the United

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<sup>17</sup> *Lake Erie & Western R. R. Co. v. State Public Utilities Comm.*, 249 U. S. 422, 424 (1919).

States Constitution, Article three, section one, in terms vested in the courts. A system of constitutional courts is, however, created and vested with judicial powers.<sup>18</sup> This difference has not as yet developed any radical distinction of opinion between state and federal courts on the location of judicial power. The reason for the omission expressly to locate judicial power in the New York courts is in a measure historical. At the time the state of New York ratified the Federal Constitution, its inhabitants were living under a constitution by which the court of last resort, called the Court for the Correction of Errors, was composed of twenty-four (afterwards thirty-two) members of the senate (the upper house of the legislature), the chancellor and the three judges of the Supreme Court, while the appointment of every officer in the executive government of the state, including local officers, with the exception of a few named in the constitution, was vested in the council of appointment composed of one senator from each of the four senatorial districts into which the state was divided. The council of appointment continued until 1821, when it was abolished by the new constitution of that year, but the Court of Errors remained the court of last resort until the Constitution of 1846, and the Senate still sits with the Court of Appeals as the court for the trial of impeachments.

The state government did not first become free in 1846, the theory of Aristotle, Montesquieu and the philosophers to the contrary notwithstanding. It became less centralized and more democratic and powers were distributed for that reason. Nor is the reason historical only. All judicial power, as distinguished from legislative and executive power, cannot be and has not been vested exclusively in the courts. Either we must say plainly that by the practice at common law and the practice in this country it may be in some part distributed elsewhere or we must introduce nice

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<sup>18</sup> The New York State Constitution in Article III provides that "The legislative power of this State shall be vested in the Senate and Assembly." Article IV provides that "The executive power shall be vested in a governor, who shall hold his office for two years." Article VI provides merely for a supreme court having general original jurisdiction in law and equity, an appellate division with power of review of the law and the facts, a court of appeals to review questions of law, and local courts. While judicial power is not expressly vested in these courts, the power of the legislature over them is limited and no judicial power is expressly vested elsewhere.



distinctions between judicial and *quasi*-judicial power wherever facts are decided and law is declared judicially.<sup>19</sup>

The amendment<sup>20</sup> proposed by the Convention to meet the difficulty definitely vests for the first time judicial power in the New York courts. This feature is stressed in the Report as one of supreme importance. It might, no doubt, prevent in a measure the attempted exercise of unlimited power to preclude judicial review of legislative action, such as rate fixing, by an administrative board. Dormant rights are revived, uncurbed legislation is checked, eyes are opened, the indifference of the general public to the preservation in their integrity of the principles of free government is shaken off, the judges are reminded to keep jealous hold of their portion of power by discussions such as are contained in the Report. That the argument is not all against the commission system and that the commissions are not all biased for or against the corporations makes the discussion more valuable. One cannot foresee what the change will accomplish or whether it will accomplish anything. If one ventures to assert what a court or a judge will decide in the future on a novel question, after argument and in a new environment, one speculates on mental processes rather than on the operation of natural laws, and seeks to say that which the court or the judge does not know. The state courts may refuse to be controlled in their construction of the state constitution by the decisions of the Supreme Court of the United States construing the corresponding provisions of the Federal Constitution.<sup>21</sup>

It would seem, however, that the great safeguard against the exercise of arbitrary power by the state legislatures will be found not so much in a clearly outlined separation of governmental powers as in the state Bill of Rights and the Fourteenth Amendment. The orders of administrative boards should be in accordance with the state and federal constitutions; within the powers delegated

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<sup>19</sup> *People ex rel. Dawley v. Wilson*, 232 N. Y. 12 (1921); *Crane v. Hahlo* 42 Sup. Ct. Rep. 214 (1922).

<sup>20</sup> Article VI, section 1. The judicial power of the state shall be vested in the courts which are in this article expressly continued and established and in such inferior local courts as now or hereafter may exist under and by virtue of the provisions of this article.

<sup>21</sup> *Ives v. S. Buffalo Ry. Co.*, 201 N. Y. 271, 317, 94 N. E. 431 (1911); *People v. Adams*, 176 N. Y. 351, 68 N. E. 636 (1903).

to such boards; resting on law and evidence; and — considering the interests both of the public and the corporations or persons regulated — not arbitrary but reasonable, discreet and judicious. The courts could not, under the pretext of exercising judicial powers, consistently with the decisions of the Supreme Court of the United States, set aside orders lawfully made, for nothing is more elementary than that power to make such orders may be given to such boards even when judicial power is expressly vested in the courts, as it is under the Federal Constitution. The right of the legislature to delegate such order-making power seems now to be as inherent to government as the right to trial by jury or the writ of *habeas corpus*.<sup>22</sup> The Supreme Court of the United States may, in the absence of fraud or manifest mistake, as a matter of efficient government and sound public policy, decline to make the determinations of commissioners and other officers of an administrative character on questions of fact the subject of judicial review, but it does not hesitate to exercise judicial power to keep legislative and executive power in its proper place.<sup>23</sup> We might expect the state courts to follow in the main the same line of reasoning that the Supreme Court has adopted on these problems.

At least under the Federal Constitution, for fundamental purposes, to compel the due observance of the rights thereby guaranteed, free and independent judicial power must exist somewhere in the state system. Courts cannot be made the tame cats either of the executive or the legislative power except as they themselves yearn for a warm place by the fire. If the judges, "the inheritors of great traditions," have seemed at times, abruptly or by imperceptible degrees to abdicate some measure of their functions, the fault, if it is a fault, rests not on the phraseology of a particular constitution but rather on the construction which the final interpreters of the law have put on the ordinary constitutional rights of person and property. In their cautious reluctance to push such

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<sup>22</sup> *I. C. C. v. Ill. Cent. R. R.*, 215 U. S. 452 (1910); *United States v. Louisville R. R. Co.*, 235 U. S. 314 (1914).

<sup>23</sup> *Marbury v. Madison*, 1 Cranch (U. S.) 137 (1803). *Newton, Atty. Gen. v. Consolidated Gas Co.*, 42 Sup. Ct. Rep. 264, (1922). See also the comprehensive article on "Judicial Review of Administrative Action by the Federal Supreme Court," by E. F. Albertsworth, 35 HARV. L. REV. 127.

rights to a stubbornly literal conclusion in the interests of an extreme individualism the courts have frequently demonstrated that they are not automata, playing the game with mere mechanical skill and accuracy. Independent judgment as an organ of the judicial mind is not wholly atrophied, however reluctant its possessors are at times to exercise it.<sup>24</sup>

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<sup>24</sup> The proposed New York judiciary article creates additional constitutional courts discarding, as the Massachusetts Commission did, the suggestion that courts should be unified. The New York Report says on this subject: "The judicial system of the state of New York had proved reasonably successful and satisfactory as a whole in practical experience." (Report, p. 7.) The Massachusetts Report said: "We are not prepared to recommend this simplified organization at the present time. In the first place, we are by no means sure that, if it were adopted, it would work out in actual practice as well as it might appear on theoretical consideration. In the next place, we are inclined to think that the community is not at present ready for it." (Second and final Report of the Massachusetts Judiciary Commission, 1921, p. 25.)

## DELIVERY AS A REQUISITE IN THE SALE OF CHATTEL PROPERTY

THE early law governing the effect of possession or lack of possession on the ownership of chattels has been examined with great care, and the content of the rather meager authorities assiduously explored.<sup>1</sup> Little more is likely to be added to our knowledge of the effect on the ownership of chattel property caused by a voluntary delivery of the goods to a bailee, or by the tortious taking by a trespasser. To what extent Mr. Ames's contention that ownership by the loss of possession was turned into a mere right of action was ever maintainable, is the less important because it certainly ceased to be so centuries ago, and such a theory has left no impress on modern law. The results which seemed to Mr. Ames to make the early law as he conceived it afford a desirable rule for all time, when they have been achieved and kept as part of the modern law, are placed on quite other grounds than those urged by Mr. Ames. Nevertheless possession is still of vital importance in English and American law, though it is not the equivalent of title.<sup>2</sup> The purpose of this article is to consider briefly what modification there may be in modern times of one of the consequences of the early theory of seisin, not much discussed in the papers above referred to.

### I

If a disseisor, or a bailee, acquired by virtue of his possession of goods the property in them, even more clearly, it would seem, a seller of goods who should fail to deliver them would still remain the owner; and Pollock and Maitland regard it as fairly certain

<sup>1</sup> Maitland, "The Seisin of Chattels," 1 L. QUART. REV. 324; Ames, "The Disseisin of Chattels," 3 HARV. L. REV. 23, 313, 337; Bordwell, "Property in Chattels," 29 HARV. L. REV. 374, 501, 731; Bordwell, "Seisin and Disseisin," 34 HARV. L. REV. 592, 717.

<sup>2</sup> This importance is not a peculiarity of Anglo-American law. The familiar provision of Art. 2279 of the French code that *possession vaut titre*, though it conveys to one not familiar with the limitations of the rule and the disputes as to its meaning a somewhat exaggerated idea of the importance of possession even in the French law, is significant, and Art. 1141 explicitly provides that a second buyer from a seller who still retains possession prevails over an earlier buyer who failed to obtain delivery.

that in Bracton's time delivery of possession was essential to the transfer of ownership of a chattel, either by way of gift or of sale.<sup>3</sup> But the treatment of the matter by Glanville leaves it somewhat doubtful whether, even when he wrote, payment of the price might not be sufficient. He says:<sup>4</sup>

"A purchase and sale are concluded effectively as soon as the price has been agreed upon between the contracting parties, provided the delivery of the thing purchased and sold has followed, or that the price has been paid in whole or in part, or at least that earnest money has been given and received on either side. But in the two former cases neither of the contracting parties can withdraw from the contract, of his own will alone, except for some just and reasonable cause, for instance, if it were agreed upon between them that it shall be allowable for either of them to withdraw with impunity therefrom within a certain time, for it is a general truth that '*conventio legem vincit*.'" . . .

"Where, however, earnest money has been given, if the purchaser have wished to retire from the contract, it will be permitted him with the loss of his earnest. But if the vendor have wished to retire in such a case I ask whether he can do so without a penalty? It does not seem so, because in that case a vendor would seem to be in a better position than a purchaser. But if he cannot do this with impunity, what penalty shall he incur? The risk of the property sold and bought generally rests upon him who has possession of it, unless it have been otherwise agreed."

Bracton says, however, that "the dominion of things is not transferred without delivery."<sup>5</sup> Like Glanville, he says that the risk follows possession. A seller who disposes of goods after receiving earnest can withdraw from his bargain but is bound to repay double the earnest money. In regard to this matter of earnest, Pollock and Maitland say:<sup>6</sup>

"In Fleta the law merchant is said to be much more stringent, in fact prohibitory, the forfeit being five shillings for every farthing of the earnest, in other words 'pound for penny.' It is among the merchants

<sup>3</sup> 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 2 ed., 180. So also 3 HOLDSWORTH, HISTORY OF ENGLISH LAW, 266, 282.

<sup>4</sup> GLANVILLE, DE LEGIBUS REGNI ANGLIAE (Twiss's Trans., Tenth Book, chap. 14, p. 303). The same passage may be found in Beale's edition of Beames's Translation, p. 216. Glanville wrote in about the year 1200.

<sup>5</sup> Vol. 1, chap. 27, p. 489 of Twiss's Translation.

<sup>6</sup> 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 2 ed., 208, 209.

that the giving of earnest first loses its old character and becomes a form which binds both buyer and seller in a contract of sale. . . ."

"A few years later Edward I. took the step that remained to be taken, and by his *Carta Mercatoria*, in words which seem to have come from the south of Europe, proclaimed that among merchants the God's penny binds the contract of sale so that neither party may renege from it. At a later day this new rule passed from the law merchant into the common law."<sup>7</sup>

It is not clear at what time it became recognized that a buyer might acquire a property interest without delivery. In Henry VI's reign, however, we find it clearly stated that upon an agreement to sell a specific chattel the vendor may sue in debt and the purchaser in detinue.<sup>8</sup>

"The right to get the chattel gave a right to sue in detinue. . . . It is clear that this is a departure from the old law and an extension of the actions of debt and detinue. It is possible that if we look closely at these extensions we shall see the origin of the doctrine that a contract of sale of specific goods passes the property in the goods."<sup>9</sup>

About this time also, if not earlier, it became established that property in the goods might be transferred by deed without either delivery or payment of the price or of earnest. Speaking of the thirteenth century, Pollock and Maitland say:<sup>10</sup>

"At a later time [than the 13th century] our common law allowed that the ownership of a chattel could be transferred by the execution, or rather the delivery, of a sealed writing. . . . We can hardly suppose that it was already known in the thirteenth [century]."

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<sup>7</sup> NOY, *MAXIMS*, c. 42: "If the bargain be that you shall give me ten pounds for my horse, and you do give me one penny in earnest, which I do accept, this is a perfect bargain; you shall have the horse by an action on the case, and I shall have the money by an action of debt."

<sup>8</sup> Y. B. 20 HENRY VI, Trin., pl. 4; Fortescue, arguing, says: "Sir, I will show that if I buy a horse from you, now the property in the horse is in me, and for that you shall have writ of debt for the money, and I shall have detinue for the horse on that bargain." In Y. B. 37 HENRY VI, Mich., pl. 18, Prisot, arguing, says: "As if a man buys a cow or a horse from me for 20 shillings, now I shall have good action of debt against him because of his sale, and yet perhaps the buyer has no *quid pro quo*, for perhaps I have no horse, and yet I shall have good action of debt; for it is no plea for me to allege that I have no horse at the time of the sale, because *caveat emptor*. But if I have the horse he can take him from my possession because of my sale."

<sup>9</sup> 3 HOLDSWORTH, *HIST. OF ENG. LAW*, 282.

<sup>10</sup> 2 *HIST. OF ENG. LAW*, 2 ed., 181.

The rule clearly was established by the reign of Edward IV. In his learned opinion of the necessity of delivery for an effective gift, Fry, L. J., says:<sup>11</sup>

"In the reign of Edward IV. a step seems to have been taken in the law relative to gifts which resulted in this modification: that whereas under the old law a gift of chattels by deed was not good without the delivery of the chattel given, it was now held that the gift by deed was good and operative until dissented from by the donee.

"Thus in Michaelmas Term, 7 Edw. 4, pl. 21, fol. 20, it was held by Choke and other justices that if a man executes a deed of his goods to me that this is good and effectual without livery made to me, until I disagree to the gift, and this ought to be in a Court of Record.

"In Hilary Term, 7 Edw. 4, pl. 14, fol. 29, it was alleged by counsel (Catesby and Pigot), that if a man give to me all his goods by a deed, although the deed was not delivered to the donee, nevertheless the gift is good, and if he chooses to take the goods he can justify this by the gift, although notice has not been given by him of the gift; and further, that if the donee commit felony before notice, &c., still the king will have the goods, and although notice may be material, nevertheless when he has notice, this would have relation to the time of the gift, &c. But the Court said that such a gift is not good without notice, for a man cannot give his goods to me against my will."

By the sixteenth century it seems to have been established that the property in goods would pass to the buyer without delivery if he either paid for them or gave earnest, or a fixed time of credit was expressly limited. The doctrine of implied concurrent conditions in bilateral contracts was not developed, but the unfairness of allowing a buyer to claim goods before he had paid for them was too obvious to be disregarded. In the modern law of sales the seller is protected by giving him a lien, but the early law gave protection by treating the transaction as what is now called a cash sale; that is, the transfer of ownership was conditional upon immediate payment of the price unless it was otherwise expressly agreed.

"If I am in the market, and you have a piece of cloth and I say that I will give you 20 shillings for it and you agree, and while I am counting my money some one gives more and throws his money to me, still, I, who am the first buyer shall have it for there is no default in me, and I

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<sup>11</sup> *Cochrane v. Moore*, 25 Q. B. D. 57, 67, 68 (1890).

have done my duty and therefore it was a perfect contract. But if there was any default in me, as if I depart and the other is in no certainty of his duty, then it is not a perfect contract but a communication, and each of the parties is free, and the reason is because each has not the same advantage one against the other, for one will have a chose in possession and the other perhaps an action which will neither be right nor the same advantage."<sup>12</sup>

But the property now might also be transferred without delivery or payment of the price if a day of credit was expressly limited.

"This diversity was taken, when the day of payment is limited, and when not: in the first case, the contract is good immediately, and an action lies upon it without payment; but in the other not so: as if a man buy of a draper twenty yards of cloth, the bargain is void, if he do not pay the money at the price agreed upon immediately; but if the day of payment be appointed by agreement of the parties, in that case, one shall have his action of debt, the other an action of detinue."<sup>13</sup>

Blackburn assumes that the difference between the early and the modern English law with reference to transfer of ownership by mere agreement is merely a difference of presumed intention.<sup>14</sup> But the distinction is deeper than a rule of presumption. The early law did not deal with implied intention; parties must express their desires in words or they were of no legal consequence. This is illustrated in the late development of contracts implied in fact;<sup>15</sup> and the law of Sales presents the same phenomenon.

The law thus fixed underwent little recognized change until the beginning of the nineteenth century. Until then the statement made in 1641 by Noy remained nearly if not quite acceptable. Noy's statement is:

"In all . . . agreements there must be *quid pro quo* presently, except a day be given expressly for the payment, or else it is nothing but communication. If a man do agree for a price of wares he may not carry them away before he hath paid for them. . . . But the merchant shall

<sup>12</sup> 14 HENRY VIII, HIL, pl. 7, per Brook.

<sup>13</sup> Dyer, 30 a (1537).

<sup>14</sup> CONTRACT OF SALE, 1 ed., 148; 3 ed., 181, 182. "In the earlier English law books, it seems to be assumed that all agreements are of this ready money character, unless there is something to indicate a contrary intention." The author then quotes from NOY'S MAXIMS; but there is no support in his quotation for the suggestion that a "contrary intention" would be given effect.

<sup>15</sup> See Ames, "The History of Assumpsit," 2 HARV. L. REV. 53; LECTURES ON LEGAL HISTORY, 149.



retain the wares until he be paid for them, and, if the other take them, the merchant may have an action of trespass or an action of debt for the money at his choice.

"If the bargain be that you shall give me ten pound for my horse and you do give me a penny in earnest which I accept, this is a perfect bargain. You shall have the horse by an action of the case, and I shall have the money by an action of debt.

"If I say the price of a cow is four pound, and you say you will give me four pound and do not pay me presently, you may not have her afterwards, except I will, for it is no contract. But if you go presently to telling of your money, if I sell her to another you shall have your action of the case against me. . . .

"If I sell my horse for money, I may keep him until I am paid, but I cannot have an action of debt until he be delivered, yet the property of the horse is by the bargain in the bargainee or buyer; but if he does presently tender me my money, and I do refuse it, he may take the horse or have an action of detainment. And if the horse die in my stable between the bargain and the delivery, I may have an action of debt for my money, because by the bargain the property was in the buyer."<sup>16</sup>

*Sheppard's Touchstone*, the first edition of which was published shortly afterwards, asserts the same diversities.<sup>17</sup> And they are repeated in 1676 in the seventeenth section of the Statute of Frauds. This section allows validity to no contract for the sale of goods for the price of ten pounds or more, "except the buyer shall accept part of the goods so sold and actually receive the same or give something in earnest to bind the bargain or in part of payment; or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

It is almost certain that this section of the statute was intended and understood to relate only to executed sales; and such was its construction for a century or more after its enactment.<sup>18</sup> Its effect would then be, in regard to transactions for the price of ten pounds or more, to deny validity to a cash sale where the buyer began presently to count his money and nothing had yet passed, and also, and more particularly, to invalidate a sale where an express day of credit was given unless one of the statutory requisites had been complied with. Not only the substantial identity of the require-

<sup>16</sup> NOY'S *MAXIMS*, chap. 42.

<sup>17</sup> *SHEPPARD'S TOUCHSTONE*, 224, 225.

<sup>18</sup> *Towers v. Osborne*, 1 *Strange*, 506; *Clayton v. Andrews*, 4 *Burr.* 2101 (1767).

ments of the section, allowed as alternatives to a memorandum, with the early requirements of the common law for an executed sale, points to the correctness of the early construction, but it should be observed that executory contracts to sell are within a clause of another section of the statute,—the clause relating to contracts not to be performed within a year,—and there is no reason why an executory contract to sell which is to be performed in less time should be dealt with more strictly than executory contracts of other kinds. Moreover, the portion of the statute where section seventeen occurs relates to transactions like devises, trusts, and judgments which are in their nature executed rather than executory.

It was not until 1792 that it was decided that executory agreements were within the terms of the seventeenth section of the statute.<sup>19</sup> Lord Loughborough in so holding said: "It seems plain from the words made use of that it was meant to regulate executory as well as other contracts. The words are 'no contract for the sale of any goods' etc." In basing an argument on the use of the word "contract" Lord Loughborough forgot that this word is that habitually used for sale in the older books, and that it was rarely used in the sense of executory obligation.<sup>20</sup>

Blackstone in the latter half of the eighteenth century substantially copies Noy's statement of the law.<sup>21</sup> He does indeed say, "As soon as the bargain is struck the property in the goods is transferred to the vendee, and that of the price to the vendor"; but he also says after Noy, "If the vendor says the price of a beast is £4 and the vendee says he will give £4 the bargain is struck; and they neither of them are at liberty to be off provided immediate payment be tendered by the other side; but if neither the money be paid nor the goods delivered, nor tender made nor any subse-

<sup>19</sup> *Rondeau v. Wyatt*, 2 H. Blackst. 63 (1792).

<sup>20</sup> In the *Mirror of Justices*, chap. xxvii (p. 73 of Selden Society Translation) it is said: "Contract is a discourse between persons to the effect that something that is not done shall be done. And of this there are divers kinds, some of which are perpetual, such as gift, sale, matrimony, and others are temporary, such as bailments and leases. And there are a mixed kind, such as exchange, which may be for a time and may be for ever. And one kind of contract is an obligation." The use of contract for sale is frequent in the Year Books, and when Noy says in 1641: "If I say the price of a cow is £4 and you say you will give me £4 and do not pay me presently, you may not have her afterward except I will, for it is no contract," he means there is no sale.

<sup>21</sup> 2 COMM. 448.

quent agreement entered into, it is no contract and the owner may dispose of the goods as he pleases." This should be understood to mean that there is no sale, for certainly when Blackstone wrote, executory bilateral agreements were enforceable.

Early in the nineteenth century, if not before, it became clear that if nothing remained to be done to put goods which were the subject of a bargain in a deliverable condition or to fix the price, the property presumably passed as soon as the bargain was made, though the goods were not delivered nor the price paid, nor earnest given.<sup>22</sup>

## II

Though it is thus clear that for centuries delivery of possession has not been necessary to transfer the property in the goods, and that in modern times not only delivery but no other formality, except such as the Statute of Frauds expressly requires, is essential, the bare intention of the parties being sufficient and that intention being presumed if nothing remains to be done but to exchange in the future the goods for the price, yet possession has continued to be vital for perfect and complete ownership.

The familiar statute against fraudulent conveyances<sup>23</sup> was enacted in the reign of Elizabeth, and this statute was held in 1601 to be applicable to a transfer made in satisfaction of a debt due to the

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<sup>22</sup> That does not seem to have been decided until 1827, in the case of *Tarling v. Baxter*, 6 B. & C. 360 (1827); and even in this case an express term of credit was given, though the seller was not to remove the goods until they were paid for. Certainly after the publication of BLACKBURN on the CONTRACT OF SALE in 1844, the principle stated in the text has not been doubted.

In *Dixon v. Yates*, 5 B. & A. 313, 340 (1833), Parke, J., said: "I take it to be clear that by the law of *England* the sale of a specific chattel passes the property in it to the vendee without delivery. The general doctrine that the property in chattels passes by a contract of sale to a vendee without delivery is questioned in *Bailey v. Culverwell*, [See Com. Dig. Biens, D. 3] 2 *Mann. & Ry.* 566, in a note by [the reporters]; but I apprehend the rule is correct as confined to a bargain for a specific chattel. Where there is a sale of goods generally, no property in them passes till delivery, because until then the very goods sold are not ascertained; but where, by the contract itself, the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel, and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel, and to pay the price, is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee."

<sup>23</sup> 13 ELIZ. C. 5.

grantee where the grantor retained possession and continued to use the goods as his own.<sup>24</sup> A century later in a case where the seller was left in possession by the buyer with authority to sell the goods,<sup>25</sup> it was argued that the sale was fraudulent and void as to creditors, and counsel said:

"It had been ruled forty times in his experience in Guild Hall that if a man sells goods and continues in possession as visible owner of them that such sale is fraudulent and void, as to creditors and that the law has always been so held; [but] My Lord Chancellor was of Opinion, that the trust of those goods appeared upon the very face of the bill of sale; that though they were sold to the plaintiffs, yet they trusted Brewer [the seller] to negotiate and sell them for their advantage, and Brewer's keeping possession of them, was not to give a false credit to him, as in other cases which have been cited, but for a particular purpose agreed upon at the time of sale."

The distinction thus suggested was upheld in the Kings Bench nearly a century later, where Buller, J., speaking for the court said: "We are all of opinion that if there is nothing but the absolute conveyance without the possession, that in point of law is fraudulent," but otherwise "if the want of immediate possession be consistent with the deed."<sup>26</sup> Some years later, however, it was held that in any case retention of possession is only evidence of fraud, and that if the transaction is made in good faith retention of possession will not make it voidable.<sup>27</sup>

The question has been made of much less importance in England than formerly by what are known as the Bills of Sale Acts.<sup>28</sup> These require that bills of sale whether given in an absolute sale or merely for the purpose of security (that is as chattel mortgages) shall be registered as a condition of their validity against third persons if possession of the goods is not transferred. But transactions entered into orally are not within the scope of the Act.

Another English statutory provision emphasizing the importance of possession so far as creditors are concerned is one which has been

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<sup>24</sup> *Twyne's Case*, 3 Coke, 80 b (1601).

<sup>25</sup> *Bucknal v. Roiston*, Prec. in Ch. 285, 287 (1709).

<sup>26</sup> *Edwards v. Harben*, 2 T. R. 587, 597 (1788).

<sup>27</sup> *Martindale v. Booth*, 3 B. & Adol. 408 (1832).

<sup>28</sup> Those now in force are 41 and 42 VICT., c. 31; 45 and 46 VICT., c. 43; 53 and 54 VICT., c. 53; 54 and 55 VICT., c. 35.

contained in substance in all English Bankrupt Statutes since that of 1623,<sup>29</sup> and which provides that if bankrupts "by the consent and permission of the true owner and proprietary have in their possession order and disposition any goods and chattels whereof they shall be reputed owners" such goods shall pass under the commission in bankruptcy.

In the United States retention of possession is everywhere at least evidence of fraud against creditors, and in about a third of the states, by statute, there must be an immediate, notorious, and continuous change of possession in order to make a sale valid as against either creditors or purchasers.<sup>30</sup>

The question whether a seller who retains possession of goods after having transferred the property in them can make an effective sale of them to another purchaser who is ignorant of the prior bargain seems not to have been much discussed in the English books. There is, however, a *dictum* in 1821 by Abbott, C. J.,<sup>31</sup> that the second buyer with delivery would prevail. It is said in Blackburn on Sale,<sup>32</sup> that this is inconsistent with the later case of *Reeves v. Capper*.<sup>33</sup> In the latter case, however, the goods in question had been delivered to the first buyer though they were subsequently re-delivered to the seller to hold as bailee, and the effect of the original delivery was relied on by the court in sustaining the title of the first buyer. Not long afterwards, however, there are decisions which unquestionably are inconsistent with the *dictum* of Chief Justice Abbott.<sup>34</sup>

Such decisions seem not to have commended themselves to the English Parliament, for in 1889 a statute finally settled the matter in favor of the buyer who first secured delivery though he might hold under a subsequent sale.<sup>35</sup> In the United States the same

<sup>29</sup> 21 JAC. I, c. 19, § 11.

<sup>30</sup> The American authorities are collected in WILLISTON, SALES, §§ 351 *et seq.*

<sup>31</sup> Knowles v. Horsfall, 5 B. & Ald. 134, 140 (1821).

<sup>32</sup> 3 ed., 496.

<sup>33</sup> 5 Bing. N. C. 136 (1838).

<sup>34</sup> In both Langton v. Higgins, 4 Hurl. & N. 402 (1859), and Young v. Matthews, L. R. 2 C. P. 127 (1866), a purchaser who had acquired ownership but who never had possession of goods was allowed to maintain an action against a subsequent purchaser to whom they had been delivered. There is also a *dictum* to the same effect in Meyerstein v. Barber, L. R. 2 C. P. 38, 51 (1866).

<sup>35</sup> 52 and 53 VICT., c. 45, § 8.

conclusion has generally been reached without the aid of statute.<sup>36</sup> In the leading case, a Massachusetts decision in 1821,<sup>37</sup> the court said: "The general rule is perfectly well established, that the delivery of possession is necessary in a conveyance of personal chattels, as against every one but the vendor. When the same goods are sold to two different persons, by conveyance equally valid, he who first lawfully acquires the possession, will hold them against the other."

The American Uniform Sales Act, now adopted by twenty-six states, provides expressly, as the English statute does, that a sale by a seller remaining in possession accompanied by delivery to the second buyer, provided the latter pays value in good faith, gives him a good title.<sup>38</sup>

The net result, therefore, of the modern law, in jurisdictions where retention of possession by a seller leaves the goods open to seizure by his creditors without regard to actual fraud, is not inaccurately expressed by the common statement that as between the parties (and only in controversies between them) the property may pass without delivery. In jurisdictions where the seller's creditors may not seize goods retained by him after a sale, unless there has been actual fraud, the statement needs some qualification. The results thus achieved, though reached by a different road, are not very unlike those which Mr. Ames sought to reach by some modification of the theory that a buyer without possession had a right of action for the property rather than the property itself.

### III

Another type of case illustrating the ineffectiveness of mere intention to produce all the consequences of ownership, less often discussed than bargains for sale of specific existing goods, is afforded by bargains for the sale of future or unascertained goods. Let it

<sup>36</sup> *McDermott v. Kimball Lumber Co.*, 102 Ark. 344, 144 S. W. 524 (1912); *Patchin v. Rowell*, 86 Conn. 372, 85 Atl. 511 (1912); *Cummings v. Gilman*, 90 Me. 524, 38 Atl. 538 (1897); *Williams v. Lancaster*, 119 Me. 461, 111 Atl. 754; *Lanfear v. Sumner*, 17 Mass. 110 (1821); *Hallgarten v. Oldham*, 135 Mass. 1 (1883); *Flanigan v. Pomeroy*, 85 Minn. 264, 88 N. W. 761 (1902); *Hallett & Davis Piano Co. v. Starr Piano Co.*, 85 Ohio St. 196, 97 N. E. 377 (1911).

<sup>37</sup> *Lanfear v. Sumner*, 17 Mass. 110, 113 (1821).

<sup>38</sup> *UNIFORM SALES ACT*, § 25. The provision was enforced in *Hier v. Wightman*, 188 N. Y. Supp. 274 (App. Div., 1921).

be supposed that a seller contracts to sell such goods, that he later acquires them, and that they become clearly defined as the goods in regard to which the parties bargained. Of course if they are merely goods of the proper kind, no interest in them can pass unless by some special appropriation or delivery, for the seller might satisfy his contract by getting other goods of the same kind and furnishing those; but if he contracts to sell all the goods of a certain kind which he may afterwards acquire, or the first goods of the sort which he acquires, or anything which when acquired is the only thing that can fulfill the description in the contract, no such possibility is open. Likewise subsequent mutual assent to a particular thing as the thing which shall be applied in fulfillment of the contract precludes every right if not every power to dispose of that article otherwise than by transferring it to the buyer. In such cases why may not the ownership pass to the buyer as soon as the goods are identified? Why should not the rule be the same as it is in regard to bargains for the sale of existing goods,—that whether the ownership passes depends upon intention, and that in the absence of any expression indicating the contrary, an intention is implied to transfer ownership as soon as the goods are identified, and nothing further remains to be done to put them in a deliverable condition. There is singularly little discussion about the matter, but this statement pretty clearly does not represent the law, and whether even an express intention that ownership shall pass at that moment is effective, is not free from doubt.

Two distinct principles seem to have contributed to render doubtful the possibility of such transfer by mere force of the intention of the parties. One of these is that which has just been discussed with reference to chattels existing and specific at the time of the bargain — the assumed necessity of delivery. The other, a rule of logic as well as of law, is that it is impossible to make an effective present grant of property not now in existence, and specified. It may first be shown how the latter rule affects the problem.

The early authorities are stated in Tindal, C. J., in a summary of the plaintiff's argument in *Lunn v. Thorton*:<sup>29</sup>

"On the part of the plaintiff, the authorities were strong to shew that no personal property could pass by grant, other than that which belonged

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<sup>29</sup> 1 C.B. 379, 386 (1845).

to the grantor at the time of the execution of the deed. *Perkins* [Tit. Grants, § 65] says, 'It is a common learning in the law, that a man cannot grant or charge that which he hath not.' So in *Hobart's Reports*, [page 132] it is laid down, that 'a man cannot grant all the wool that shall grow upon his sheep *that he shall buy hereafter*; for, there he hath it neither actually nor potentially,' — a distinction which seems to be adopted by *Perkins*, [Tit. Grants, § 90] 'that, if a man grants unto me all the wool of *his sheep* for seven years, the grant is good.' By which is evidently intended, the wool of sheep which the grantor at that time has. And, still further, the plaintiff relied on the authority of *Bacon's Maxims* [Reg. 14]: '*Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio praecedens, quae sortitur effectum, interveniente novo actu.*' Upon which it is to be observed, that Lord *Bacon* takes the first branch of the maxim, namely, that a disposition of after-acquired property is altogether inoperative, as a proposition of law that is to be considered as beyond dispute; and only labours to establish the second branch of the maxim, namely, that such disposition may be considered as a declaration precedent, which derives its effect from some new act of the party after the property is acquired; for, he says, 'The law doth not allow of grants, except there be a foundation of interest in the grantor; for, the law will not accept of grants of titles, or of things in action, which are imperfect interests, much less will it allow a man to grant or incumber that which is no interest at all, but merely future.' "

It is clear that these early authorities are correct in holding that there can be no present grant of unidentified or future goods. The early lawyers were illogical only in making an exception of goods in the "potential possession" of the seller, holding as they did that a present grant might be made of future crop of land owned by the seller, or the future wool or young of animals belonging to him at the time of the grant. But they did not consider whether words purporting to be a present grant of such goods might not be regarded as at least a contract that they should be the buyer's when they came into existence and into the seller's possession; and, if the transaction was so regarded, what the effect of the contract would be on the subsequent ownership of the goods. In this failure to consider words strictly appropriate to present grant as implying a contract to perform in the future is visible again the indisposition of the early law to make implications. And even after the law had developed so far that implications of fact were generally effectual, early modes of state-



ment established before that time persisted. So it is said in Powell on Contracts,<sup>40</sup> with no suggestion that what is invalid as a grant may be effective as a contract: "In our law, therefore, every contract executed, respecting a subject of which the party conveying is not owner, actually or potentially, at the time of entering into it, is void. Thus if a man grant all the wool that shall grow upon his sheep, that he shall buy *hereafter*, this is a void grant; for he has the wool neither actually nor potentially."

Indeed the earliest statement in the books recognizing that such a grant amounted in effect to a contract seems to have been in 1871.<sup>41</sup> There is abundant authority now for the proposition in the United States,<sup>42</sup> and it has been incorporated in the English Sale of Goods Acts,<sup>43</sup> and in the American Sales Act.<sup>44</sup>

It may thus be taken as settled that what purports to be a present grant of future or unspecified goods amounts to an agreement that the buyer shall have such goods in the future, and the inquiry becomes pertinent, What is the effect of such an agreement on the ownership of the goods when the seller acquires them and their identity becomes fixed? When the law regarding existing goods had so far developed that not only delivery was unnecessary to a transfer of the property in the goods but the property was presumed to pass immediately upon the making of the bargain, in the absence of circumstances indicating a contrary intention, it might be supposed that a similar rule would be applied to a contract to sell future or unidentified goods, so that the ownership would presumably pass as soon as the goods became identified and the seller acquired them; but this supposition is unsupported.

In 1808, in the case of *Mucklow v. Mangles*,<sup>45</sup> a buyer who had paid the whole value of a barge while it was in the course of con-

<sup>40</sup> Page \*152 (1791); 5 Am. ed., p. 93.

<sup>41</sup> By Lord Westbury — *Vickers v. Hertz*, 9 Session Cas., 3d series (H. L.), 65, 71 (1871).

<sup>42</sup> *Hogue-Kellogg Co. v. Baker*, 32 Cal. App. 56, 190 Pac. 493 (1920); *Bates v. Smith*, 83 Mich. 347, 47 N. W. 249 (1890); *Battle Creek Bank v. First Bank*, 62 Neb. 825, 88 N. W. 145 (1901); *Proctor & Gamble Co. v. Peters*, 187 App. Div. 376, 176 N. Y. Supp. 169 (1919).

<sup>43</sup> Sec. 5. Judge Chalmers in his annotation to the Act which he drew cites in support of the provision, *Lunn v. Thorton*, 1 C. B. 379, 386 (1845). That case, however, gives no suggestion of such a doctrine but merely holds that a present grant of goods not then in existence can convey no title to them.

<sup>44</sup> Sec. 5 (3).

<sup>45</sup> 1 Taunt. 318 (1808).

struction brought trover against the assignees of the bankrupt sellers who were in possession of the barge, which had been nearly finished before an act of bankruptcy had been committed, and the buyer's name had been painted on the stern. It seems clear that this identical barge was the only one to which the contract could relate. The builder would not have been justified in selling it to another person and informing the buyer that another barge would be made for him. The barge, however, was not in deliverable condition and the case might be rested on this ground, but one member of the court, Lawrence, J., said: "No property vests till the thing is finished and delivered." The effect of later decisions is expressed in the Sale of Goods Act,<sup>46</sup> in the provision which has been copied in the American Uniform Sales Act<sup>47</sup> to the effect that the property presumptively passes in such a case when the goods have been "unconditionally appropriated to the contract" with the assent of both parties. It seems clear from the decisions that "appropriated" means something more than "identified." Judge Chalmers in his annotations to the English statute expresses regret that the word delivered was not used in the Act instead of appropriation, for he believes that in the cases where the property has been held to pass there has been at least a constructive delivery.<sup>48</sup> It is going pretty far to call an act constructive delivery where the seller retains the entire possession and control of the goods but has merely set them aside for the buyer with the latter's consent.<sup>49</sup> But it is probable that the idea of constructive delivery is at the bottom of the rule regarding such appropriation.<sup>50</sup>

<sup>46</sup> Sec. 18, Rule 5 (1).

<sup>47</sup> Sec. 19, Rule 4 (1).

<sup>48</sup> CHALMERS, *SALE OF GOODS ACT*, 8 ed., p. 59.

<sup>49</sup> This is, however, sufficient appropriation. *Wilkins v. Bromhead*, 6 M. & G. 963 (1844); *Weld v. Came*, 98 Mass. 152 (1867); *Tift v. Wight & Weslosky Co.*, 113 Ga. 681, 39 S. E. 503 (1901).

<sup>50</sup> In *Mason v. Lickbarrow*, 1 H. Bl. 357, 363 (1790), Loughborough, J., said: "The sale is not executed before delivery: and in the simplicity of former times, a delivery into the actual possession of the vendee or his servant, was always supposed. In the variety and extent of dealing, which the increase of commerce has introduced, the delivery may be presumed from circumstances, so as to vest a property in the vendee. A destination of the goods by the vendor to the use of the vendee; the marking them, or making them up to be delivered; the removing them for the purpose of being delivered, may all entitle the vendee to act as owner, to assign, and to maintain an action against a third person, into whose hands they have come. But the title of the vendor is never entirely divested, till the goods have come into the possession of the vendee."

It may be said that so far at least as this rule has been expressed in the English and American statutes it is merely one of presumed intention, and that if the parties clearly express the intention that the property in the goods shall pass without other appropriation, as soon as they become identified this intention will be effected.<sup>51</sup> This argument is not conclusive if reference is had merely to the words of the statute, and from the standpoint of authority a difficulty is presented by the decisions where the seller in terms makes a present grant. It seems hard to question the conclusion that the proper inference in such a case is not merely that the seller will make the buyer owner in the future by some further act, but that the seller agrees at the time of the grant that the buyer shall become owner by virtue of the very agreement itself. If an intention of the parties that the property shall pass immediately on the identification of the goods is ever effectual the rule should be applicable to transactions where the seller purports to make a present grant of future property. But courts have almost uniformly declined to give this effect to such a present grant, though this has been done without much discussion. Most of the cases have related to mortgages where an attempt was made to transfer by way of mortgage, generally together with existing goods, the property in future goods. In the leading case of *Holroyd v. Marshall*<sup>52</sup> the English court held that such a transaction gave the transferee an equitable property interest, but it was agreed by the court that for the transfer of a legal interest some *novus actus interveniens* was necessary. Judge Story had made a similar decision in the United States at an earlier day,<sup>53</sup> and there

<sup>51</sup> Section 18 of the Sales Act provides that property in specific goods passes when the parties so intend. This section clearly does not touch the problem where the goods are unspecified. Section 17 provides as to unascertained goods that no property passes until the goods become ascertained. Section 19 provides that unless a different intention appears, the property in unascertained or future goods passes when the goods are unconditionally appropriated to the contract with the assent of both parties. Under these provisions it is clear that property in unascertained or future goods cannot pass until they are specified, and, unless a different intention appears, will not pass until there is an act of appropriation; but the statute does not specifically say that an intention that the goods shall pass, without an act of appropriation, as soon as they become ascertained will be effectual. It may be added that the statute was intended to codify the common law, and should be considered with reference thereto.

<sup>52</sup> 10 H. L. Cas. 191 (1861).

<sup>53</sup> *Mitchell v. Winslow*, 2 Story, 630 (1843).

have been a great number of cases subsequently.<sup>54</sup> The point discussed in these cases is whether the mortgagee obtains an equitable right to the future goods, it being assumed that he gets no legal title. In many jurisdictions he does not acquire any property right, legal or equitable.

There have been few cases of the sort in the Law of Sales. There have, however, been a few. In *Low v. Pew*,<sup>55</sup> the owners of a fishing schooner received part payment of the price of a catch of halibut to be obtained on a voyage of the schooner about to be undertaken. The sellers signed a paper stating "we hereby sell, assign, and set over," all the halibut that might be caught on the voyage upon which the schooner was about to proceed. The sellers became bankrupt shortly before the return of the schooner and it was held that the assignees in bankruptcy were entitled to the catch; yet it is evident that as each fish was caught the expressed intention of the parties was that the buyer should have that fish. If the law permits such a bargain ever to be effectual to transfer ownership on the goods becoming identified, it would seem that this should have been allowed in that case. The recent case of *Procter & Gamble Co. v. Peters*,<sup>56</sup> presents a similar inquiry. In that case, a corporation engaged in the production of fish oil entered into a contract providing that it "hereby sells" and the purchaser (the plaintiff) "buys" from it "all the Menhaden Fish Oil to be produced" at its plant from the date of the contract to a certain date, except 6000 barrels which its agent had an option to take under a prior agreement. The purchaser was to receive the oil in tank cars to be supplied by it at the factory or at its option in barrels to be furnished by it. The oil was to be invoiced to the purchaser by the agent of the seller "as and when" it was produced at the factory, and thereupon said agent was to be entitled to draw at sight to its own order upon the purchaser for the oil at a certain rate per gallon.

The oil after it was extracted at the seller's plant was allowed to remain in settling tanks until it became clear and then was pumped into storage tanks from which it was pumped out for

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<sup>54</sup> See 19 HARV. L. REV. 557, where the matter is discussed and the cases collected.

<sup>55</sup> 108 Mass. 347 (1871).

<sup>56</sup> 187 App. D. 376, 176 N. Y. Supp. 169 (1919).

shipment. Part of the oil thus accumulated was shipped through the seller's factor, who diverted it to a third person, and the plaintiff brought this action for conversion against the factor. A majority of the court held the plaintiff could recover, on the ground that the property passed to it when the oil was pumped into the storage tanks. Though the decision seems opposed to a great number of the decisions referred to above in which it has been held that a mortgage purporting to make a present grant of future property can at most give the mortgagee an equitable interest, it might be supported as a construction of the Sales Act which was in force in New York when the case arose, and which is relied on in the opinion of the majority of the court, since, as indicated above, this statute states the rule in regard to appropriation as one merely of presumed intention, if it were not for the circumstance that in the particular case the oil had not become fully identified. The seller's agent was entitled to an option to purchase part of the oil to the extent of 6000 barrels, and had not fully exercised its right. The point is not met by the suggestion of the court that though the plaintiff's title was subject to the exercise of the option, none of the oil in question had been taken in the exercise of the option. The agent was to take the oil which it desired from the seller, not from the plaintiff.

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## THE CHANGE IN TRUST POLICY

THE tendency to disregard long-time social interests in favor of immediate and often petty advantage seems to be one of the inescapable incidents of a post-bellum period. It emerges in fields so diverse as education, domestic relations, trade, and international politics. It exhibits itself most clearly in an attitude of mind: let things in general alone. "Everything" is supposed to take care of itself in times of peace, so that the only proper business of men and women is to attend to their own private affairs. Other people and the general situation must be molested as little as possible lest matters go from bad to worse. This frame of mind is so prevalent among common men that evidence of its existence, even in so cloistered a tribunal as the Supreme Court, scarcely draws the attention, much less the criticism, of the public. Yet no explanation of the decision of the Supreme Court in *United States v. United States Steel Corporation*<sup>1</sup> can be complete without taking account of the prevalent psychological reaction from the strenuousness of war.

Decisions of our highest court, however, cannot be allowed to rest simply on a popular mood. They are always justified in the opinions by reference to the reason in the law, and however much the individual judgments of the members of the court may be influenced by personal preconceptions or popular psychology these things get little recognition in the reports. There all is made to appear dependent upon the logic of legal rules and the clear evidence of the facts. Accordingly it seems worth while to examine the background of legal doctrine and the economic conclusions the application of which in this case has produced so remarkable a result: the unqualified indorsement of the greatest industrial combination in history.

It must be admitted that the decision is not capricious. It is supported by the high authority of precedent. It is the logical outcome of the important judicial legislation of 1911, and upon that

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<sup>1</sup> 251 U. S. 417 (1920).

legislation it professedly<sup>2</sup> rests. The new construction given the Sherman Act by the Standard Oil and Tobacco cases was grounded, so it was averred,<sup>3</sup> upon principles of the common law. It is necessary, therefore, in order to appraise the doctrine enunciated by the late Chief Justice in those rulings, to revert to the common law to find what rules it set up governing market conduct as such. It seems possible to bring these common-law rules under three heads: (I) the doctrine of contracts in restraint of trade; (II) the doctrine of conspiracy to monopolize; (III) the doctrine of unfair competition. While the enumeration may not be exhaustive,<sup>4</sup> it will serve our present purpose. These doctrines will be considered in order.

## I

"Restraint of trade" was a term having in the early common law a definite, technical meaning.<sup>5</sup> Its use was confined to covenants, usually ancillary to some other and principal engagement, to refrain from carrying on an occupation or business. Originally all such were void<sup>6</sup> and possibly of positive illegality, inasmuch as in the sixteenth-century industrial system every man had his place and was supposed to stay in it. Such covenants, therefore, not only worked to deprive a man absolutely of a livelihood, but also tended to promote change and flexibility, which was exactly what the social system was organized to prevent. By the beginning of the eighteenth century, however, the guild system had reached a moribund state, and the legal rules founded upon it were subject to modification in accordance with the altered circumstances. In the leading case of *Mitchel v. Reynolds*<sup>7</sup> (1711) it was determined that such covenants, where given for the protection of one party in

<sup>2</sup> See particularly pages 450-451 of the opinion. I have reference to the doctrine that "unreasonable" conduct (presumably extortionate price policy or unfair aggression upon pseudo competitors) is essential to the illegality of combinations suppressing competition.

<sup>3</sup> *United States v. Standard Oil Co.*, 221 U. S. 1, 51 (1911).

<sup>4</sup> With respect to the crime of engrossing, see *infra*, pp. 828-831.

<sup>5</sup> 2 EDDY, COMBINATIONS, 779-790. *United States v. Addystone Pipe Co.*, 85 Fed. 271 (1898); *Fisher Mills Co. v. Swanson* 76 Wash. 649 137 Pac. 144 (1913).

<sup>6</sup> *The Dyer's Case*, Y. B. 2 HEN. V. (Pasch., f. 5, pl. 26) (1415). It is not clear from the report whether it was the usual engagement supplementary to the sale of a business or the apprenticeship of the covenantor.

<sup>7</sup> 1 P. Wms. 181, 1 Smith L. C. 406; for an early American authority to the same effect see *Alger v. Thatcher*, 19 Pick. (Mass.) 51 (1837).

a voluntary contract for the sale of a business or of apprenticeship or between partners upon adequate consideration, and limited to a particular area or a specified period, were valid and enforceable. The tendency toward the relaxation of the restrictions upon freedom of contract, so characteristic of the century which followed, is well exhibited in the development of this doctrine. The existence of a time limitation seems to have gradually lost weight,<sup>8</sup> and the rule was restated in *Young v. Timmins*<sup>9</sup> (1831): "Any agreement . . . in general restraint of trade is illegal and void. But . . . a partial restraint (as to space) may be good or bad as the consideration is adequate or inadequate." The courts presently ceased to test the adequacy of the consideration<sup>10</sup> for these promises, moreover, and they were brought into conformity on this point with contracts generally. About the same time the enforceability of these agreements or the validity of bonds conditioned upon their fulfillment was made to hinge upon another consideration: the reasonableness<sup>11</sup> of the restriction imposed upon one's pursuit of his calling. Reasonableness depended upon the extent of the business of the covenantor, the nature of the trade, the circumstances of the parties, and finally the effect upon the public interests.<sup>12</sup> This change in the law upon restraint of trade took place gradually both in England and in America. As late as 1873, it seems to have been the view of courts in this country that the doctrine of reasonableness applied only to partial restraints; a general restraint being regarded as void *ipso facto*. Thus the Supreme Court declared<sup>13</sup> in that year: "Of course, a contract not to exercise a trade generally would be obnoxious to the rule,

<sup>8</sup> *Bunn v. Guy*, 4 East, 190 (1803).

<sup>9</sup> 1 Tyr. 226, 241 (1831).

<sup>10</sup> *Hitchcock v. Coker*, 6 Ad. & El. 438, 456 (1837).

<sup>11</sup> *Horner v. Graves*, 7 Bing. 735 (1831).

<sup>12</sup> C. J. Tindal in *Horner v. Graves*, *supra*, at p. 743, stated the test to be: "by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public." The fuller statement of the "rule of reason" given in the text above follows closely the opinion in *Hubbard v. Miller*, 27 Mich. 15, 19 (1873).

<sup>13</sup> *The Oregon Steam Nav. Co. v. Winsor*, 20 Wall. (U. S.) 64 (1873). But qualification of the full and strict meaning of this language may perhaps be drawn by the further remarks of the court to the effect that: "This country is substantially one country, especially in all matters of trade and business; and it is manifest that cases may arise in which it would involve too narrow a view of the subject to condemn as invalid a contract not to carry on a particular business within a particular State."



established, was condemned for its tendency to prejudice the public interests. The courts viewed such action or such an object as unlawful; not *malum in se*,<sup>23</sup> perhaps, but fully within the doctrine of conspiracy when undertaken by several. Contracts involved in such operations were unenforceable, being contrary to public policy.<sup>24</sup> It was recognized that these restraints were essentially and substantially identical with monopoly, differing only in degree of unification of power. They were the puppies, monopolies the grown dogs. Consequently the law of conspiracy was held to reach them, and in conjunction with the more rigorous penal measures presently provided by legislation it has proven a reliable if insufficient remedy.<sup>25</sup>

This evolution of the common law which we have been tracing was not uniform in all the states. Or at least it may be stated it was not accomplished everywhere without encountering decisions inconsistent with the main line of development. In several cases in this country and Canada it has been held that agreements among competitors fixing prices, dividing territory, restricting output, etc., are not in themselves unlawful or against public policy, though they may become such by reason of the effects of their operation.<sup>26</sup> Thus it was stated in *Herriman v. Menzies*,<sup>27</sup> that:

"Combinations between individuals or firms for the regulation of prices, and of competition in business, are not monopolies, and are not unlawful as in restraint of trade, so long as they are *reasonable*, and do not

<sup>23</sup> "The illegality of a contract or combination for the restraint of competition does not lie in the agreement not to compete, but in its reflex injury to the public." *Pocahontas Coke Co. v. Powhatan, etc. Co.*, 60 W. Va. 508, 525, 56 S. E. 264 (1906).

<sup>24</sup> *Emery v. Ohio Candle Co.*, 47 Ohio, 320, 24 N. E. 660 (1890); *Clark v. Needham*, 125 Mich. 84, 83 N. W. 1027 (1900).

<sup>25</sup> The writer does not wish to be understood as implying that this development of the law was adequate to extirpate the evil. Administrative regulation was essential and even that has not demonstrated its power to do more than check the movement.

<sup>26</sup> *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, 9 N. E. 629 (1887); *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 43 Atl. 723 (1899); *Skrainka v. Scharinghausen*, 8 Mo. App. 522 (1880); *Herriman v. Menzies*, 115 Cal. 16, 44 Pac. 660 (1896); *Over v. Byram Foundry Co.*, 37 Ind. App. 452, 77 N. E. 302 (1906); *Ontario Salt Co. v. Merchants Salt Co.*, 18 Grant Ch. (U. C.) 540 (1871); *Leslie v. Lorillard*, 110 N. Y. 519, 18 N. E. 363 (1888); *Nat'l Benefit Co. v. Union Hospital Co.*, 45 Minn. 272, 47 N. W. 806 (1891); *Gloucester Glue Co. v. Russia Cement Co.*, 154 Mass. 92, 27 N. E. 1005 (1891).

<sup>27</sup> All italics mine. 115 Cal. 16, 22, 44 Pac. 660 (1896).

include *all* of a commodity or trade, or create such restrictions as to *materially* affect the freedom of commerce."

It is clear from this passage as well as from others in the cases cited that what was attempted was the application of the "rule of reason" to "restraints upon trade" in the newer and broader sense, just as it had been applied to the doctrine in its earlier and narrower connotation. This would certainly have been unwarranted,<sup>28</sup> since the term was being used to cover situations more nearly approaching monopolization than the sale of good will or like innocent transactions. Nevertheless this construction of the doctrine of restraint of trade is now the unquestioned law in England.<sup>29</sup>

Fortunately the authorities in this country, resisting this mistaken lead and holding restraints of trade imposed with intent to control the market unqualifiedly illegal, are numerous<sup>30</sup> as well as notable. On the basis of the cases cited, no doubt can be entertained that at common law, in the majority of American jurisdictions, combinations to suppress competition and control prices are against public policy and illegal under the law of conspiracy,

<sup>28</sup> Simply on grounds of legal logic.

<sup>29</sup> Leading cases are: *Wickens v. Evans*, 3 Y. & J. 318 (1829); *Collins v. Locke*, 4 A. C. 674 (1879); *Mogul S. S. Co. v. McGregor*, [1892] A. C. 25; *Commonwealth v. Adelaide S. S. Co.*, [1913] A. C. 781.

<sup>30</sup> *Bailey v. Ass'n of Master Plumbers*, 103 Tenn. 99, 52 S. W. 853 (1899); *Morris Run Coal Co. v. Barclay*, 68 Pa. 173 (1871); *Arnot v. Pittston Coal Co.*, 68 N. Y. 558 (1877); *Salt Co. v. Guthrie*, 35 Ohio, 666 (1880); *Chapin v. Brown Bros.*, 83 Iowa, 156, 48 N. W. 1074 (1891); *Craft v. McConnoughy*, 79 Ill. 346 (1875); *Anderson v. Jett*, 89 Ky. 375, 12 S. W. 670 (1889); *India Bag. Ass'n v. Kock*, 14 La. Ann. 168 (1859); *Pocahontas Coke Co. v. Powhatan*, 60 W. Va. 508, 56 S. E. 204 (1906); *Milwaukee Mason v. Niezerowski*, 95 Wis. 129, 70 N. W. 166 (1897); *Stewart v. Stearns Co.*, 56 Fla. 570, 48 So. 19 (1908); *Nester v. Brewing Co.*, 161 Pa. 473, 29 Atl. 102 (1849); *Clark v. Needham*, 125 Mich. 84, 83 N. W. 1027 (1900); *More v. Bennett*, 140 Ill. 69, 29 N. E. 888 (1892); *Judd v. Harrington*, 139 N. Y. 105, 34 N. E. 790 (1893); *Vulcan Co. v. Powder Co.*, 96 Cal. 510, 31 Pac. 581 (1892); *Getz v. Federal Salt Co.*, 147 Cal. 115, 81 Pac. 416 (1905); *Texas Oil Co. v. Adoue*, 83 Tex. 650, 19 S. W. 274 (1892); *Cummings v. Union Bluestone Co.*, 164 N. Y. 401, 58 N. E. 525 (1900); *Lufkin Rule Co. v. Fringeli*, 57 Ohio, 596, 49 N. E. 1030 (1898); *Santa Clara, etc. Lumber Co. v. Hayes*, 76 Cal. 387, 18 Pac. 391 (1888); *Brent v. Gay*, 149 Ky. 615, 149 S. W. 915 (1912); *United States v. Addystone Pipe Co.*, 85 Fed. 271 (1898); *De Witt Wire Cloth Co. v. New Jersey Wire Cloth Co.*, 14 N. Y. Supp. 277 (1891); *Emery v. Candle Co.*, 47 Ohio St. 320, 24 N. E. 660 (1890); *Gibbs v. McNeeley*, 60 L. R. A. 152 (1902). Cases involving public service corporations have been omitted as resting on slightly different principles.

without regard to the conditions bringing about the combination or the actual consequences to the public. The conditions of competition may be ruinous and the prices charged and business policies followed be altogether reasonable, but these afford no excuse for the deliberate suppression of competition in any market.<sup>31</sup> A few excerpts from the opinions cited will indicate that the courts were mindful of the caution necessary in adopting an old phrase to cover a new situation. In *Cummings v. Union Bluestone Company*<sup>32</sup> the court stated:

"It may be conceded that one of its purposes was to enable the parties to obtain reasonable prices, but it gave them the power to fix arbitrary and unreasonable prices. The scope of the contract, and not the possible self-restraint of the parties to it, is the test of its validity."

"It is no answer," said the court in *Salt Company v. Guthrie*,<sup>33</sup> "to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public." And in *Pocahontas Coke Company v. Powhatan Coal Company*<sup>34</sup> it was declared that, "A contract which is charged to be in restraint of trade is not to be tested by what has been done under it, but by what may be done under it; not by its performance, but by its powers of performance<sup>35</sup> when fully exercised." Finally, in the words of now Chief Justice Taft in the oft-quoted opinion in the *Addystone Pipe Case*,<sup>36</sup> "... where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was *nothing to justify or excuse the restraint*,<sup>37</sup> that it would necessarily have a tendency

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<sup>31</sup> *People v. Sheldon*, 139 N. Y. 251, 34 N. E. 785 (1893); *State v. Minneapolis Milk Co.*, 124 Minn. 34, 144 N. W. 417 (1913), and cases above cited.

<sup>32</sup> 164 N. Y. 401, 404, 58 N. E. 525 (1900).

<sup>33</sup> 35 Ohio, 666, 672 (1880).

<sup>34</sup> 60 W. Va. 508, 525, 56 S. E. 264 (1906).

<sup>35</sup> Contrast with this the *dictum* of Justice McKenna in the *Steel Corporation Case*: "The law does not make . . . the existence of unexercised power an offence. It . . . requires overt acts." 251 U. S. 417, 451 (1920).

<sup>36</sup> 85 Fed. 271, 282 (1898).

<sup>37</sup> Italics by the present writer.

to monopoly, and therefore would be void. . . . We do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract." In these opinions there is no disposition evinced to carry over the "rule of reason" which applied to contracts in restraint of trade as that phrase was understood at early common law to the totally unlike situation which it was eventually adopted to cover.

## II

The "rule against monopolies" was a product of the political struggle of the seventeenth century which culminated in the Puritan Revolution. It is but another example of the responsiveness of the English legal system to the political and social thought of the people whom it governs, a quality so essential to institutional steadiness and progress that one wonders why the judiciary and the lawyers have ever been so zealous to conceal it. The rule was aimed at the royal prerogative of granting exclusive privileges<sup>38</sup> to conduct specific trades usually within restricted areas in the kingdom. The frequently cited and authoritative "Case of Monopolies"<sup>39</sup> decided in 1602 denied validity to letters patent from the Crown to "have and enjoy the whole trade, traffic and merchandize of all playing cards" within the realm. Shortly afterward<sup>40</sup> the common law as declared in this case was reinforced by statute, and English sovereigns ever since, mindful of the experience of Charles I, have not tempted fate by disregarding it.<sup>41</sup>

But the popular passion and legal logic which had accomplished this demission of the Crown were not spent. They were directed to the prevention of the evils which were perceived to issue from

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<sup>38</sup> This power was probably evolved from the ancient custom of the Crown to charter first the merchant guilds and later the craft guilds. By clearly limiting the scope of their activities and giving plenary powers within their jurisdiction the King was enabled to provide fairly efficient local administration without sacrifice of royal prestige, which moreover not only cost him nothing but yielded a goodly revenue. Incidentally such charter-granting tended to enhance the royal authority at the expense of the seigniorial powers of numerous lords and barons.

<sup>39</sup> *Darcy v. Allen*, 11 Coke, 84 b.

<sup>40</sup> 21 Jac. I, c. 3 (1623).

<sup>41</sup> The statute came up for consideration in *East India Co. v. Sandys*, Skin. 165, 90 Eng. Rep. 76, and though the company was defeated in its action against an interloper, it appears the charter of the company was considered to fall within the express exceptions of the statute of 1623.

power to control the market however acquired. The main source had been stopped by 21 James I, chapter 3; a lesser source, from schemes carried out by private contract, was blocked by an easy adaptation of the law of conspiracy, that perennial catchall bag of the common law. Attempts in the seventeenth and eighteenth centuries, however, to establish monopolistic control in a market by joint action of traders do not appear to have been common. And this is not surprising when one considers that it was the period of the decay of the guilds: a time when most of the ambitious masters would be extremely jealous of their independence and violent partisans of freedom of trade. But wherever such attempts at market domination came before the courts<sup>42</sup> they were roundly denounced and held indictable as conspiracies. There seems little doubt that at least up to the latter part of the nineteenth century the law condemned every combination looking toward a unified control of any line of business with the power to raise prices,<sup>43</sup> and no other

<sup>42</sup> Anonymous, 12 Mod. 248 (1699); King v. Norris, 2 Kenyon's Rep. 300 (1758).

<sup>43</sup> People v. North River Sugar Refin. Co., 54 Hun. 354, 7 N. Y. Supp. 406 (1889), 121 N. Y. 582, 24 N. E. 834 (1890); State v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279 (1892); State v. Nebraska Distilling Co., 29 Neb. 700, 46 N. W. 155 (1890); Standard Oil Co. v. State, 117 Tenn. 618, 100 S. W. 705 (1906); National Harrow Co. v. Bemet, 21 App. Div. 290, 47 N. Y. Supp. 462 (1897); National Harrow Co. v. Hench, 83 Fed. 36 (1897); Chicago Coal Co. v. People, 214 Ill. 421, 73 N. E. 770 (1905); American Strawboard Co. v. Strawboard Co., 65 Ill. App. 502 (1895); Bishop v. Amer. Preserv. Co., 157 Ill. 284, 41 N. E. 765 (1895); Distilling Co. v. People, 156 Ill. 448, 41 N. E. 188 (1895); Harding v. Amer. Glu. Co., 182 Ill. 551, 55 N. E. 577 (1899); Richardson v. Buhl, 77 Mich. 632, 660, 43 N. W. 1102 (1889); Cont. Wall Paper Co. v. Voight, 148 Fed. 939 (1906); State v. Armour Co., 173 Mo. 356, 73 S. W. 645 (1903); Finck v. Schneider Co., 187 Mo. 244, 86 S. W. 213 (1905); Slaughter v. Thacker Coal Co., 55 W. Va. 642, 47 S. E. 247 (1904).

To similar effect are the early decisions under the Sherman Act. United States v. Freight Ass'n, 166 U. S. 290 (1897); United States v. Joint Traffic Ass'n, 171 U. S. 505 (1897); United States v. Chesapeake Fuel Co., 105 Fed. 93 (1900), 115 Fed. 610 (1902).

Other cases involving genuine contracts in restraint of trade, or sale of entire output, held void because constituting part of a general scheme to monopolize, follow: Wright v. Ryder, 36 Cal. 342 (1868); Western Wooden-Ware Ass'n v. Starkey, 84 Mich. 76, 47 N. W. 604 (1890); Detroit Salt Co. v. National Salt Co., 134 Mich. 103, 96 N. W. 1 (1903); Merch. Ice Co. v. Rohrman, 138 Ky. 530, 128 S. W. 599 (1910); Shawnee Compress Co. v. Anderson, 209 U. S. 423 (1908); Merz Capsule Co. v. Capsule Co., 67 Fed. 414 (1895); Comer v. Burton-Lingo Co., 24 Tex. Civ. App. 251, 58 S. W. 969 (1900).

*Contra*: Oakdale Co. v. Garst, 18 R. I. 484, 28 Atl. 973 (1894); Davis v. Booth Co., 131 Fed. 31 (1904); Trenton Potteries v. Oliphant, 58 N. J. Eq. 507, 43 Atl. 723 (1899);

situation. It made no difference whether the attempt to influence prices were local or general in its scope,<sup>44</sup> whether the policy pursued were extortionate or moderate,<sup>45</sup> whether the combination were partial or all-inclusive, or whether or not an attempt was made to establish and maintain the power by exclusive practices.<sup>46</sup> The gist of the offense was conspiracy, so that the successful pursuit of his trade by any competitor more skilled or efficient than others could never have become unlawful<sup>47</sup> even upon the hypothesis that the independent growth of his business continued till he stood alone in the field. While it might be expected that the evils of monopoly might result as well from a monopoly thus secured as from one originating in any other manner, what might not be expected was that monopoly should originate in this way. To any one cognizant of the wide margin which must be allowed in all commercial affairs for simple fortuities the hypothesis is preposterous. When, furthermore, account is taken of the brevity of a man's active business career and the fact that genius may safely be classified as an acquired trait and non-transmissible, it would have been singular indeed to have found the ever-practical common law providing against such a remote eventuality.

It is true, therefore, as has been pointed out,<sup>48</sup> that monopoly

*Booth & Co. v. Seibold*, 37 Misc. 101, 74 N. Y. Supp. 776 (1902). See also *Gloucester Glue Co. v. Russia Cement Co.*, 154 Mass. 92, 27 N. E. 1005 (1891).

<sup>44</sup> *Fisher Mills Co. v. Swanson*, 76 Wash. 649, 137 Pac. 144 (1913).

<sup>45</sup> *Chicago Coal Co. v. People*, 214 Ill. 421, 73 N. E. 770 (1905); *United States v. Chesapeake Fuel Co.*, 105 Fed. 93 (1900).

<sup>46</sup> In recent years there has been a growing disposition to regard this as the essential core of the doctrine of monopolization, — see A. M. Kales, "Good and Bad Trusts," 30 HARV. L. REV. 830, — and it is supported by a few cases, *e. g.*, *U. S. Chem. Co. v. Provident Chem. Co.*, 64 Fed. 946 (1894); *United States v. Nelson*, 52 Fed. 646 (000); *Dolph v. Troy Mach. Co.*, 28 Fed. 553 (1886); *United States v. The Prince Line*, 220 Fed. 230 (1915); *United States v. American Canning Co.*, 230 Fed. 859 (1916).

But a survey of the cases above cited does not support this view. Cf. *Tuscaloosa Ice Co. v. Williams*, 127 Ala. 110, 28 So. 669 (1899); *American Strawboard Co. v. Peoria Strawboard Co.*, 65 Ill. App. 502 (1895).

<sup>47</sup> See opinion in *Vegelahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077 (1896).

<sup>48</sup> A very clear declaration to this effect was made by Mr. J. B. Warner, counsel for plaintiff in *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, 359, 9 N. E. 629 (1887). "It is sometimes said," he declared, "that the law is jealous of any interference with competition, and this may appear at first sight as an independent principle, and one upon which a legal decision may be based. But when the cases are examined, it will appear that an interference with competition is illegal only when accomplished by illegal means; as by restraint of trade, forestalling, conspiracy, or

*per se* is not obnoxious to the common law; or, as it is more frequently stated, there exists no independent principle of the common law compelling competition. But the attempts to monopolize which very clearly and unequivocally were condemned by the common law consisted<sup>49</sup> in confederated efforts to bring about a unification of the management of the whole or approximately the whole of the business in an industry or trade in any market area by the process of absorption or the process of exclusion of competing units. Since the pursuit of either policy might lead to the same result, and since, except for the process of "natural selection," they exhausted the possible pathways to the disfavored goal, both were condemned. It will be perceived, as was mentioned above, that the difference between "restraints upon trade" as that phrase came latterly to be understood and attempts to monopolize was a difference only of form or of degree. Monopolization was simply the more far-reaching, the more pervasive, the more permanent scheme for controlling the market. Monopolization ordinarily reached back to a command over the production processes. It implied a unification of the directing power over the methods and terms of conducting an industry or line of trade. It implied a de-individuation of all the business units coming within the control of the single authority, not necessarily in name but absolutely in fact. The essence of an illegal attempt to monopolize was a conspiracy to achieve this end. Whenever men concerted together for the primary purpose of acquiring this dominant control of affairs in a line of trade, they were guilty of conspiracy, however legitimate might be the means employed to realize their purpose. The use of commercial spies, railroad rebates, local price-discriminations, exclusive dealer agreements, on the one hand, or resort to covenants technically in restraint of trade, bogus independent concerns, "fighting brands," and similar devices, on the other hand, served but to aggravate the offense. They were not essential elements in the conspiracy; the existence of the unlawful object was sufficient.

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something similar. *There is no independent legal principle in favor of competition which can carry us beyond the other and more familiar doctrines of the law.*" (Italics mine.)

<sup>49</sup> It is instructive to contrast with this definition the situation brought about by large-scale coöperative enterprises, upon the lawfulness of which the courts never have left any doubts. *Rex v. Webb*, 14 East, 406 (1811); *Pratt v. Hutchinson*, 15 East, 511 (1812).

In short, it appears the courts were not unwilling to risk the establishment of unified control in an industry as the incidental outcome of free and active competition, but they were unwilling to risk its establishment as the intended result of a deliberate plan entered into by competitors, or, it may be added, by a group of individuals within any one firm.<sup>50</sup>

Once the fact was established of the attempt to monopolize, moreover, as in the case of agreements in restraint of trade, it was immaterial how the power might be used. The fact that it might have been used moderately could not avail to expiate the offense. For, as was frequently pointed out,<sup>51</sup> it was the danger to the public interest from the existence of the power, not the evils from its abuse, which constituted the reason for the rule. To any one even slightly familiar with our industrial history it must be manifest that any other interpretation would always have proven quite futile. To have required affirmative proof of the ill effects of every attempt to monopolize would have made nearly every one of the industrial combinations attacked in the last forty years secure in its predatory privilege. This would have been true not because the baneful effects may not have existed, but because of the endless devices and subterfuges, to the employment of which the way would have been opened to the monopolists for covering up and explaining away the specific consequences of their behavior. If the prices were higher than those previously prevailing, may this not have been due to a change in the general price level, or to the exhaustion of an essential source of raw material, or to the success of organized skilled labor? The prices may even have been lower than previously prevailing competitive prices, but every one will agree that that in itself would be far from constituting a complete vindication of monopoly. Were the prices lowered as much as they should have been in view of supervening technological improvements or the advance in the external economies of the industry,

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<sup>50</sup> *Patterson v. United States*, 222 Fed. 599 (1915); affirmed, 238 U. S. 635 (1915).

<sup>51</sup> *State v. Standard Oil Co.*, 49 Ohio, 137, 186, 30 N. E. 437 (1892): "Much has been said in favor of the objects of the Standard Oil Trust, and what it has accomplished. It may be true that it has improved the quality and cheapened the costs of petroleum and its products to the consumer. But such is not one of the usual or general results of a monopoly; and it is the policy of the law to regard, not what may, but what *usually* happens. Experience shows that it is not wise to trust human cupidity where it has the opportunity to aggrandize itself at the expense of others."



or the change in the general price level, or the increase in the efficiency of manual labor? But aside from the matter of price policy there are questions even more to the point from the long-time, social point of view. Have mechanical progress and the increase in administrative efficiency in the industry been maintained? Or has progress in these respects kept pace with similar tendencies in other industries? To answer these questions with definiteness and certainty is simply impossible.<sup>51a</sup> Economists differ widely in their interpretations of the vast maze of industrial facts which such questions bring up. Courts would flounder in the mire of dubious data and shifting speculations into which they would be plunged by undertaking such an inquiry. No settled rules and principles could possibly issue from such litigation to serve as a guide to business activity. The public interests will be far better safeguarded in these cases by holding the tendency of such arrangements generally to prey upon public well-being a sufficient ground for condemning them. These considerations seem to have been appreciated by judges in early cases, and were wisely made the basis of a majority of their decisions.

In this connection some reference should be made to the crime or crimes of forestalling, regrating, and engrossing. It is probable that these offenses originally consisted in nothing but the carrying on of wholesale operations in trades in which, because of their generally local character, the intervention of middlemen between producers and retail dealers was considered unnecessary. It was an easy step in medieval economic reasoning to pass from the unnecessary to the pernicious. So the practice of buying up large quantities of certain "necessaries," or provisions, to resell at a later time in gross, was from a very early date forbidden.<sup>52</sup> The law upon the subject was, one may say, codified in a statute of 5 and 6 Edw. VI. The measure does not appear, however, to have been effective in preventing the establishment of a wholesale distribution system for necessities as it was for other merchandise. The settled disuse of the statute for its original purpose, however, did not prevent its adoption for another purpose when the occasion arose.

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<sup>51a</sup> See *infra*, Part II, June Number summary.

<sup>52</sup> 3 INST. 196; 1 HAWK. P. C., c. 80, § 3; and 4 COM. DIG. 68; 1 EDDY, COMBINATIONS, 37-45.

In the latter part of the eighteenth century the widening of the markets under pressure of improvements in the productive processes, coming as it did before there occurred any considerable changes in the methods of communication and transportation, offered great opportunity for the operations which now go by the name of "cornering the market." These nefarious transactions, bad enough in the case of ordinary commodities, were particularly obnoxious when the supply of one of the necessities of life to large bodies of consumers in the growing urban centers was cut off. Consequently a remedy had to be provided. It was found<sup>53</sup> in the adaptation of these ancient crimes. But it became necessary again to recognize their common-law origin, the statute 5 and 6 Edw. VI, c. 14, having been repealed by 12 George III, c. 71 (1771), on account of the inconsistency between its traditional construction and the tenets of the new social policy of trade freedom. Nevertheless there was sound support for the new application of the old offenses, since what it was aimed to prevent in both cases was deviation from the "due course of trade," and the enhancement of prices.<sup>54</sup>

The success of the Manchester school in popularizing the *laissez-faire* doctrines during the first half of the nineteenth century, however, was so tremendous that these common-law offenses went the way of most other restrictions upon freedom of contract. By 7 and 8 Victoria, chap. 24, prosecution for these offenses under the common law was absolutely prohibited. It thus appears that in England<sup>55</sup> since 1844 there has been nothing illegal in an attempt to "corner the market" even for a kind of provisions<sup>56</sup> if conducted by an individual. An individual can buy up any quantity of any commodity he chooses, and whatever his motives the law will not penalize his actions.<sup>57</sup>

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<sup>53</sup> King v. Waddington, 1 East, 143 (1800); King v. Rusby, 2 Peake N. P. Cas. 189 (1800).

<sup>54</sup> BLACKSTONE COMM., bk. iv, chap. 12; 2 Cooley's ed. of BL. COMM., 3 ed., 157.

<sup>55</sup> Rex v. Hilbers, 2 Chitty, 163 (1818).

<sup>56</sup> Just what constituted "necessaries" was a point which gave the courts not a little trouble, but it seems clear that an individual operating independently at any time under the common law might with impunity "corner" the market in horseshoes, for example, and be entitled to enforce in the courts any contract entered into in execution of the plan.

<sup>57</sup> Pettamberdass v. Thackoorseydass, 5 Moore Ind. App. 109 (1850).

In so far as the offenses of forestalling, regrating, and engrossing became a part of the law of this country, it was by virtue of their being a part of the common law at the time of colonization. As that was prior to the change in their construction noted above, and as the offenses in their original meaning had become obsolete,<sup>58</sup> it is extremely doubtful if there are any such crimes as forestalling, regrating, and engrossing by the common law of these United States.<sup>59</sup> The books do not afford a single record, so far as the writer has been able to find, of an indictment in an American court for these common-law offenses. A "corner" manipulated by an individual, it may be concluded, whether in a common necessary or an ordinary article of commerce, is not a criminal offense by the common law in the principal jurisdictions in the United States,<sup>60</sup> though it has been made such quite generally by statute. Nevertheless contracts made in pursuance of such schemes are undoubtedly against public policy<sup>61</sup> and unenforceable in the courts regardless of statutory condemnation.<sup>62</sup> Even this, however, does not mean that if an individual or a corporation should acquire dominance or control in any market as the result of a competitive struggle by methods legal and fair his or its contracts would be unenforceable. Motive or purpose has always been recognized as an important element in such transactions,<sup>63</sup> and in the absence of a

<sup>58</sup> WHARTON, *CRIMINAL LAW*, 11 ed., § 2210; STORY, *SALES*, 4 ed., 585.

<sup>59</sup> *Raymond v. Leavitt*, 46 Mich. 447, 9 N. W. 525 (1881).

For a contrary view see E. A. Adler, "Monopolizing at Common Law," 31 *HARV. L. REV.* 246.

<sup>60</sup> *United States v. Patten*, 226 U. S. 525 (1913), was a case involving a conspiracy to corner a market under the Sherman Law.

<sup>61</sup> *Wright v. Cudahy*, 168 Ill. 86, 48 N. E. 39 (1897); *Sampson v. Shaw*, 101 *Mass.* 145 (1869).

<sup>62</sup> *Raymond v. Leavitt*, 46 Mich. 447, 9 N. W. 525 (1881).

<sup>63</sup> Lord Kenyon said in *King v. Waddington*, 1 *East*, 143, 158 (1800): "Here is a person going into the market who deals in a certain commodity. If he went there for the purpose of making his purchases in the fair course of dealing with a view of afterwards dispersing the commodity which he collected in proportion to the wants and conveniences of the public, whatever profit accrues to him from the transaction, no blame is imputable to him. On the contrary, if the whole of his conduct shews plainly that he did not make his purchases in the market with this view, but that his traffic there was carried on with a view to enhance the price of the commodity, to deprive the people of their ordinary subsistence, or else to compel them to purchase it at an exorbitant price; who can deny that this is an offence of the greatest magnitude?"

It may be added that it is on this point if at all that cases like *Cornor v. Burton-Lingo Co.*, 24 *Tex. Civ. App.* 251, 58 S. W. 969 (1900), and *Gloucester Glue Co. v. Rus-*

wrongful motive, *e. g.*, the primary purpose to secure command over the whole supply in a market and mulct the consuming public by exorbitant prices, there seems no ground<sup>64</sup> for holding the contracts void.

### III

For over a century now the general social policy toward trade and industry fostered by the common law has been the policy of free competition. The courts have reflected the popular belief that the long-run interests of society are best promoted by allowing all individuals the fullest liberty of contract and freedom of action in business practically feasible. The courts even appear latterly to have held more tenaciously to this position than the common run of men. Nevertheless even in the law it has all along been recognized that some limitations upon the manner of conducting a competitive business were essential if the privileges of a few were not to destroy the privileges of others. The use of force or intimidation, of course, has from the beginning been denied men in business, though these means might be intended only to advance their own trade by undoing a rival. But aside from these obviously necessary restrictions upon the liberty to compete if social order was to be maintained — restrictions which of course applied to all other forms of social intercourse — the field of competition in trade and industry was kept extremely "open."

Gradually in the course of the nineteenth century, however, there grew up a legal doctrine by which the courts sought to regulate the conduct of business firms toward rival enterprises more specifically and more rigorously. This was the doctrine of unfair competition. As the very term implies, judgment of business practices upon ethical grounds, or at the least upon grounds of expediency, came to supplement the old unquestioning confidence in "free competition." This doctrine of unfair competition was a development of a branch of the law of fraud. Its aim was simply to prevent the deceitful sale or "passing off" of goods made by one person or firm for goods made by another. It operated to protect trade-marks and other bases of "good will" as property.

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*sia Cement Co.*, 154 Mass. 92, 27 N. E. 1005 (1891), are to be distinguished. See also *Tuttle v. Buck*, 107 Minn. 145, 119 N. W. 946 (1909), on importance of motive.

<sup>64</sup> *Rex v. Webb and Pratt v. Hutchinson*, *cit. supra*.

But so much had been a recognized legal policy in previous centuries. The change was in widening the application of the principle to all cases where one trader or manufacturer sought to take advantage of the good reputation of a competitor by causing confusion of their identity or the identity of their goods in the minds of purchasers or patrons.<sup>65</sup> In short, by the doctrine of unfair competition as it came to be developed, protection was afforded to business enterprises not only in the use of trade-marks and trade names but also in the enjoyment of their established commercial relationships.<sup>66</sup> The protection long accorded the symbol came finally to embrace the whole of the substance, if such it may be termed, — good will.

This was no mean addition to the social limitations upon competitive warfare in business. The doctrine undoubtedly covered much more than came under the general law of fraud.<sup>67</sup> It had a salutary effect upon the ethics of manufacture and trade, — directly, by curbing the commercial buccaneer who would profit from the enterprise of some one else; indirectly, by encouraging identification of products and standardization of quantity, quality, and price. Yet as almost the sole legal principle defining what was fair dealing in a competitive market, its scope<sup>68</sup> strikes the twentieth-century observer as very narrow indeed. It did not reach deliberate disparagement of a competitor's product,<sup>69</sup> unless a libel or slander was proved<sup>70</sup> of his character. It placed no bar to commercial spying, price discrimination, exclusive handling arrangements, or any of the other similar devices for throat-cutting

<sup>65</sup> *Hogg v. Kirby*, 32 Eng. Rep. 336 (1803); *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169 (1896).

<sup>66</sup> *Reddaway v. Banham*, 74 L. T. R. 289 (1896); *American Waltham Watch Co. v. United States Watch Co.*, 173 Mass. 85, 53 N. E. 141 (1899); *Eureka Fire Hose Co. v. Eureka Mfg. Co.*, 72 N. J. Eq. 555, 65 Atl. 870 (1907).

<sup>67</sup> See opinion of Lord Herschel in *Reddaway v. Banham*, 74 L. T. R. 289 (1896), and opinion of Holmes, J., in *New Eng. Awl Co. v. Awl Co.*, 168 Mass. 154, 46 N. E. 386 (1897).

<sup>68</sup> See, however, *Davis v. New England Ry. Pub. Co.*, 203 Mass. 470, 89 N. E. 565 (1909), as illustrating the elasticity of the doctrine of fraud.

<sup>69</sup> *Canham v. Jones*, 35 Eng. Rep. 302 (1813); *White v. Mellin*, [1895] A. C. 154; *Hubbuck v. Wilkinson*, [1899] 1 Q. B. 86; *Boynton v. Shaw Stocking Co.*, 146 Mass. 219, 15 N. E. 507 (1888); *Hopkins Chem. Co. v. Read Drug Co.*, 124 Md. 210, 92 Atl. 478 (1914); *Victor Safe Co. v. De Right*, 147 Fed. 211 (1906).

<sup>70</sup> *Davey v. Davey*, 22 Misc. 668, 50 N. Y. Supp. 161 (1898); *Blumhardt v. Rohr*, 70 Md. 328, 17 Atl. 266 (1889); *Ramharter v. Olson*, 26 S. D. 499, 128 N. W. 806 (1910); also *American Waltham Watch Co. v. Watch Co.*, 173 Mass. 85, 53 N. E. 141 (1899).

in the market. Only "palming off" one's goods as those of a business rival was forbidden.<sup>71</sup> For a rule of law thus circumscribed, the following encomium pronounced by the court in the case of *Dennison Manufacturing Company v. Thomas Manufacturing Company*<sup>72</sup> seems scarcely warranted:

"The gradual but progressive judicial development of the doctrine of unfair competition in trade has shed lustre on that branch of our jurisprudence as an embodiment, to a marked degree, of the principles of high business morality, involving the nicest discrimination between those things which may, and those things which may not, be done in the course of honorable rivalry in business."

The influence of the *laissez-faire* tenets was too persistent and too powerful to permit this judicial dream to become a judicial achievement. But the swelling tide of popular skepticism and discontent finally broke through the *laissez-faire* dam, and legislative regulation and administrative supervision of business competition were provided. The development has taken place almost entirely since the turn of the century, and ordinary industries (once termed "private") have come under commission control but slightly and in quite recent years. The states took the lead, Wisconsin being the pioneer. In the sphere of interstate trade the Clayton Act and the Federal Trade Commission Act were the fulfillment of these "progressive"<sup>73</sup> aspirations. It is significant that in the latter Act the powers of the Commission were extended to cover every "unfair method of competition in commerce," thus eliminating any doubt regarding the intention to expand the law beyond the confines indicated by the technical legal phrase "unfair competition."<sup>74</sup>

#### IV

#### SUMMARY AND CONCLUSION

The results of our brief survey of the common law covering market conduct as such may be thus summarized:

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<sup>71</sup> *Rocky Mt. Bell Tel. Co. v. Indep. Tel. Co.*, 31 Utah, 377, 88 Pac. 26 (1906); *G. W. Cole Co. v. American Cement Co.*, 130 Fed. 703 (1904); *Citizens Light & P. Co. v. Montgomery Light & P. Co.*, 171 Fed. 553 (1909). See also *Elgin Watch Co. v. Ill. Watch Co.*, 179 U. S. 665 (1901).

<sup>72</sup> 94 Fed. 651, 659 (1899).

<sup>73</sup> If not "Progressive."

<sup>74</sup> Cf. W. H. S. STEVENS, *UNFAIR COMPETITION*, particularly the introduction.

(a) A "restraint of trade" at common law meant an agreement not to enter or carry on an occupation within a prescribed territory. By the rule as finally evolved, a "restraint of trade" might be lawful or unlawful according as its provisions were reasonable or unreasonable, having regard both to the interests of the parties and the protection of the public. In the latter decades of the nineteenth century, courts came frequently to use the phrase in a general way as signifying "restriction of competition." The term was applied particularly to indirect and incipient monopolizing, — "pooling," as it was known in the industrial world. It served to cover a growing class of cases in which the purpose and power of monopoly were present though the form was lacking. Thus used, "restraints upon trade" were not subject to the "rule of reason" in the majority of American jurisdictions.

(b) Monopolizing at common law was removing or abolishing competition in any line of trade in any market (whatever its width) by a conspiracy among competitors. Essentially it was the acquisition of the power to control prices, not the abuse of the power or the effort to conserve it by obstructing the entrance of competitors into the field, which the courts combated.

(c) Barring outright force and fraud, the only conduct of one competitor toward another which might render him legally liable at common law for the too zealous prosecution of his business was the passing off of his own goods as the product of a competitor. This doctrine of "unfair competition," while comprehending more than such deception as would have been illegal in ordinary transactions as fraudulent deceit, still fell far short of providing an adequate moral code for business. Accordingly it has latterly been supplemented by legislative and administrative regulation of competition in trade and industry.

If the foregoing statements *re* the common law on market conduct be accepted, how do they bear upon the action of the federal courts in the Standard Oil, American Tobacco, and subsequent cases in modifying the theretofore accepted interpretation of the Sherman Act? The conclusion seems clear that the modification was unwarranted so far as it was sought to be justified by common-law principles. There is no sound legal basis discoverable in the authorities herein reviewed for distinguishing between "good"

trusts and "bad" trusts.<sup>75</sup> The common law condemned alike combinations whose behavior flagrantly violated common principles of honesty and fair dealing, as did the Standard Oil Company, and those whose behavior was more restrained and conformed more closely to accepted business usage, as did the United States Steel Corporation. Moreover, even if there be some semblance of logic in holding that "restraint of trade" as used in Section I of the Sherman Act implied the qualification of unreasonableness, there certainly can be no show of reason in extending the same qualification to Section II,<sup>76</sup> which forbids monopolizing and attempts to monopolize.

The ground upon which, if at all, it would seem possible to make out some legal justification for the changed judicial policy is that the laws defining what is unfair in trade competition and setting up administrative machinery for detecting and suppressing the same have the effect of sanctioning all forms of industrial consolidation, providing only that no unfair tactics be used in "killing off" competitors and no illegitimate methods of excluding potential competitors from the field be resorted to. But may this legislation be properly construed to have such far-reaching consequences? Does it represent so fundamental a change of public policy toward business enterprise? That such was not the intention of those who were responsible for the federal legislation, at least, is not open to argument. Mr. Wilson in political campaigns and public addresses again and again made his unalterable opposition to private monopoly, whatever its source and however benevolently conducted, perfectly evident. In addressing Congress on the subject of anti-trust legislation he explicitly declared: "Fortunately, no measures of sweeping or novel change are necessary. . . . We are all agreed that private monopoly is indefensible and intolerable and our program is founded upon that conviction." <sup>77</sup>

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<sup>75</sup> For the argument *contra*, see A. M. Kales, "Good and Bad Trusts," 30 HARV. L. REV. 830.

<sup>76</sup> *Pulp Wood Co. v. Green Bay P. & F. Co.*, 168 Wis. 400, 170 N. W. 230 (1919). In the opinion the court declares: "While it is settled by judicial decisions that the 'restraint of trade' named in the statutes does not mean every restraint however trifling, but only an unreasonable or undue restraint, we do not understand that it has yet been held, by the court of last resort at least, that there may be a reasonable monopoly established by private persons at their own motion. . . ."

<sup>77</sup> *JOUR. OF COMMERCE* (New York), January 21, 1914, page 10.



The same view was taken by Congressional leaders,<sup>78</sup> and has been confirmed by the judiciary.<sup>79</sup> The provisions of the Clayton Act and the Federal Trade Commission Act must be held, on any impartial consideration of the evidence,<sup>80</sup> to have been plainly intended to supplement, not to supplant, the sweeping condemnation of monopolies and combinations in restraint of trade contained in the Sherman Act. Finally, it should be noted that in any case the evolution of public policy represented by the anti-trust measures of 1914 can have little part in the justification of the change in the judicial construction of the Sherman Act first manifested in 1911.

But though perhaps it may be granted that "rereading the Sherman Act in the light of common law" will hardly, if the reading be carefully done, warrant the change in judicial construction which is taking place, it is still open to those who look favorably upon this turn of affairs to defend the new policy on grounds of social expediency or national economy. Such indeed appears to me to be the true explanation of the flexure in the trend of decisions of the federal courts, particularly the Supreme Court. But the writer has been unable to find in the opinions in these important cases, or in the arguments, mainly deductive, of those who defend

<sup>78</sup> See report of Senate Committee on Interstate Commerce, June 13, 1914, 63d Cong., 2d. Sess., No. 597; and 51 CONG. REC., 11,381. Senator Cummins, quoting this report, stated:

"The Committee is of the opinion: 'First, that the statute [that is, the "Sherman" anti-trust act] should stand as the fundamental law upon the subject and that any supplemental legislation for more effective control and regulation of . . . commerce, should be in harmony with the purpose of the existing statute.' " See also his remarks on page 11,380 in answer to an argument by Senator Borah similar to the one propounded above (in the text).

<sup>79</sup> The first important case involving the scope of the powers of the Federal Trade Commission to reach the Supreme Court was *Federal Trade Commission v. Gratz*, 253 U. S. 421, 426 (1920). The majority opinion simply declared: "It is unnecessary now to discuss conflicting views concerning validity and meaning of the act creating the commission." But Justice Brandeis in an able dissenting opinion reviews the whole development of this legislation and shows quite incontestably that the view here taken of it is the only one that the facts support.

<sup>80</sup> This is the interpretation given these acts by Professor A. A. Young in a scholarly series of articles in 23 *JOUR. OF POL. ECON.*, Nos. 3, 4, 5, and by economists generally. See article by W. H. S. Stevens in *AMER. EC. REV.*, p. 840 (1914), and W. Z. RIPLEY, *TRUSTS, POOLS, etc.*, revised edition, p. 703.

them, any convincing demonstration <sup>81</sup> of their soundness from the industrial or economic point of view. On the other hand, he believes the unsoundness of this new public policy toward business enterprise is capable of proximate proof inductively, and that is what will be attempted in a concluding article.

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*(To be concluded.)*

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<sup>81</sup> There is no intention of asperity here. Indeed, the *method* pursued by the district court in reaching its decision in the principal case (223 Fed. 55) can only be commended.

THE FUNCTION OF COMPARATIVE LAW  
WITH A CRITIQUE OF SOCIOLOGICAL JURISPRUDENCE

## I

SOCIOLOGICAL JURISPRUDENCE, LEGAL SOCIOLOGY AND  
COMPARATIVE LAW

ONE of the first things to strike a foreigner who comes in contact with American lawyers is the general lack of interest in questions of comparative law. This indifference seems to be chiefly due to a failure to understand the real functions of that science in the modern world. Most see in it nothing more than an amusing puzzle, the chance to satisfy an idle curiosity. Nearly all the books and courses which have dealt with the subject amply confirm this estimate.

We have come to a period when, in most countries, there is a real inadequacy in the law, a failure to reach scientific standards and to meet social ends. From that follows a general dissatisfaction. This dissatisfaction seems to be a consequence of the method used. Law is, in one sense, a social medicine. Let us see what has been done in medicine. For centuries, when a new case was brought to a doctor, he tried to gather what he could out of his past experience by analogy, or to get an inspiration from the "spirit" of his profession, or to use the common sense he had left, and then, trusting the gods, he tried a remedy. If the patient became worse, the doctor tried something else. But in the nineteenth century, when anatomy and physiology began to develop, the doctors quickly availed themselves of the new knowledge, and took advantage of the facts discovered by these sciences to direct their art. Medicine is now an "art" based on "factual sciences," and all doctors have a very substantial knowledge of these sciences.

What has been done in that social medicine which we call law? More than fifty years ago men began to study the social organism

inductively, with scientific methods. Patiently, by monographs, some endeavored to discover the general laws which govern the mechanism or the function of this or that social institution, while others tried to establish methods and to evolve a program. These pioneer studies have established that wherever we find a social group, we have, in one form or another, religious, moral, economic, legal organisms and functions as automatic products of the synthesis obtained by the mere fact that men are together. This synthesis is a generator of forces. A social fact is an external force which coerces the individual.<sup>1</sup> Let us take an example. If a man of the world decides to walk down Fifth Avenue without a hat, he will certainly feel some resistance in executing his project; shame, fear of ridicule, etc., are the individual effects of forces outside the individual, forces which are just as real as the force of the wind which threatens to blow his hat from his head. If the same man tries to break the law, he will encounter contrary moral forces of the same nature, but much clearer here, because their sanctions are accentuated by physical sanctions. All of these forces, immaterial as light, electricity, or universal attraction, are yet as real as those, and, like them, submit to generalization in the form of scientific laws.

All that is by no means new.<sup>2</sup> And if law be looked upon as a system of forces which are bound by certain general, necessary laws to act and react in definite ways toward other social forces, it seems to follow that the lawyers should do what the doctors have done: bend their efforts to the discovery of the scientific facts which limit and direct their control over these forces. But the lawyers have failed to enter in the way which was offered. Hardly anyone has tried to study inductively legal facts, in connection with other social facts, in order to discover the necessary laws of their relation.

In spite of the great achievements of the school of "sociological jurisprudence," it seems doubtful whether it can help very effectively in this task; for, while it is undoubtedly a school of jurisprudence, it is hardly a school of sociology. Instead of deducing

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<sup>1</sup> See E. DURKHEIM, *LES RÈGLES DE LA MÉTHODE SOCIOLOGIQUE*, chap. I.

<sup>2</sup> See, for instance, the book of L. LÉVY-BRÜHL, *MORALE ET SCIENCE DES MŒURS*, 5 ed. (1913), which propounds similar ideas in the general field of moral facts.

the law from abstract principles, the members of this school fix their attention upon the *functions* of the law, its ends, its practical results. This is, indeed, a proof of practicality and common sense. But the history of the law shows a constant swing of the pendulum between periods of growth where the tendency is practical and teleological, and periods of organization where the tendency is logical and systematic. It is this opposition which is now expressed in books under the names of "analytical jurisprudence" and "sociological jurisprudence." But the last name is rather misleading, because the work of this school seems to differ from sociology, both (1) in its *method* of observing the facts, and (2) in the *end* it has in view.

(1) As to the *method*, sociological jurisprudence claims the title of "sociological" because it looks at the function of the law more than at its logical unity. But its practical tendencies, its pragmatic flavor, its teleological philosophy, show the psychological behavior of its members, their personal tendencies, but do not, *ipso facto*, create a scientific method, a new technique. Among the doctors of the middle ages, also, some were more inclined to deduce their science from Aristotelian premises, others preferred to take more into consideration the effect on the patient. But the latter have never constituted a physiological school. Sociology, as truly as physiology, is based on facts. Like all other sciences, it has a great preliminary work to do in clearing the ground of what Bacon calls "anticipationes,"<sup>3</sup> i. e., the popular notions that everybody already has of the facts, — notions which, in the moral sciences, are taken very often for the facts themselves. In social sciences the facts, far from being isolated from one another, are integrated together in a very complicated way; but popular conceptions take chunks from this complexus, and lump together facts which are quite different one from another. In other words, the popular notions cut reality as a butcher cuts beef. And just as a physiologist has to do his own cutting in a different way, the sociologist has to work out his method, his objective criteria, in order to isolate the real facts.<sup>4</sup> Unfortunately, nothing of this sort seems to be

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<sup>3</sup> NOVUM ORGANUM, bk. I, aphorism 26.

<sup>4</sup> This idea is demonstrated at length and very clearly in E. DURKHEIM, *LES RÈGLES DE LA MÉTHODE SOCIOLOGIQUE*, ch. II. See also POUND, *THE SPIRIT OF THE COMMON LAW*, 213 *et seq.*

attempted yet in "sociological jurisprudence," which looks at society as everybody does, and by doing so, uses from the very beginning a method which can hardly be termed sociological.

(2) Sociology is an inductive science; that is, its *end* is to discover by observation the general laws which control facts. Curiously enough, the jurisprudence that we are now examining does not seem to aim at the discovery of such laws.

Here we encounter the very interesting "theory of social interests" of Dr. Roscoe Pound, Dean of the Harvard Law School.<sup>5</sup> This theory has been so "dephlegmatizing," and has done so much in preparing young lawyers to meet the exigencies of the present day, that every thinker must acknowledge its value, proved by its success. But all human creations, especially the first steps in a new field, are imperfect. In order to live, they must change; and criticism may perhaps help them to change. So the following criticism, far from desiring to destroy something which is full of life, seeks rather to promote its evolution. Therefore it does not purport to be conclusive, but attempts to point out difficulties and defects of the system. Mr. Pound's theory is composed of two different elements: (A) an attempted explanation of what actually takes place in the framing of the law, and (B) a rule of action, a suggested method of approach to solve the problems of law in the way which seems right to him.<sup>6</sup>

(A) Let us examine the first point, which I think may be fairly stated as follows: The cause of the substance, form and evolution of the rules, principles, and standards in the law is mainly a compromise, a balance of all the social and individual interests involved in the social facts which are to be regulated.<sup>7</sup> Such a theory attempts to give a keynote to the entire legal process, and

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<sup>5</sup> The principal articles expounding the system are: Pound, "Do we Need a Philosophy of Law?" 5 COL. L. REV. 339 (May, 1905); "The Scope and Purpose of Sociological Jurisprudence," 24 HARV. L. REV. 591 (1911); 25 HARV. L. REV. 140 (1911); "Legislation as a Social Function," 7 PUBLICATIONS OF THE AM. SOC. SOCIETY, 148 (1912); "Juristic Problems of National Progress," 22 AM. J. SOCIOLOGY, No. 6 (1917); "A Theory of Social Interests," 15 PROC. AM. SOCIOLOGICAL SOC. (May, 1921). See also POUND, *THE SPIRIT OF THE COMMON LAW*; POUND, *INTRODUCTION TO THE PHILOSOPHY OF LAW*, chap. II.

<sup>6</sup> We shall use the word *morale* in referring to this second part of the theory.

<sup>7</sup> This short statement is a little crude. Mr. Pound, in fact, does not state it in such absolute form. See *INTRODUCTION TO THE PHILOSOPHY OF LAW*, chap. II.

looks very like the general explanations of the physical world attempted by physicists in the middle ages. If one considers how infinitely more complex are social facts, one cannot help thinking that so sweeping a generalization risks being a negation of sociological method, that it either is premature or does little more than restate the problem.

Such an explanation raises two lines of difficulties: (1) one springing from the notion of *interest*; (2) the other from the notion of *balance*.

(1) If it were true that Mr. Pound means<sup>8</sup> by "interest" what everyone means by the word, his explanation would be by means of *final* causes and not by means of *efficient* causes. That would be to a great extent the negation of sociology, which starts from the assumption that a social fact is a force that must be explained by antecedent forces. It may be to our interest that men have keener eyes and stronger hands, but the mere fact that there is an interest does not help us. We should have to have the optimistic philosophy of the "Candide" of Voltaire in order to admit such an explanation. Such was the weak point of Jhering — but apparently not of the theory that we now analyze. Such a theory logically presupposes, moreover, that we know what the interests of society are. For such knowledge there are two requisites. The first is, that we have an ideal of what society should be. But such an ideal is a metaphysical conception; and if legal sociology is to be a science, it cannot be based on any metaphysical conception. The second requisite is that we know what the final results of any given social facts will be. To make the point clear, let us take an example. Suppose we can establish that the immediate results of the Eighteenth Amendment have been a decrease in the number of crimes and a higher average of expenditure for the education of children between eight and twelve. It does not follow that the prohibition law conforms to the interests of American society. It may turn out later that such a law, in taking from a man the choice which he formerly had, of being sober or not, has broken the proper equilibrium between the respective functions of law and morals, and in so doing has worked more harm than good.

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<sup>8</sup> This hypothesis is taken here only in order to allow us to present a more complete analysis of the idea of interest, but we are persuaded that Mr. Pound does not take the word in this sense.

When a judge decides one way or the other, he cannot be directed by the truest interest of society because such interest can only be the final one, and the judge knows only the immediate ones. Of course, when legal sociology is wholly developed, he may have the means of knowing the final interest. But as, at the present time, we do not have the means of reaching these final interests, law cannot be a balance of these final interests: the only real ones.<sup>9</sup>

Mr. Pound has seen these difficulties, and gives to the word "interest" the sense of claims or demands made by the members of the social group. This sense of the word obviates the difficulties that we have pointed out, but it raises immediately other difficulties. A claim formulated, for which men struggle, is indeed an active social force, but it is necessarily a *conscious* claim. Therefore the theory tries to explain the law (a) by moral causes alone (excluding physical causes; which seems doubtful, at least, from what we know in other branches of sociology), and, (b) among these moral causes, by the conscious phenomena alone (excluding the whole unconscious field).

This second implication cannot stand without modification. We already know that in society, as in the individual, the unconscious forces play by far the greatest rôle. That is why Mr. Pound seems rather ready to admit that by "interests" he means all claims of society, whether conscious or unconscious. But a claim, in its very nature, is something formulated; you cannot have a *de facto* claim that no one has ever made. If what is meant is the obscure needs of society, this must mean one of two things: (a) the things that society really needs without knowing that it needs them, and that is simply to return to the first sense of the word "interest" which we have already criticized, or (b) the obscure forces which drive society, unconsciously, in a certain direction.

This second meaning is very fruitful, and brings us in sociology to the position reached by modern psychology, where there is a tendency to consider that an individual's decision is by no means a mere balance of various motives, existing independently, and

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<sup>9</sup> We cannot transform this analysis into a metaphysical discussion, but we ought to state that our point of view by no means involves a negation of any dualist metaphysical system.



offsetting one another, but that it is an expression of the whole personality, like the descending current of a stream. A decision, that is, is no more made of separate motives than a river is made of separate pails of water. But if law is a product of the social group in its unity, in its personality, so that it is artificial to speak of motives having a separate existence and counterbalancing each other, the ground is cut from the rule of action which forms the second part of Mr. Pound's theory, for that seeks consciously to balance these diverse claims as separate elements. Moreover, although such a principle is intensely interesting in itself, it cannot lead to any method of approach to a specific problem, since it only states that all solutions are the product of the whole organism.

(2) The second main difficulty raised by Mr. Pound's explanation of the legal process is the notion of balance. In order to affirm that a balance is determined by what is in the two scales, it seems that one must know the relative weight of these things. Of course, the word "balance" does not mean, in Mr. Pound's system, a strict mathematical process; it means an endeavor to harmonize interests. But so far as it means anything, it must be based on a knowledge of the weight of the different claims. Apparently, up to the present time, few efforts have been made to solve these problems.<sup>10</sup> For instance, between two claims equal in every respect except that one represents a force of the past, the other a new-rising force, which shall prevail? In other words, is there not within some claims a vitality distinct from their content, a mysterious force of youth that pushes them forward? Does a claim formulated by a hundred fools have more "weight" than a claim formulated by ten intelligent men? Do the claims of an organized body have more influence than do those of unorganized social bodies? Does a claim which would tend to a worse functioning of society lose *ipso facto* some of its weight, even if no one, at the time, is aware of that tendency? Does persistence outweigh clamor? These questions indicate that their answers must be a condition precedent to any warranted affirmation that law is the result of a balance of interests. If we have not even a rough idea of what the weights are, it is logically impossible to say that any fact is the result of the weighing.

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<sup>10</sup> In Chapter VIII of his *THE SPIRIT OF THE COMMON LAW*, Mr. Pound seeks rather to find out what these interests are than to discover their relative weight.

To say that law is a mere balancing of interests involves the postulate that the legal system is an impartial, impassive receptacle in which more or less automatic reactions take place. But, as a matter of fact, we know that the legal machinery of a given society is very much like a living body with its reactions, its currents, its temperament, its prejudices; that it is extra-sensitive to certain things, blind to others. When reality is presented to the legal eye, it is as much distorted as it is to the human eye. The symbol of justice as it is actually administered is not the goddess disinterested and infallible, holding the scales, but rather the Gaul who throws his sword into the balance. In other words, it seems to us that the theory of Mr. Pound does not see the legal system, itself, as a dynamic system, involving as it does forces entirely *sui generis*. This would make a serious gap between sociological jurisprudence and legal sociology.

This critique does not mean that we deny all truth to the system. We believe, on the contrary, that if it fails to explain the real causes of the birth of jural phenomena it gives a good explanation of the *continuance* of these phenomena when once created. In the social system, as in the physiological system, there is in the majority of cases (but not always) — when the being is normal — an internal teleology, a quality inherent in everything living, which tends to eliminate the noxious elements and to keep the useful ones.<sup>11</sup>

(B) On these attempted explanations of facts Mr. Pound builds a rule of action, a method of education, and says to the future lawyers, to the prospective judges, "You ought to balance the different interests at stake, in the case that you have to decide, and give the solution which will be the best compromise of all of them."

Of course, as soon as Mr. Pound leaves the explanation of facts and begins to direct future actions, he is out of the field of sociology, and is a moralist and a metaphysician. Let us follow him for a moment in that field. Up to this time we have been considering Mr. Pound's attempted explanation of the facts; by successive deductions we came to the conclusion that the word "interest," there, could only mean that complexus of conscious and unconscious forces which forms the whole social personality. As we turn to the second part of the theory, the rule of action, the first thing that

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<sup>11</sup> Moreover, we believe the system much more adequate to explain phenomena of private international law. We shall analyze this point later in a separate study.

strikes us is that the word "interest" cannot mean here what it meant there. The reason is that men cannot balance unconscious forces which, by hypothesis, they do not know. So we are led to consider again the two other meanings of the word "interest."

(1) If it meant the real final interests of society, the theory would be lame, because it would not give us the means of knowing what these interests are, since it gives us no plan of social reconstruction. It would fail to point to any absolute values, to give us an end to strive for. And if the answer is that by interests is meant simply the things which help the normal functioning and development of society, then we would reply that such rule of action is no more efficacious than the *morale* of a professor of medicine who should tell his students to apply the remedies best fitted to promote the health and evolution of the human body. Every one agrees to that, but it is by no means a method of approach for the discovery of a remedy. Such discovery presupposes a great development of all social sciences.

(2) But the doctrine means, as we understand it, the *de facto* claims made by members of the social group, and so comes to this: "Try to satisfy everybody if you can." Such a theory is based on William James's idea that any demand made by a human being legitimates itself, and that it is for those who deny its satisfaction to show cause for the denial.<sup>12</sup> Such a point of view appeals very strongly, at first, to the human consciousness; but on closer analysis grave objections appear. We do not mean that these objections are decisive, but only that they are serious enough to make us hesitate to follow such a rule of action without proof of its validity. The objections may be formulated as follows:

(a) In certain periods of history it seems that all the claims, all the demands of society, combine to further the destruction of that society. Such was the case in the later periods of Babylon, Greece, and the Roman Empire. So, to allow the law to be directed by the weight of conscious claims would often be to precipitate a nation toward its own suicide.

(b) This situation is only an exaggeration, in a decadent period, of what happens more or less in any society: in a normal being,

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<sup>12</sup> JAMES, *THE WILL TO BELIEVE*, 195-206.

whether an individual or a group, the majority of his desires tend to secure his conservation and evolution; but many demands, needs, tendencies, on the contrary, work for his destruction. The individual's desire for smoke, spirits, and nervous excitement may be instanced; that of society for capital executions, scandals, etc. The majority of the demands will usually inhibit these destructive demands, but there will be frequent cases where this inhibition will not occur, because the contradiction between the majority of the claims and the present demands will not be perceived by the subject. The destructive desire will triumph because no other demand will arrive in due time upon the scale. That is the cause of most human misery. And this psychological impossibility of seeing what the real conflicts are is so inherent in our mind that in practice every rule of individual conduct, every system of *morale* based on a harmony of desires (hedonism), has always been a failure. The systems which have succeeded in really directing life have always been based either on an end or on absolute values. Even if such a balance of interests were theoretically a good system, it would be a dangerous one, because if we are looking for a rule of action we are bound to take the practical point of view, from which we see, as a fact, that if a man has no absolute standards, a mere idea of compromise will be insufficient to direct his action because such an idea requires too great a knowledge of this tremendously complex net of claims, and too high a mental honesty. So an ethical norm without an imperative, a law without a plan of social progress, is, from a purely psychological point of view, a body without a spine. After all, it was a law which obeyed the preponderance of claims which condemned Socrates. Claims, by the very fact that they are formulated, heard, and approved, are already something of the past; if we have not a system which gives us a way of enforcing those feeble, new-born claims, which contain the future in germ, which are full of vital force, our mind cannot be satisfied by such a system. And, as is pointed out above, this part of Mr. Pound's theory is a metaphysic; hence the fact that it does not satisfy our mind is a sufficient objection.

(c) If the satisfaction of a claim does not necessarily mean happiness, if some of our claims directly tend to our destruction, why ought a claim be satisfied for the mere reason that it is a claim? Nowhere in the system do we find any justification for this.

We must therefore conclude that we have reached the metaphysical basis of the theory: if a claim is not to be justified by the result that it can bring about, it must be justified in itself. What is it in itself? A mere expression of will. Therefore, at the bottom of the theory we find a voluntaristic philosophy; a glorification of the will, as will.

(d) The foregoing argument is based on the supposition that claims and happiness are not necessarily linked together. If Mr. Pound denies this, and bases the value of the claims on the intrinsic value of happiness, the difficulty becomes both (1) metaphysical and (b) sociological.

(a) From the idea of happiness,<sup>13</sup> Mr. Pound's theory seems to pass to the idea of the greatest happiness of the greatest number. We do not say that such passage is theoretically impossible, but we contend that it needs to be demonstrated. From the mere fact that we may regard happiness as the supreme good to be pursued by law, it does not follow that our final goal is the greatest happiness of the greatest number. It is at least conceivable, if happiness is the supreme aim, that we ought to try to realize the highest form, the best quality of happiness; that we ought to climb the mountain as high as we can. It might well be a matter of indifference that we must sacrifice the mediocre happiness of many men in order to create a more perfect happiness in some,<sup>14</sup> since it is not men who are the final aim, but happiness. Happiness is the feeling of relation between one's ideal and one's realization of that ideal. Therefore a fool may derive the same amount of happiness from owning an automobile as a great and learned man from making a discovery.

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<sup>13</sup> We do not here analyze the value of happiness as supreme good, because we are going to explain that the supreme good is, for Mr. Pound, something else than happiness. But if that supreme good were happiness for him, it would raise new objections. We may indicate two of them: (1) Happiness is only a psychological equilibrium which may be brought about in a thousand different ways. So the concept itself is an ambiguous one. (2) Happiness is a rather low ideal, perhaps. A well-known astronomer said lately, that if his only aim were human happiness, he would immediately cease to work. The importance given to the idea of happiness when it is not a mere popular conception is a professional deformation of the lawyer's mind.

<sup>14</sup> And this suggestion is not so strictly theoretical as it may seem at first: the policy of keeping the white race from any mixture with the black one is based, among other causes, on the necessity of protecting the integrity of what is considered the higher type.

Shall we sacrifice the happiness of the hundred fools for the happiness of the learned man?

If we do, it means that man, as such, is not a means, but must be an end. Therefore if Mr. Pound bases the value of claims on happiness, he returns to Kantianism; if he bases it on the will, he goes back to Hegelianism. Of course, he can conceivably escape both systems by creating a new metaphysic. Our contention is simply that at the bottom of Mr. Pound's *morale* there is a metaphysical principle which must be seen and explained.

(b) Moreover, the end of the law he depicts is one that would hardly be acceptable to any sociologist. In order to explain the objection of the sociologist let us make a comparison between an individual body and a social body (and this does not involve the adoption of the organicist sociology). Physiologists and doctors consider the human body as a whole; they do not consider the welfare of the human being as the sum of the welfares of all the cells taken separately. And to insure the proper functioning of the body a surgeon will often destroy many thousands of cells. When he hesitates, it is not out of consideration for the cells, but out of consideration for the individual. A sociologist considers an individual in society much as a physiologist considers a cell in the individual. Of course, the problem is different, but it is so for emotional and moral reasons. So far as scientific method is concerned, the problem which those dealing with social facts have to face is the problem of the functioning of an organism. This problem is quite different from that of individual happiness. To consider that the end of a social organization is the individual (whether his happiness or his will) is to repeat the fault of Bentham, and to deny one of the fundamental principles of modern sociology.

(e) Even if such a system were, in the abstract, the best, the main objection to it would remain: it is not worth trying if it does not fit the facts. If the *de facto* claims of society do not give us an account of the framing of law in the past, these claims cannot frame it for the future.

A rule of action can only tell us to act according to the natural laws which govern the facts on which we wish to impose our action. A theory that does not fulfill this requirement runs the same dangers as a metaphysical principle; if we try to deduce from it a technique,

and solutions for the problems of law, we encounter the very objections raised against a jurisprudence of conceptions.

(f) There is a further difficulty apparent in the very term "sociological jurisprudence." Sociology is a science of facts, which in itself does not give any rule of action, and is an entire stranger to philosophy. Every lawyer has a certain amount of jurisprudence, just as every man has his philosophy, whether he wants it or not; but as soon as one is in the domain of jurisprudence, he is beyond the field of sociology.<sup>16</sup>

If the difficulties of the system have not been pointed out, it is because the atmosphere, the spirit, which are behind the present school of jurisprudence, are very different from the atmosphere and spirit that we find behind the former schools. When the sociological school appeared there was a real dissatisfaction with the law, because lawyers were more or less thinking in their own "universe of discourse"; they were looking more to the logical unity of the law than to its function; they failed to realize that law is made for human beings who are forever changing, while logic is made for eternity only. At the end of the last century there was everywhere in the civilized world a gap between what law did and what the people asked it to do. There was a real danger and an emergency. An endeavor such as we are advocating here would never have met the problem, for it would have been far too slow. It will always be to the great honor of sociological jurisprudence to have gathered liberal and open minds together, to have given the law a refreshing bath of humanity, common sense, and realism, and to have helped to dissipate the danger which was threatening modern society. This school has already achieved results of the most profound significance, and will achieve others — by the life that is in it and its enthusiasm. Thus it has drawn liberal minds together, and in so doing may have blinded them to the weaknesses of the system. Sociological jurisprudence, like all human creations, is not a permanent thing: it may represent the best forces of the present generation; it will certainly dissatisfy the next. Excellent doctrine for an emergency, we should be deceived in relying on it more permanently. Far from desiring to burn others' crops, we

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<sup>16</sup> The word "jurisprudence" has five or six different meanings, but each of them seems to be included in the scope of the present objection.

should like, in the autumn, while others are still gathering the fruits, to do something to help prepare the crops of the coming year. We ought to work not only for the solution of our own problems, but also to put in the hands of our grandchildren the means of meeting the difficulties of their generation.

If sociological jurisprudence, in its present stage, seems unable to help us discover the method of legal sociology, we are obliged to find that method ourselves. The scope of this article is by no means to make a complete draft of such a method. It is submitted that such a draft cannot profitably be made in one piece.<sup>16</sup> We wish merely to indicate the place of comparative law in legal sociology. Aside from the big problem of finding our data, our method must, generally speaking, be determined by our end. As stated above, our end is to discover general laws which govern the legal world. Such laws, like all natural laws, will express relations; and such relations may be either of one legal fact to another legal fact, or of a legal fact to a social fact that is not legal (it may be economic, moral, religious, political, etc.).

From this two consequences follow. The first is that no effective work can be done if we have not on hand all the different classes of facts which obtain in the society that we want to study. And as, of course, such work is beyond the capacity of any man, the solution of the problem is to apply to purely scholarly work the business methods of coöperation and organization. To take a concrete case: We want to study the general laws which govern the relation of the legal institution of marriage to the other social facts. Apparently we must have, working together, a group of men, all sociologists, but each specialized in a different branch of sociology. In a given society, one would study the moral phenomena involved in the institution; another, its religious aspect, etc. Even if, in a particularly narrow study, one man had the capacity for studying these different points of view, he should not do so, because it is essential that the man dealing with the moral side of this particular case have an intimate knowledge of the moral structure and function of the whole society which is under consideration, and see things from the inside. Therefore, the first

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<sup>16</sup> A method is framed little by little, inductively, by the development of the science itself. The failures and successes of each day lead to a perpetual modification and adaptation of the methods and technique used.



consequence which we draw from the statement of our aim is that no fruitful work can be done if the legal scholar stays in his study. In social sciences we can no longer work like the artisan of the middle ages, doing all his labor alone in his shop; we must be of our own time in framing our methods.

The second consequence is that the aim of legal sociology gives to comparative law a very important function. If there are natural laws which govern the forces which come into play in the legal world, these can only be discovered inductively, at least for a long time (all inductive sciences, on reaching a certain stage of development, become to a certain extent deductive). The classical steps recognized in the inductive method are: (1) observation, (2) hypothesis, (3) experimentation, (4) formulation of a general law. One sees immediately that the third step presents a difficulty: how can we make experimentation in social facts? How, without the power of a Nero, turn a society into a laboratory? The physiologist and the psychologist can work on animals because there are substantial similarities between men and animals from these two points of view, but there are practically no such similarities in the social field, for we do not find among animals religious, moral, artistic, political, or legal phenomena which present resemblances that are fruitful for study. Fortunately this objection is not fatal. Astronomy, to the extent that it is an inductive science, is also obliged to dispense with experimentation; it is, nevertheless, a science. The astronomers have overcome the difficulty by replacing experimentation by what is called in French *recoupement*.<sup>17</sup> It seems, at the present time, that this is the only method open to the legal sociologist; and such *recoupement* must be conducted somewhat as follows: We study one institution in a given society, and we discover that certain facts are altered when certain changes occur in other facts (observation); then we assume that these "concomitant variations" are not accidental, but that the first are the causes of the second (hypothesis); then we try our hypothesis on some other system of law, and it is confirmed with some slight differences (*recoupement*); then, taking account of these differences, we formulate the general law. With only one observation there is a methodological impossibility of going further than the hypothesis.

<sup>17</sup> *Recoupement* is the method of verifying an hypothesis by successive observations of the same phenomenon from different angles.

History cannot give us the material for scientific *recoupement*, because if our field of observation is always the same society, there may be certain factors which remain always the same, which we ignore, and which make the facts appear to us in a way that necessarily leads to error.

If scientific *recoupement* be one of the main functions of comparative law, this fact determines to a great extent what the method of comparative law must be.

First, it must be clear that a comparison restricted to *one* legal phenomenon in two countries is unscientific and misleading. A legal system is a unity, the whole of which expresses itself in each part; the same blood runs in the whole organism. Hence each part must necessarily be seen in its relation to the whole. An identical provision of the law of two countries may have wholly different moral backgrounds, may have been brought about by the interplay of wholly different forces, and hence the similarity may be due to the purest coincidence — no more significant than the double meaning of a pun.

Second, the unity of a legal system is often more apparent than real. The significant forces that frame new law are not only legal forces, but also moral, economic, religious, etc.; in a word, all social forces, in different proportions, come into play in each social phenomenon. So that, if the point of view of legal sociology is to be a dynamic one, all these forces must be taken into account and weighed in the process of comparison.

This indicates the immensity of the work that has to be done, but it is not a reason for discouragement; all scientific work is a process of slow building by many artisans. Are physicists discouraged because they have no hope of solving all the problems of the universe, but must content themselves with the discovery of laws which are usually of narrow and very definite scope? If lawyers are less easily resigned, the reason is evident: In past ages, every one felt at liberty to speak about astronomy, the laws of nature, and of the mind, etc. Step by step, science has expelled the laymen from most fields. At present no one who is not trained in the methods and technique of physics would attempt to discover the secrets of nature simply by looking about him at the spectacles which nature offers. But each time that science says to the layman, "A gift of observation and good common sense are not enough to

deal with this kind of subject; you must either get out, or bind yourself to a hard, strict technique, and abandon your bright and wide literary viewpoint," the layman feels bitter until he grows accustomed to the idea. The layman has been expelled successively from all these fields; almost the only one that remains to him now is the field of social facts. That is why he rushes into this field, to make it the subject of all his conversation and to publish shelves of books on jurisprudence, politics, and moral questions. If the sociologist in turn comes and says, "If you want to study social facts scientifically, your present method is illegitimate," he will raise a temporary storm of bitter resentment. But when one considers how little efficient work has been done in comparative law up to this time, and how much other sciences have done for the welfare of mankind, the magnitude of the new endeavor should not be a cause of discouragement but a source of joy.

Even if such a science had no practical bearing, it is certain that it would be studied, because there is an irresistible current in mankind toward knowledge. As soon as it was known that there were general laws governing stars distant from us by forty thousand years of light, men were found willing to devote their lives to the study of such laws; as soon as the site of ancient Babylon was located, men also were found willing to give their energy to exploring the mysteries of the city. It is a psychological fact that there is enough idealism in the world, and enough dislike of being surrounded and led by mysterious forces, to promote the study of such a science as the laws of the law. But our position is stronger, because such a science has very important practical consequences. Actions of legislatures and of courts often mean dishonor, tears, ruin, death; and yet these actions are not based on exact, certain knowledge that the suffering imposed is necessary or beneficial to society. They are made in the dark; they are based on haphazard opinion. The coöperation of medicine with physiology and anatomy has meant much less suffering for mankind. When the laws come to be based on the scientific knowledge of the effects, limits, and reactions of law, when men cease to be the guinea-pigs of legislators, there will probably be more happiness among us, more efficiency in the working of our social organism.

If the legal sociologist must be essentially a man of science, his training must be quite different from that of a lawyer. He must

be, above all, a man trained in inductive methods; and he must have a serious knowledge of psychology and of social sciences. Of course, he must know enough law to be able to understand its working and technique, and the relation of the problem he studies to other legal questions.

To sum up, though it is idle to compare by mere curiosity without being able to go beyond the comparison, it seems that comparative law is a necessary step in a highly scientific study of the law.

## II

### UNIFORM LAW AND COMPARATIVE LAW

From a more directly practical point of view the function of comparative law seems equally important.

It is strange that there is no portion of the law which is uniform in all nations, *i. e.*, no body of rules to direct the actions of men in the same way in all civilized nations. What we find, in fact, is that each nation frames its own law as if it were the only nation in the world; it regulates the law of bills and notes, for instance, as if the bills and notes circulated only within its boundaries. As it is known to every one that in actual business, notes have an international circulation, we come necessarily to a conflict. And as nations know that conflicts between their respective laws are economic conflicts, and that such conflicts are one of the main causes of war, they try to pour a little oil where there is friction; and that is what is called "rules of the conflict of laws." Such rules try eternally to palliate the evil without reaching the cause; they eternally try to fill up the Danaïdes' barrel, while it seems by no means impossible to put a partial bottom to this barrel. It is generally admitted that states are dependent upon each other to a greater or less extent in their economic life. Nevertheless, law is framed by each state, in complete isolation from the others. A big corporation which is doing business in ten different nations must see its rights and liabilities vary greatly from one place to another. Granting that the municipal law of a state should not be imposed upon it from the outside by a superstate, we submit that the proper method of approach to the problem of framing new law in these commercial and economic matters, which by their nature are international, is by taking

account of the laws of other countries, and by aiming at uniformity. Here, again, we see that law is behind the times, and has not been able to mold its methods to meet the economic changes. Nevertheless, events like the adoption of the Uniform Sales Act and of the Negotiable Instruments Law clearly show that the law is bound, sooner or later, to yield to the pressure of other social facts to lose its flavor of provincialism, in framing what are really the first pieces of international uniform law. What is done in this line within the United States is only a sign of what is sure to come between nations bound together by no federal link. A state of the United States is no more bound to adopt the Sales Act than, for instance, is France. The social interests that would impel France to adopt a uniform commercial law are substantially of the same nature as those of any state of the United States.

We believe therefore, first, that the fields of the municipal law which have an international importance will become each day larger and larger; second, that in any such part of the law the proper method of framing new law is to consider the corresponding provisions of the laws of other countries, and, if it does not conflict with strong domestic interests, to aim at greater unification; third, that in these fields the tendency toward uniformity is inevitable and increasing. It seems that it will be a chief duty of the younger generation of jurists to promote the interest in this real, new uniform international law, in the fields where it is possible and advisable to realize it.<sup>18</sup>

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<sup>18</sup> This theory does not purport to be new. It was formulated by Cicero, and in modern times may be found, for instance, in PFEIFFER, *DAS PRINZIP DES INTERNATIONALEN PRIVATRECHTS*, pp. 78-79; COHN, *BEITRÄGE ZUR LEHRE VOM EINHEITLICHEN WECHSELRECHT*, § 8; J. A. LEVY, *WET OF TRACTAAT?* (La Haye), pp. 67 *et seq.*; JITTA, *LA MÉTHODE DU DROIT INTERNATIONAL PRIVÉ*, pp. 227 *et seq.*; ASSER, *DROIT INTERNATIONAL PRIVÉ ET DROIT UNIFORME*; JITTA, *LA RÉNOVATION DU DROIT INTERNATIONAL* (La Haye, 1919), pp. 142 *et seq.* And, in fact, there have been several attempts to start in this line. Congress of Gand (1863), on the "lettres de change" (ANNALES, 1863, pp. 203-216). — Convention de la Haye, Brème, Antwerp, Frankfurt, London (REVUE DE DROIT INTERNATIONAL, t. V, 592-702; t. VII, 307-310; t. VIII, 683-689; t. IX, 405, 415; t. X, 656-661; t. XI, 440-442.) [An historical account of the movement toward uniformity up to 1879 is to be found in an address of Georges Cohn, at Vienna, on 18th of March, 1879: *Ueber international Gleiches Recht*]. International Maritime Conference of Brussels, 1911. International Labor Conferences of Washington, 1919, Genoa, 1920, Geneva, 1921 (under Part 13 of the Treaty of Versailles).

The place and function of comparative law in such a program is easy to understand. If one admits that a legal system is a system of forces, the conclusion follows that a uniform law can by no means be an ideal law framed freely according to ideal theory. The only thing that can be done is what Mr. Williston did: take into account the different theories and provisions of the states, and frame a law which is inspired by certain directive ideas but is necessarily a compromise. So, the condition precedent of any effort toward a better international legal situation is the study of comparative law for the purpose of understanding the various laws. Only thus can a sound foundation be laid on which to build some uniform international laws. If these laws are needed directly by the business world, they are needed indirectly by the whole world, because divergences in laws cause other divergences that generate unconsciously, bit by bit, these misunderstandings and conflicts among nations which end with blood and desolation.

### III

#### LEGAL EDUCATION AND COMPARATIVE LAW

But while the two functions of comparative law outlined in the first two parts of this article are vital for the development of the science, they would interest only a small class of scholars with special training and aims. But there is a third function of comparative law which makes it a desirable item in the curriculum of all law schools of high standing.

As Dean Ames put it, the great law schools try less to give the knowledge of the law than to infuse in the mind of the student the "spirit" of the common law.<sup>19</sup> Taking this method of education as a fact, without assuming to judge its value, it is clear that there is in it a danger. To be possessed of the spirit of the law is (I state here my personal experience), to a great extent, to live in the "universe of discourse" of the law, to indulge in certain kinds of reasoning for the beauty of it, to be satisfied with the law as it is; to attach to the past of the law, to the binding forces of precedent, importance liable to paralyze the progress of the law. These defects may be trifling in the periods when society, not in rapid evolution, is organizing pre-acquired assets. But in a period

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<sup>19</sup> 31 REPORTS AMERICAN BAR ASS'N, 1025 (1907).

like the present, when many social organisms and functions are growing very rapidly, often in unforeseeable ways, when the law, in many points, is already far behind the times, when there is a rising discontent with the inadequacy of the law to meet the new conditions, it seems that the first duty of any law school, either toward the science of law at large, or toward its own country, is to train the new generation in such a way as to enable it to meet the entirely new situations created by the new and profound changes in modern society.

When one is immersed in his own law, in his own country, unable to see things from without, he has a psychologically unavoidable tendency to consider as natural, as necessary, as given by God, things which are simply due to historical accident or temporary social situation. If I may state a personal experience, I never completely understood the French law before coming to the United States and studying another system. History of law seems inadequate to give to the student this sense of relativity, because in history we often deal with forces which are not yet dead, which still unconsciously bend the mind of the student in a certain direction. To see things in their true light, we must see them from a certain distance, as strangers, which is impossible when we study any phenomena of our own country. That is why comparative law should be one of the necessary elements in the training of all those who are to shape the law for societies in which every passing day brings new discoveries, new activities, new sources of complexity, of passion, and of hope.

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FEDERAL TAXATION OF EMPLOYERS OF CHILD LABOR. — It is common knowledge that the main purpose of the federal tax of 1919 upon income derived from the products of child labor<sup>1</sup> was to discourage the employment of children in industry, and that any intention or expectation of raising revenue thereby was at best epiphenominal.<sup>2</sup> On the other hand, the statute appears upon its face to be an excise tax within the language of the constitutional grant of power of taxation.<sup>3</sup> Is it

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<sup>1</sup> See Act Feb. 24, 1919, c. 18, §§ 1200 *et seq.*, 40 STAT. AT L., 1057, 1138; 1919 COMP. STAT. ANN. SUPP., §§ 6336a-6336h. The act imposes an annual tax, in addition to all other taxes, of 10 per cent of the net income derived from the products of mines, mills, etc., in which during the year children under certain ages have been employed or where children have been permitted to work longer than certain hours.

<sup>2</sup> See CONGRESSIONAL RECORD, Dec. 18, 1918, p. 620; 31 YALE L. J. 310, 311. "The question . . . is whether the last act is intended to raise revenue. It will scarcely be insisted that such is its object." *Per* Boyd, J., in *George v. Bailey*, 274 Fed. 639, 641-642 (W. D. N. Car., 1921). "The purpose of the act in question appears upon its face. It is disclosed by its title and by its scope and inevitable effect. Through the medium of a tax, Congress here, as through the medium of a regulation of commerce in the act of Sept. 1, 1916 (c. 432, 39 STAT. 675), has attempted to fix the standard of labor for mines, quarries, factories, mills, etc., in the various states. The act was not intended to, nor will it, raise revenue. This was admitted, if not openly declared, by its sponsors during its passage through Congress." *Per* Boyd, J., in *Drexel Furniture Co. v. Bailey*, 276 Fed. 452, 454 (W. D. N. Car., 1921).

<sup>3</sup> "The Congress shall have Power (1) To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Wel-



nevertheless unconstitutional, because it in effect regulates and was intended to regulate the methods of manufacturing in the several states, a field over which Congress has neither expressly nor impliedly been given any power of direct control?<sup>4</sup> In *Hammer v. Dagenhart*,<sup>5</sup> by five justices to four, the Supreme Court held unconstitutional a statute prohibiting the shipment in interstate commerce of the products of industrial units in which child labor had been employed.<sup>6</sup> To this decision the prompt answer of Congress was the tax law here considered. This statute is now before the courts. It has twice been held unconstitutional in a lower federal court,<sup>7</sup> in reliance upon the authority of *Hammer v. Dagenhart*.<sup>8</sup> But although the present tax and the condemned restriction upon interstate shipment have this close historical connection and involve questions intimately allied, it does not follow that they must meet the same fate before the Supreme Court. The later statute purports to exercise a different power, and it is necessary to examine the background of precedent with particular reference to that power.

Prior to 1869 there was no decision bearing directly upon the question, although there had been considerable judicial affirmation of the generally unlimited nature of the taxing power of Congress.<sup>9</sup> In that year, how-

fare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." CONSTITUTION OF THE UNITED STATES, Art. I, § 8. For a discussion of the now discredited doctrine that the "general welfare" provision conferred a full national police power, see Robert E. Cushman, "The National Police Power," 3 MINN. L. REV. 289, 293-295.

<sup>4</sup> "The objection urged against the power is that the States have exclusive control over their methods of production, . . . and taking the proposition in the sense of direct intermeddling I agree to it and suppose that no one denies it." *Per* Holmes, J., dissenting, in *Hammer v. Dagenhart*, 247 U. S. 251 (1918).

<sup>5</sup> 247 U. S. 251 (1918).

<sup>6</sup> This decision and the statute with which it was concerned invoked a vast amount of discussion. It is commented upon adversely in Thurlow M. Gordon, "The Child Labor Law Case," 32 HARV. L. REV. 45. References to many articles are collected in 30 YALE L. J. 310; and in Robert E. Cushman, "The National Police Power," 3 MINN. L. REV. 452, 456 n., 471 n.

<sup>7</sup> *George v. Bailey, supra*; *Drexel Furniture Co. v. Bailey, supra*. For the facts of these cases see RECENT CASES, *infra*, p. 881.

<sup>8</sup> 247 U. S. 251 (1918). Judge Boyd, who decided the case which was affirmed in *Hammer v. Dagenhart*, also decided the cases cited in the preceding footnote. He follows that case rather complacently; and the more so, apparently, that it tends to decentralization of powers. "If therefore, the statute under consideration either directly or by its necessary operation substantially and necessarily disturbs the states in their control of their internal affairs, it must be held invalid, whatever may have been the professed purpose for which it was enacted" (relying upon the Tenth Amendment), *Drexel Furniture Co. v. Bailey, supra*, at 453. But such language can hardly stand after the intrastate rate case. *Houston & Texas Ry. v. United States*, 234 U. S. 342, 351-352 (1914). See Thomas Reed Powell, "The Child Labor Law, the Tenth Amendment, and the Commerce Clause," 3 SO. L. QUART. 175, 184. *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., U. S. Sup. Ct., Oct. Term, 1921*, 206. See 35 HARV. L. REV. 864, 886.

<sup>9</sup> "That the power to tax involves the power to destroy, that . . . are propositions not to be denied." *Per* Marshall, C. J., in *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316, 431 (1819). "The power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion." *Per* Chase, C. J., in *Li-*

ever, in *Veasie Bank v. Fenno*,<sup>10</sup> a destructively high tax upon the circulation as money of the notes of state banks was upheld as constitutional. Two grounds were given: (1) that the power to tax is subject to no limitation which the courts will enforce—that it may not be exercised oppressively, but only to the control of the electorate through the ballot;<sup>11</sup> and (2) that the tax was appropriate to aid legislation aimed at securing a sound national currency.<sup>12</sup> It is hard to say that either *ratio decidendi* was meant to have superior force. The second soon became fixed in decisions;<sup>13</sup> while for a time the tide seems to have set somewhat against the first, so far as it asserts a bar to inquiring into the motives of Congress.<sup>14</sup> But this tide was turned. The general comment of the court upon the breadth of the taxing power continued.<sup>15</sup> Then in *In re Kolloch*,<sup>16</sup> a federal statute was said to be “on its face an act for levying taxes and . . . its primary object must be assumed to be the raising of revenue.”<sup>17</sup> And in *McCray v. United States*,<sup>18</sup> it was squarely held (1) that the motives of Congress in the exercise of its granted powers are not a matter for the court’s inquiry; (2) that an act on its face an excise tax is within the grant of power of taxation; and (3) that a tax destruc-

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cense Tax Cases, 5 Wall. (U. S.) 462, 471 (1866). Similarly, *per* Swayne, J., in *Pacific Ins. Co. v. Soule*, 7 Wall. (U. S.) 433, 443-446 (1868). This is the sort of broad language usually used in connection with the express grants of power in the Constitution. Similar is the sweeping characterization of the power to regulate commerce, — “like all others vested in Congress,” — *Per* Marshall, C. J., in *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 196-197 (1824).

<sup>10</sup> 8 Wall. (U. S.) 533 (1869).

<sup>11</sup> *Id.*, p. 548.

<sup>12</sup> *Id.*, p. 548-549. The passages referred to illustrate neatly the usual language of the court concerning express and implied powers respectively. As a tax, the court will not even question its source in motives or effect; as an indirect means of controlling the currency the court is at pains to find that it is appropriate to the furtherance of an express power. Thus Marshall, C. J., in a case of *implied* powers: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” See *McCulloch v. Maryland*, *supra*, at 421. See also *id.*, p. 425; *Hepburn v. Griswold*, 8 Wall. (U. S.) 603, 613-614 (1869); *Legal Tender Cases*, 12 Wall. (U. S.) 457, 539-540 (1870) (*Hepburn v. Griswold*, *supra*, overruled). It cannot be permissible to cite such expressions as allowing inquiry into the ends sought by Congress where the legislation is clearly within an *express* grant of power, and not contrary to the Fifth Amendment, or to some limitation such as that precluding taxation of state agencies employed about governmental functions. Yet they may, perhaps, be relevant upon the question of whether an act upon its face within such a power is really within its scope when the sole and necessary result of the statute is one disconnected from the objects for which the power was given.

<sup>13</sup> *National Bank v. United States*, 101 U. S. 1 (1879) (a similar tax upon circulation of notes of municipalities, etc.). See *Legal Tender Cases*, *supra*, at 544-545; *Head Money Cases*, 112 U. S. 580, 596 (1884).

<sup>14</sup> Judge Cooley seems to have thought that a “tax” for the bare purpose of destruction could not be valid. See 1 COOLEY, TAXATION, 3 ed., 14. Cf. *Head Money Cases*, *supra*, at 596; *Loan Assoc. v. Topeka*, 20 Wall. (U. S.) 655, 663-664 (1874).

<sup>15</sup> See, for example, *United States v. Singer*, 15 Wall. (U. S.) 111, 121 (1872); *Springer v. United States*, 102 U. S. 586, 593 (1880); *Spencer v. Merchant*, 125 U. S. 345, 355 (1888). The court will not inquire into the reasonableness of the amount of the tax. *Patton v. Brady*, 184 U. S. 608, 623 (1902).

<sup>16</sup> 165 U. S. 526 (1897).

<sup>17</sup> *Id.*, at 534.

<sup>18</sup> 195 U. S. 27 (1904).

tively high is not, merely therefore, invalid. This decision has since been uniformly cited with complete approval.<sup>19</sup>

Upon these precedents, the problem of the tax may be stated thus. The arguments against its validity are four: (1) it is not a tax within the meaning of the taxing power; (2) it is a tax, but affects the internal affairs of the states, and is therefore invalid by virtue of an implied constitutional limitation; (3) it is a tax, but the motives of Congress were not tax motives; and (4) it is destructive of fundamental rights which no free government can destroy. The answers are: that it is upon its face quite as much a tax as were the enactments in *Veazie Bank v. Fenno*, *In re Kollock*, or *McCray v. United States*; that there is no such implied limitation;<sup>20</sup> that the court has no concern with the objects or motives of legislation when in the immediate exercise of express powers;<sup>21</sup> and that the right to employ child labor is hardly a "fundamental right" when it can be restrained by any state under its police power.<sup>22</sup> Does *Hammer v. Dagenhart* alter any of these answers? That depends upon the *rationale* of that decision, a somewhat difficult question upon its language alone, but easier upon reading it in conjunction with other authority. The second and third arguments cannot have been intended, as both have been rejected in a subsequent decision.<sup>23</sup> The fourth is answered just as in the tax problem.<sup>24</sup> That leaves only the first ground, namely, that the statute there was not a regulation of commerce within the meaning of the Constitution. It is easier to say that the case is wrong;<sup>25</sup> but it is not hopelessly impossible to say that this argument

<sup>19</sup> The cases are numerous. See, for example, *Flint v. Stone Tracy Co.*, 220 U. S. 107, 154 (1911); *United States v. Doremus*, 249 U. S. 86, 93 (1919); *Hamilton v. Ky. Distilleries Co.*, 251 U. S. 146, 161 (1919).

<sup>20</sup> *Veazie Bank v. Fenno*, 8 Wall. (U. S.) 533 (1869); *Knowlton v. Moore*, 178 U. S. 41 (1900); *McCray v. United States*, 195 U. S. 27 (1904); *Hamilton v. Ky. Distilleries Co.*, *supra*, and cases cited *id.*, p. 156. The only limit is against interference with governmental activities of the states. *Collector v. Day*, 11 Wall. (U. S.) 113 (1870); *South Carolina v. United States*, 199 U. S. 437 (1905).

<sup>21</sup> *Veazie Bank v. Fenno*, *supra*; *McCray v. United States*, *supra*; *Hamilton v. Ky. Distilleries Co.*, *supra*.

<sup>22</sup> *Sturges v. Beauchamp*, 231 U. S. 320 (1913). See Thomas Reed Powell, *supra*, 194. In the *McCray* case, White, J., held that, conceding, for argument only, that some taxation might possibly be so arbitrary and destructive of "fundamental rights" that it would be invalid, yet the tax in that case could not be so considered since its subject matter — sale of oleomargarine — could be prohibited by a state under the police power. *McCray v. United States*, *supra*, at 62-64. In other words, the only limitation is one of due process — the Fifth Amendment read in conjunction with the grants of power which it restricts.

<sup>23</sup> "When the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power or that it may tend to accomplish a similar purpose." *Per Brandeis, J.*, in *Hamilton v. Ky. Distilleries Co.*, *supra*, at 156. *Acc.*, *Houston & Texas Ry. v. United States*, note 9, *supra*, under the commerce clause, not cited in *Hammer v. Dagenhart*. "No principle of our constitutional law is more firmly established than that the court may not, in passing upon the validity of a statute, enquire into the motives of Congress." *Per Brandeis, J.*, in *Hamilton v. Ky. Distilleries Co.*, *supra*, at 161. *Acc.*, *Smith v. Kansas City Title Co.*, 255 U. S. 180 (1921).

<sup>24</sup> See note 22, *supra*.

<sup>25</sup> Compare the argument in Thomas Reed Powell, *supra*, attacking the decision, with that of Andrew A. Bruce, "Interstate Commerce and Child Labor," 3 *MINN. L. REV.* 89, supporting it.

is good, and that the *Lottery*<sup>28</sup> and *White Slave* cases<sup>27</sup> are distinguishable. For the evils to be prevented in those cases were evils of consumption, for which the primary object of transportation is to furnish time and place utilities; and perhaps prohibitions aimed at such evils may be regulations of transportation and commerce, while prohibitions aimed at evils of production, which are served more indirectly by the transportation in question, may not be such regulations. This furnishes at least a distinction in degree, and may be grasped at without denying the main principle; namely, that if a statute is a regulation of commerce it is valid for all of the other arguments above.

Placed upon this ground, *Hammer v. Dagenhart* is not necessarily controlling of the tax question.<sup>28</sup> In the first place, there were not as close precedents in that case as there are in this.<sup>29</sup> In the second, that decision has not been treated by the court as at all discrediting the *McCray* case.<sup>30</sup> In the third, the tax power has always been one of the broadest powers of government, and if any difference is to be accorded, may receive the more liberal treatment.<sup>31</sup> And in the fourth, the error of *Hammer v. Dagenhart*, if any, lies not in the test but in its application. The test which the precedents justify, and practical statesmanship demands, is this: examine the statute and the Constitution; compare them with the strongest presumption in favor of the correspondence of the former to some power granted in the latter; and unless the lack of correspondence is apparent, then the statute is constitutional unless it offends some express<sup>32</sup> or some — rarely — implied<sup>33</sup> limitation within the Constitution itself. The *rationale* of *Hammer v. Dagenhart* must be that the court is affirmatively able to deny such a correspondence of the statute to the commerce power because the former's sole and necessary result is one disconnected from the objects of that power.<sup>34</sup> One

<sup>28</sup> *Champion v. Ames*, 188 U. S. 321 (1903).

<sup>27</sup> *Hoke v. United States*, 227 U. S. 308 (1913). Similarly of the Pure Food and Drugs Act. *Hipolite Egg Co. v. United States*, 220 U. S. 45 (1911); *Weeks v. United States*, 245 U. S. 618 (1918).

<sup>29</sup> Non-judicial opinion favors the validity of the tax. See 31 YALE L. J. 310, 314; 17 MICH. L. REV. 83, 87. But see Andrew A. Bruce, *supra*, 101-103. A ground of unconstitutionality might be that the classification is unreasonable since it bears upon a whole year's income, regardless of the actual extent to which child labor is employed during the year, and is therefore more in the nature of a penalty. Cf. Thurlow M. Gordon, *supra*, 45.

<sup>30</sup> The *McCray* case is fully in point upon the tax question, while the cases in notes 26 and 27, *supra*, are not quite square upon the commerce question, assuming the suggested ground of distinction.

<sup>31</sup> See *United States v. Doremus*, 249 U. S. 86, 93 (1919); *Hamilton v. Ky. Distilleries Co.*, *supra*, at 161; *Evans v. Gore*, 253 U. S. 245, 256 (1920); *Smith v. Kansas City Title Co.*, *supra*, at 210.

<sup>32</sup> The power of taxation is one of the incidents of sovereignty. See 1 COOLEY, TAXATION, 3 ed., 7. It is dealt with expressly in the Constitution but in its nature is much like the "resulting powers" such as that of eminent domain. See Robert E. Cushman, *supra*, 295. It necessarily depends upon the same territory as do the states for revenue. See *Flint v. Stone Tracy Co.*, 220 U. S. 107, 154 (1911). It has been said to be able to "overlap state authority more than can the commerce power." See Thomas Reed Powell, *supra*, 186.

<sup>33</sup> Such as the Fifth Amendment.

<sup>34</sup> Such as that against taxation of state governmental agencies. See note 20, *supra*.

<sup>35</sup> See *Collins v. New Hampshire*, 171 U. S. 30 (1898), in which a state inspection law was held bad in substance a regulation of interstate commerce. But such

question remains. Is this "necessary result" forecast from the face of the statute alone, or does the court inquire into the actual subsequent events? If the latter, then the statute under discussion may be distinguished from that in the *McCray* case, if the earlier tax actually produces revenue and that on child labor does not.<sup>35</sup> But to make this distinction fruitful, the language of the *McCray* and other cases must be overruled so far as they hold that the face of the statute is the only basis of comparison with the Constitution. And it is submitted that *Hammer v. Dagenhart* need not go to that length, and perhaps should not.<sup>36</sup> Should it be settled that the correspondence upon the face of the statute is the only test, it will not be the only point in the division of powers at which the function of the court approaches the ministerial.<sup>37</sup>

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FEDERAL CONTROL OF INTRASTATE RAILROAD RATES. — The power to regulate commerce left to the states by the commerce clause<sup>1</sup> includes power not only to adopt regulations over intrastate commerce which in no way affect interstate commerce, but also some that do. The scope of the states' power thus to affect interstate commerce is varying and is determined by two doctrines: (1) no power exists to burden directly interstate commerce, or to legislate as to matters requiring national uniformity, even in the absence of congressional action;<sup>2</sup>

authorities must be used upon the present question with extreme caution, for the question in such cases is whether the state act invades a federal power, while the question here is not whether a federal act invades a state power, but passes the outer bounds of the federal power under which it purports to justify. See *McCray v. United States*, *supra*, at 60.

<sup>35</sup> See Annual Report of the Commissioner of Internal Revenue for the Fiscal Year ending June 30, 1921, pp. 16, 23.

<sup>36</sup> Whatever might be the desirability of such an express doctrine in the Constitution, it would be extraordinarily unfortunate if a narrow doctrine of "fraud on a power" should be taken over from property law and applied to the great powers of government upon a ground that those powers were so assimilated to ordinary agencies as to require that result by implication. As to motives, therefore, the *McCray* case must be right; especially considering (1) the almost impossibility of judicially determining the motives of a majority of Congress, (2) the undignified nature of such a proceeding, and (3) that a law well within the power in question might be invalidated because of the motives merely. Some of these considerations are of less weight as arguments against looking beyond the face of a statute to ascertain its necessary result. But a fourth is added, — that the Constitutionality of a "tax" might be made to turn upon whether Congress guesses with precise accuracy the rate of tax at which it will not be so discouraging as to preclude all revenue. Yet it is hard to say that from the point of view of the objects of the tax power it will be any loss to have the law unconstitutional unless Congress does make the guess correctly. The real answer to this is a question of judgment. Which is more desirable: that the national powers shall be capable of unified dealing with as many national problems as possible; or that the lobbies of organized minorities be compelled to seek the approval of forty-eight rather than one legislative body? It is the belief in the latter which gives rise to a desire to moderate the federal powers. The good and the evil must be taken or left together.

<sup>37</sup> Cf. the field of "political questions." *Luther v. Borden*, 7 How. (U. S.) 1 (1849); *Pacific States Tel. Co. v. Oregon*, 223 U. S. 118 (1912). Such a question being the issue raised by the writ of error to the state court in the last named case, the writ was dismissed for want of jurisdiction.

<sup>1</sup> CONSTITUTION OF THE UNITED STATES, Art. I, § 8, Par. 3.

<sup>2</sup> A state cannot prescribe rates to be charged for interstate transportation. *Wabash, St. Louis & Pacific Ry. Co. v. Illinois*, 118 U. S. 557 (1886). A state cannot

(2) power does exist, until Congress acts, to regulate for the public welfare matters of local concern.<sup>3</sup> Nine years ago in the *Minnesota Rate Cases*<sup>4</sup> the Supreme Court declared it is the second of these doctrines which determines the states' power to regulate intrastate rates. The Interstate Commerce Act at that time prohibited undue discriminations against particular persons or localities.<sup>5</sup> No such discriminations were found by the Interstate Commerce Commission in that case, and the court, while recognizing that the state's action indirectly disturbed the relation between rates in the two kinds of commerce, sustained the state's power to regulate. One year later, in the *Shreveport Case*,<sup>6</sup> the commission found unfair discriminations against localities in Louisiana in favor of Texas points caused by intrastate rates fixed by Texas. The court ordered the roads to desist their discriminatory practices, which order necessitated a disregard of those particular Texas rates found to be such. Thus was determined for the first time that Congress, by the Act to Regulate Commerce, had partially restricted the powers of the states over intrastate rates.

In 1920 the Transportation Act<sup>7</sup> was passed, broadening the powers of the commission. It ordered the commission to take steps to maintain an adequate railway service for the people of the United States.<sup>8</sup> It required the commission to prescribe rates so that the carriers as a whole or in groups should earn an aggregate net income equal to a reasonable return on their aggregate property values.<sup>9</sup> It empowered

tax property in transit in interstate commerce. *Coe v. Errol*, 116 U. S. 517 (1886). A state may not regulate tolls upon a bridge connecting it with another state. *Covington and Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204 (1893). See *Minnesota Rate Cases*, 230 U. S. 352, 398 (1913).

<sup>3</sup> Regulation of pilotage. *Cooley v. Board of Wardens*, 12 How. (U. S.) 299 (1851). Quarantine regulations. *Morgan's S. S. Co. v. Louisiana*, 118 U. S. 455 (1886).

<sup>4</sup> 230 U. S. 352 (1913). For a discussion of this case, see Hannis Taylor, "The *Minnesota Rate Cases*," 27 HARV. L. REV. 14.

<sup>5</sup> See ACT TO REGULATE COMMERCE, § 3, 24 STAT. AT L. 379. "That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any manner whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

<sup>6</sup> *Houston, E. & W. T. R. Co. v. United States*, 234 U. S. 342 (1914). For discussion and criticism of this case, see William C. Coleman, "The Evolution of Federal Regulation of Intrastate Rates: The *Shreveport Rate Cases*," 28 HARV. L. REV. 34; John S. Sheppard, Jr., "Another Word about the Evolution of the Federal Regulation of Intrastate Rates and The *Shreveport Rate Cases*," 28 HARV. L. REV. 294. See also 14 COL. L. REV. 294.

<sup>7</sup> This act took effect March 1, 1920. Among other things it provided for the termination of federal control. An interesting collection of articles and addresses antedating the passage of this act, which discuss its proposed provisions, and related topics, can be found in the January, 1920, publication of the Academy of Political Science. See 8 ACADEMY OF POLITICAL SCIENCE, No. 4.

<sup>8</sup> See INTERSTATE COMMERCE ACT, § 15 a, PAR. 3, 41 STAT. AT L. 488.

<sup>9</sup> See INTERSTATE COMMERCE ACT, § 15 a, PAR. 2, 3, 41 STAT. AT L. 488. Paragraph 3 of this section provides that during the two years beginning March 1, 1920, 5½ per cent, with an additional ½ per cent for improvements at the discretion of the commission, shall be a fair return. At the expiration of that period, the commission shall from time to time determine what percentage constitutes a fair return. For a

the commission to deal directly with intrastate rates which were unduly discriminatory, not only against persons or localities, but also *against interstate commerce as such*.<sup>10</sup> The effect of these amendments has been recently determined in the case of *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy Railroad Company*,<sup>11</sup> wherein the Supreme Court unanimously sustained an order of the commission imposing a horizontal increase in all Wisconsin rates beyond the point fixed by that state. The court first examined and overruled the contention that the order could be sustained on a showing of discrimination against persons or localities under the doctrine of the *Shreveport Case*<sup>12</sup> on the ground that the order was too sweeping. The court then examined and sustained the claim that the order was necessary to prevent discrimination against interstate commerce as such. It reasoned, in effect, that as the commission was under a duty to fix rates to insure a fair return on the aggregate value of the carriers' property engaged in transportation,<sup>13</sup> unless it could fix the general level of the intrastate rates so that intrastate traffic could produce its fair share of income, it must increase the interstate rates to take care of the loss to the carriers derived in intrastate transportation due to lowered intrastate rates. The results of the latter course would produce an unjust discrimination against interstate commerce. This the Act declares unlawful. It is apparent that the effect of the Transportation Act is to restrict further the power of the states over intrastate rates. But this is not an attempt by Congress to regulate intrastate rates as such. The Act disclaims that power.<sup>14</sup> It is but an incident of the exercise of the supreme power of Congress over interstate commerce.<sup>15</sup> The case enunciates no new principle of law; it but applies existing principles to changed facts. Transportation is to-day so vastly important in the economic life of the country that an adequate railway service, national in character, must be secured. Interstate and intrastate commerce are now so indistinguishably blended that a regulation of the former, adequate to secure present needs, requires a broadened regulation of the relation between them by Congress, and a consequent restricted power of the states over the latter. However, the states' power is but limited, not destroyed. As the general level of intrastate rates discriminates against interstate commerce it must be changed, but the burden of detailed regulation remains with the states. Efficient rate regulation will demand increased coöperation between the Interstate Commerce Commission and the state regulating bodies.

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criticism of this legislation and suggested changes, see GARTNER, COMMENTARIES ON THE INTERSTATE COMMERCE ACT, 41.

<sup>10</sup> See INTERSTATE COMMERCE ACT, § 13, PAR. 3, 4, 41 STAT. AT L. 488.

<sup>11</sup> U.S. Sup. Ct., Oct. Term, 1921, No. 206. For the facts of this case, see RECENT CASES, *infra*, p. 886.

<sup>12</sup> See note 6, *supra*.

<sup>13</sup> See note 9, *supra*.

<sup>14</sup> See INTERSTATE COMMERCE ACT, § 1, PAR. 2, 41 STAT. AT L. 474.

<sup>15</sup> "This power, like others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Per* Marshall, C. J., in *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 196 (1824).

This can be achieved through conferences. Willingness on the part of the states to cooperate will do much toward decreasing the necessity for stringent federal control and go far toward facilitating the work of the commission.

THE EFFECT OF A DEFENDANT'S REFUSAL TO RETRACT ON A QUALIFIED PRIVILEGE IN DEFAMATION. — The victim of a defamatory publication and the public are interested in having the author make an adequate retraction. The public is interested in the truth. The victim is interested in the restoration of his reputation. The German law permits a plaintiff who cannot show economic injury to secure a retraction (*Ehrenreklärung*).<sup>1</sup> The Dutch law allows generally the recovery of a similar "honorable amends."<sup>2</sup> In our law, a retraction has primarily evidential effect.<sup>3</sup> It is not a defense.<sup>4</sup> If, however, it is made in the same conversation with the utterance of a slander, and in such a way as to destroy its defamatory effect, it defeats recovery.<sup>5</sup> Further, a retraction may sometimes be shown in mitigation of damages.<sup>6</sup> It may be evidence of the absence of the "malice" necessary to punitive damages;<sup>7</sup> and it may be evidence that the plaintiff has suffered less than he claims in actual damages.<sup>8</sup> In many jurisdictions this subject is regulated by

<sup>1</sup> See 2 CROME, *SYSTEM DES DEUTSCHEN BÜRGERLICHEN RECHTS*, 1028; SCHUSTER, *THE PRINCIPLES OF GERMAN CIVIL LAW*, 340. The French law authorizes a publication of a judgment for defamation at the defendant's expense. DEMOGUE, *DE LA RÉPARATION CIVILE DES DÉLITS*, 44-47; 4 GARSONNET AND CÉZAR-BRU, *DE PROCÉDURE*, 36-37. For a comment on an English case in which the court vindicated the plaintiff while rendering judgment for the defendant, see Roscoe Pound, "Equitable Relief against Defamation and Injuries to Personality," 29 HARV. L. REV. 640, 670. Cf. *Couper v. Lord Balfour of Burleigh*, [1913] S. C. 492.

<sup>2</sup> This is a civil remedy, concurrent with the recovery of "profitable amends." See DE VILLIERS, *THE ROMAN AND ROMAN-DUTCH LAW OF INJURIES*, 173-181; VAN DER LINDEN, *INSTITUTES OF HOLLAND*, § 152. A voluntary retraction will defeat the recovery of "honorable amends," and mitigate "profitable amends." See DE VILLIERS, *op. cit.*, 244-246.

<sup>3</sup> See Wesley N. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning: Operative Facts Contrasted with Evidential Facts," 23 YALE L. J. 16, 25-28. For a full note on the subject of retraction, see 13 A. L. R. 794.

<sup>4</sup> *Lehrer v. Elmore*, 100 Ky. 56, 37 S. W. 292 (1896); *Dixie Fire Insurance Co. v. Betty*, 101 Miss. 880, 58 So. 705 (1912). It is good consideration for an agreement not to sue. *Boosey v. Wood*, 3 Hurl. & Colt. 484 (1864); *Marks v. National Fire Insurance Co.*, 129 La. 903, 57 So. 168 (1911). Publication of a retraction on request does not, *per se*, constitute an accord and satisfaction. *Dixie Fire Insurance Co. v. Betty*, *supra*.

<sup>5</sup> *Trabue v. Mays*, 3 Dana (Ky.) 138 (1835); *Linney v. Maton*, 13 Tex. 449 (1855).

<sup>6</sup> *Coffman v. Spokane Chronicle Publishing Co.*, 65 Wash. 1, 117 Pac. 596 (1911); *Dixie Fire Insurance Co. v. Betty*, *supra*. An offer to retract may similarly be shown in mitigation. *Dalziel v. Press Publishing Co.*, 102 N. Y. Supp. 909 (1906). But an offer to publish a statement by the person defamed is not, in this respect, like an offer to retract. *Constitution Publishing Co. v. Way*, 94 Ga. 120, 21 S. E. 139 (1894). The failure of a plaintiff to request retraction is no mitigation. *Coffman v. Spokane Chronicle Publishing Co.*, *supra*. On retraction and mitigation, see NEWELL, *SLANDER AND LIBEL*, 3 ed., § 1062.

<sup>7</sup> *Fessinger v. El Paso Times Co.*, 154 S. W. 1171 (Tex. App., 1913); *Myerle v. Pioneer Publishing Co.*, 178 N. W. 792 (N. D., 1920). It must be on this ground that an offer to retract is admissible in mitigation. *Dalziel v. Press Publishing Co.*, *supra*.

<sup>8</sup> *Turner v. Hearst*, 115 Cal. 394, 47 Pac. 129 (1896); *Myerle v. Pioneer Publishing Co.*, *supra*. Thus it has been held that, under a statute making it a bar to re-



statutes. A common provision is that, regarding certain newspaper libels, a request for a retraction shall be a condition precedent to the recovery of punitive damages, and a retraction shall defeat any claim therefor.<sup>9</sup> To be effective, a retraction must be full and unequivocal;<sup>10</sup> must be given a publicity equal to that of the original statement;<sup>11</sup> and in some states it must be made before the beginning of an action.<sup>12</sup>

A refusal to retract may also have considerable practical importance. It deprives the victim of a vindication which he deserves. It may increase the original injury by confirming people in their belief in the truth of the defamatory statement. Where the plaintiff has requested a retraction,<sup>13</sup> therefore, a refusal may sometimes be shown in aggravation of damages,<sup>14</sup> as evidence of the "malice" which warrants punitive damages, or as increasing the actual injury suffered.

As retraction may be evidence of an absence of "malice," and refusal to retract may be evidence of its presence, when punitive damages are

covery of punitive damages, a retraction may also be shown in mitigation of actual damages. *White v. Sun Publishing Co.*, 164 Ind. 426, 73 N. E. 890 (1905); *Webb v. Call Publishing Co.*, 180 N. W. 263 (Wis., 1920).

<sup>9</sup> To compare the statutes on the subject, which vary considerably, see: 1907 ALA. CODE, §§ 3749, 3750, 3751, 3752, 3753; 1914 IND. BURNS ANN. STAT., §§ 380-381; 1913 IA. CODE S. S., § 3592a; 1922 KY. CARROLL'S STAT., § 2438b, 1; 1916 ME. REV. STAT., c. 87, § 46; 1921 MASS. GEN. LAWS, c. 231, § 93; 1912 NEV. REV. LAWS, § 6430; 1913 N. D. COMP. LAWS, §§ 9555, 9562; 1918 N. Y., 5 BIRDSEYE, CUMMING & GILBERT CONSOL. LAWS, § 1344; 1919 N. C. CONSOL. STAT., §§ 2420, 2430, 2431; 1920 COMPLETE TEX. CIVIL STAT., art. 5596; 1917 UTAH COMP. LAWS, § 3692; 1919 VA. ANN. CODE, § 6240; 1913 W. VA. CODE, § 4904; 1919 WIS. STAT., § 4256a. The English statute was the parent of this legislation. See 1843, 6 & 7 VICT., c. 96, §§ 1, 2; 1845, 8 & 9 VICT., c. 75, § 2. For a discussion of this act, see BOWER, CODE OF ACTIONABLE DEFAMATION, § 52; ODGERS, DIGEST OF THE LAW OF LIBEL AND SLANDER, 5 ed., 404-406, 613-640, 644, 783-787. In the United States it has been held that such a statute cannot constitutionally provide that a retraction shall deprive a plaintiff of all but "special damages." *Park v. Detroit Free Press Co.*, 72 Mich. 560, 40 N. W. 731 (1888); *Hanson v. Krehbiel*, 68 Kan. 670, 75 Pac. 1041 (1904). Cf. *Post Publishing Co. v. Butler*, 137 Fed. 723 (6th Circ., 1905); *Allen v. Pioneer Press Co.*, 40 Minn. 117, 41 N. W. 936 (1889), *contra*. The statute in question was condemned also for its common feature in applying only to newspapers in *Park v. Detroit Free Press Co.*, *supra*. *Contra*, *Allen v. Pioneer Press Co.*, *supra*; *Osborn v. Leach*, 135 N. C. 628, 47 S. E. 811 (1904).

<sup>10</sup> *Monaghan v. Globe Newspaper Co.*, 190 Mass. 394, 77 N. E. 476 (1906); *Goolsby v. Forum Printing Co.*, 23 N. D. 30, 135 N. W. 661 (1912). Cf. *Dalziel v. Press Publishing Co.*, *supra*.

<sup>11</sup> *Lafone v. Smith & Hurl*, 735 (1858); *Storey v. Wallace*, 60 Ill. 51 (1871). In the latter case, however, the jury was permitted to give the retraction some effect.

<sup>12</sup> *Evening News Association v. Tryon*, 42 Mich. 549, 4 N. W. 267 (1880); *Byrne v. News Corporation*, 195 Mo. App. 265, 190 S. W. 933 (1916). *Contra*, *Turner v. Hearst*, *supra*. The question of the sufficiency of a retraction has been held for the court. *Gray v. Times Newspaper Co.*, 74 Minn. 452, 77 N. W. 204 (1898). *Contra*, *Turner v. Hearst*, *supra*.

<sup>13</sup> *Reid v. Nichols*, 166 Ky. 423, 179 S. W. 440 (1915). The failure of a newspaper to publish news of a pending libel action against it, may be used in the action as evidence of "malice." *Post Publishing Co. v. Hallam*, 59 Fed. 530 (6th Circ., 1893). A letter threatening suit is not a request for retraction. *Bird v. Press Publishing Co.*, 154 App. Div. 491, *affd.*, 214 N. Y. 645, 108 N. E. 1089 (1915).

<sup>14</sup> *Simpson v. Robinson*, 12 Q. B. 511 (1848); *Wallace v. Jameson*, 179 Pa. St. 98, 36 Atl. 142 (1897); *Crane v. Bennett*, 177 N. Y. 106, 69 N. E. 274 (1904). Cf. *Couper v. Lord Balfour of Burleigh*, *supra*.

in question; so the one or the other may be evidence of the absence or presence of the same elusive quality in privileged communications.<sup>15</sup> A *dictum* in a recent Canadian case suggests the view that a refusal to retract might well be given a somewhat broader effect.<sup>16</sup> If a defendant has published statements defamatory of the plaintiff, though "in good faith" and on a conditionally privileged occasion; and if, when the plaintiff brings him evidence sufficient to convince a reasonable man of their falsity, he refuses to take reasonable measures to counteract their effects, it may well be argued that he ought to lose the protection of the privilege. The private and social interests in having certain types of communication freely made<sup>17</sup> must be weighed against the interests in having false and defamatory reports of the same types corrected. The interests of the parties to the communication and of society in having a master, so long as he acts "in good faith," perfectly free to give his servant a false and defamatory "character,"<sup>18</sup> do not seem equal to the interests of the servant, the person to whom the communication was made, and the public, in having the master take reasonable steps to rectify his statement on proof of its falsity. Similarly, one who issues a mistaken and defamatory credit report,<sup>19</sup> and refuses to take reasonable steps to give notice of the error, when he knows of it, ought not to be protected.

<sup>15</sup> Compare the effect of repetition. *Hemmings v. Gasson*, 27 L. J. Q. B. (N.S.) 252 (1858); *Sclar v. Resnick*, 185 N. W. 273 (Ia., 1921). See *Ely v. Mason*, 115 Atl. 479, 482 (Conn., 1921). See 16 HARV. L. REV. 147.

The nature of the "malice" which destroys immunity for a false defamatory publication on a conditionally privileged occasion is not entirely clear. By the better American view negligence, or want of "probable cause," is enough to defeat a qualified privilege. *White v. Nichols*, 3 How. (U. S.) 266 (1845); *Carpenter v. Bailey*, 53 N. H. 590 (1873); *Holmes v. Clisby*, 121 Ga. 241, 48 S. E. 934 (1904). This seems to have been Chief Justice Cockburn's view in *Morrison v. Belcher*, 3 F. & F. 614 (1863); *Hedley v. Barlow*, 4 F. & F. 224 (1864); *Blake v. Stevens*, 4 F. & F. 232 (1864). But in the law of England and a number of the states a bad motive, or "bad faith," is now required to defeat a qualified privilege. *Clark v. Molyneux*, 3 Q. B. D. 237 (1877); *Joseph v. Baars*, 142 Wis. 390, 125 N. W. 913 (1910); *Ely v. Mason*, *supra*. Such a requirement is inconsistent with the law generally applicable to negligent acts, and it unduly restricts recovery. The argument for the rule that negligence defeats a qualified privilege depends finally, like the argument for the rule that refusal to retract defeats a qualified privilege, on a balance of interests. See W. A. Purington, "An Examination of the Doctrine of Malice as an Essential Element of Responsibility for Defamation Uttered on a Privileged Occasion," 6 AM. LAW. 365. For discussion of the effect of negligence as a conditional privilege, see also 12 HARV. L. REV. 221; 16 HARV. L. REV. 71; 29 HARV. L. REV. 533; 57 U. PA. L. REV. 243. Cf. Jeremiah Smith, "Liability for Negligent Language," 14 HARV. L. REV. 184.

<sup>16</sup> *Palmer School v. Edmonton*, 61 D. L. R. 93 (Alta. Sup. Ct., 1921). The defendant was held protected in making his publication, on the ground of conditional privilege, since there was no evidence of malice. The court said that a refusal to retract might have changed the result. For the facts of this case, see RECENT CASES, *infra*, p. 885. The court does not make it clear on what ground it bases its *dictum*, and thus does no more than "suggest" the view indicated.

<sup>17</sup> See BOWER, CODE OF ACTIONABLE DEFAMATION, 124 *et seq.*; ODGERS, A DIGEST OF THE LAW OF LIBEL AND SLANDER, 5 ed., 249 *et seq.* See also 7 HARV. L. REV. 312.

<sup>18</sup> Cf. *Child v. Affleck*, 9 B. & C. 403 (1829). Cf. also *Lawless v. The Anglo-Egyptian Cotton Co.*, L. R. 4 Q. B. 262 (1869); *A. B. v. X. Y.* [1917] S. C. 15.

<sup>19</sup> Cf. *Ormsby v. Douglass*, 37 N. Y. 477 (1868); *London Association for Protection of Trade v. Greenlands*, [1916] 2 A. C. 15. Under the rule suggested, the English courts might feel safe in broadening the qualified privilege now extended to credit agencies. Cf. *Macintosh v. Dun*, [1908] A. C. 390.

Compromises might be suggested. Refusal to retract, in those jurisdictions where negligence does not, of itself, defeat a qualified privilege, might forfeit the immunity only when the original report was negligently made. One who refuses to retract might be held liable for such damages only as could be shown to flow from that refusal. On the other hand, one might be held to refuse on peril of later proof of the falsity of his statements. And he might be rigidly required to make his retraction full, as public as the original statement, and before action. On the whole, however, the position that refusal to make a reasonable retraction destroys the immunity of a conditional privilege seems the most satisfactory, whether it be embodied in decision or statute.<sup>20</sup>

THE EFFECT OF NOTICE TO THE BUYER OF INTENDED RESALE BY AN UNPAID SELLER. — The right of an unpaid seller having a lien on the goods to resell them is well established in this country.<sup>1</sup> It is generally held that notice of intention to resell is not essential,<sup>2</sup> and the authorities agree that there need not be notice of the time and place of resale.<sup>3</sup> By the prevailing view, the one requisite to the validity of the resale is that it be made at such a time and place and in such a manner as to afford reasonable protection to the interests of the defaulting buyer.<sup>4</sup> If the seller fulfills this requirement, he may recover from the buyer the difference between the resale price and the original contract price.<sup>5</sup>

<sup>20</sup> Such a law would, in effect, impose a new liability for failure to act. On this point, see James Barr Ames, "Law and Morals," 22 HARV. L. REV. 97, 111-113.

As to when a retraction may reasonably be demanded, see the citations in note 14, *supra*.

One of the advantages of narrowing the definition of conditional privilege by making it defeasible by refusal to retract or negligence is that a ground is thus afforded for enlarging its scope to include some of the cases which are otherwise treated as gossip, and governed by the harsh law of absolute liability. Under the proposed rule, the family minister, doctor, or lawyer, or anyone in the position of family adviser, might safely enjoy a conditional privilege in making a communication to a girl as to the character of her suitor. Cf. *Joannes v. Bennett*, 5 Allen (Mass.) 169 (1862). One who without negligence makes a report under a reasonable but mistaken belief in the existence of circumstances which would make his statements privileged might well be afforded similar protection. Cf. *Hebditch v. Macilwaine*, [1894] 2 Q. B. 54. See 8 HARV. L. REV. 235. Cf. also *Macintosh v. Dun*, *supra*.

<sup>1</sup> See WILLISTON, SALES, c. 16; BURDICK, SALES, 3 ed., 289; 2 MECHEM, SALES, §§ 1621 *et seq.*

<sup>2</sup> See *Wrigley v. Cornelius*, 162 Ill. 92, 44 N. E. 406 (1896); *Van Brocklen v. Smeallie*, 140 N. Y. 70, 75, 35 N. E. 415, 416 (1893). Cf. *Pratt v. Freeman Co.*, 115 Wis. 648, 92 N. W. 368 (1902). *Contra*, *Dill v. Mumford*, 19 Ind. App. 609, 49 N. E. 861 (1898). See WILLISTON, SALES, § 548; 2 MECHEM, SALES, §§ 1633-1636.

<sup>3</sup> *Woodward v. Tyng*, 123 Md. 98, 91 Atl. 166 (1914). Cf. *Walker v. Gateway Milling Co.*, 121 Va. 217, 92 S. E. 826 (1917). See WILLISTON, SALES, § 549.

<sup>4</sup> *Clore v. Robinson*, 100 Ky. 402, 38 S. W. 687 (1897). See *Morris v. Wibaux*, 159 Ill. 627, 646, 43 N. E. 837, 842 (1896). Cf. *Ackerman v. Rubens*, 167 N. Y. 405, 60 N. E. 750 (1901). See WILLISTON, SALES, § 547.

<sup>5</sup> *Dustan v. McAndrew*, 44 N. Y. 72 (1870); *Van Brocklen v. Smeallie*, 140 N. Y. 70, 35 N. E. 415 (1893); *Bowden v. Southern, etc. Co.*, 206 S. W. 124 (Tex. Civ. App., 1918). See 2 MECHEM, SALES, § 1643. The seller may keep any profits from the resale. *Bridgford v. Crocker*, 60 N. Y. 627 (1875). See UNIFORM SALES ACT, § 60 (1); WILLISTON, SALES, § 553.

Although notice to the buyer of intention to resell and of the time, place, and terms of the resale is not essential, such notice or its absence may be relevant on any issue involving the reasonableness of the duration of the buyer's default<sup>6</sup> or the fairness of the resale.<sup>7</sup> A recent decision<sup>8</sup> attributes greater significance to the giving of notice, by holding that the buyer's failure to object before the resale, precludes him thereafter from asserting, as a defense to an action by the seller, that the resale was not made in the exercise of "reasonable care and judgment."<sup>9</sup>

The question thus presented would seem an important one commercially, but there is a striking absence of authority upon it.<sup>10</sup> *Pride v. Marshall*<sup>11</sup> bids fair to become a leading case. The seller gave four days notice of the time, place, and terms of resale. The buyer neither consented nor objected thereto. The sale was held, and the seller sued the buyer for the difference between the contract and resale prices. The buyer contended for his defense that the terms of the resale were unreasonable, that it was not reasonably advertised, and that a better price could have been secured in the Middle West than in Boston, the place where the resale was made.

Since the remedy of reselling the buyer's goods is a privilege conferred by the law upon the unpaid seller, that party, to have the benefit thereof, must exercise this privilege reasonably,<sup>12</sup> and must prove that he did so.<sup>13</sup> Logically, the buyer may deny this reasonableness, unless

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The Uniform Sales Act codifies the law as to the seller's rights thus far stated. See UNIFORM SALES ACT, § 60; MASS. GENL. LAWS, c. 106, § 49.

<sup>6</sup> See UNIFORM SALES ACT, § 60 (3). See *VanBrocklen v. Smeallie*, *supra*, at 75. See WILLISTON, SALES, § 548. As to whether the reasonableness of resale is a question of fact or of law, see *Woodward v. Tyng*, 123 Md. 98, 113, 91 Atl. 166, 167 (1914); *Morris v. Wibaux*, 159 Ill. 627, 645, 43 N. E. 837, 842 (1896).

<sup>7</sup> See WILLISTON, SALES, § 548; 2 SEDGWICK, DAMAGES, 9 ed., § 755.

<sup>8</sup> *Pride v. Marshall*, 131 N. E. 183 (Mass., 1921). For the facts of this case see RECENT CASES, *infra*, p. 887.

<sup>9</sup> See UNIFORM SALES ACT, § 60 (5). See also note 4, *supra*.

<sup>10</sup> The only other expression of opinion which could be found upon the point is a strong *dictum contra* in *West v. Cunningham*, 9 Port. (Ala.) 104, 108 (1839). *Mendel v. Miller*, 126 Ga. 834, 56 S. E. 88 (1906), sometimes cited to the same effect, is distinguishable. In the case of resale by an unpaid pledgee, the Massachusetts court has held that failure to object to the place of resale after notice thereof precludes the pledgor from asserting its unreasonableness. *Guinzburg v. Downs Co.*, 165 Mass. 467, 43 N. E. 195 (1896). This seems to be the only decision so holding, and an unlimited application of its principle may not be desirable. In *Pride v. Marshall*, the court was apparently impressed by the analogy between the cases. As to the similarity in the positions of an unpaid seller and an unpaid pledgee, see *Madison v. Weyl-Zuckerman*, 60 Cal. Dec. 243, 192 Pac. 110 (1920); *Tuthill v. Skidmore*, 124 N. Y. 148, 154, 26 N. E. 348, 349 (1891). In general, the unpaid seller stands in the better position. For example, he may keep any profits from the resale (see note 5, *supra*), and he may at the resale buy in the goods himself. *Ackerman v. Rubens*, *supra*.

<sup>11</sup> See note 8, *supra*.

<sup>12</sup> See UNIFORM SALES ACT, § 60 (5). It is often suggested that the seller acts as the buyer's agent in making the resale. This is not true. It is a power given by the law. See *Moore v. Potter*, 155 N. Y. 481, 487, 50 N. E. 271, 272 (1898). See WILLISTON, SALES, § 553; 2 MECHEM, SALES, § 1629.

<sup>13</sup> *Thayer Lumber Co. v. Naylor*, 100 Miss. 841, 57 So. 227 (1911); *Brownlee v. Bolton*, 44 Mich. 218, 6 N. W. 657 (1880). Cf. *Wisconsin, etc. Lumber Co. v. Buschow Lumber Co.*, 236 S. W. 410 (Mo. App., 1922).

he has estopped himself from so doing. This he can do only by giving the seller reason to believe that he acquiesces in what is being done.<sup>14</sup> On the other hand, the result of *Pride v. Marshall* achieves a certainty which may go far to offset logical difficulties in reaching it. It insures that the seller may know just where he stands, and avoids troublesome inquiries into the buyer's state of mind. The effect of notice on the buyer's right to assert unreasonableness must, therefore, be decided with two considerations in mind: (1) the possibility of working out an estoppel; and (2) the commercial need of certainty.

First, as to the terms of resale, the buyer had notice, and if any of them were unreasonable, he must have known it at that time. It works no hardship in such a case to require prompt remonstrance; and to hold *contra* would render the position of the seller less certain than is commercially desirable. He may reasonably consider that the buyer acquiesces to these terms by his silence. It is submitted that the decision is sound in protecting him when he acts accordingly.

The buyer's second objection was to the amount and kind of advertising. He had no notice as to either. This decision requires the buyer to inform himself at his peril, and puts the burden of seeing that the resale is reasonable in this respect squarely upon him. It is not a very great burden, however, for complete information can be had upon inquiry from the seller.<sup>15</sup> Failure to take this simple step may reasonably be interpreted by the latter as a representation of acquiescence in whatever is being done; and when the seller is thus "lulled into security,"<sup>16</sup> and acts accordingly, it is arguable that the buyer is estopped from asserting unreasonableness.<sup>17</sup> The result thus reached seems to accord with the requirements of business convenience.

The third objection, as to the place of resale, presents a still different problem. The buyer had notice of the place, but asserted that he did not know enough collateral facts to judge of its reasonableness.<sup>18</sup> The

<sup>14</sup> In *Guinzburg v. Downs Co.*, note 10, *supra*, the court said that silence after notice is a waiver of the right to object. "Waiver" is a slippery term; it seems better, if a true estoppel cannot be worked out, to place the decision frankly upon grounds of practicability or commercial convenience. See 2 WILLISTON, CONTRACTS, § 679.

<sup>15</sup> The seller's refusal to tell what advertising is being done would ordinarily foreclose him from asserting either estoppel or commercial need for his own protection, and would be evidence of unreasonableness and bad faith.

<sup>16</sup> See EWART, ESTOPPEL, 40, 133.

<sup>17</sup> A close analogy is found in the case where failure, during the erection of a house, to make inquiry as to the exact property line was held to estop an adjoining owner from asserting that the house extended upon his land. *Greene v. Smith*, 57 Vt. 268 (1884). It has often been held that where a man stands by and knowingly allows his property to be sold, without remonstrance, to one who buys under an erroneous impression of title, he is estopped from later asserting that the seller did not have authority to sell it. *Chapman v. Pingree*, 67 Me. 198, 202 (1877); *Pickard v. Sears*, 6 Ad. & E. 469 (1837). See *Trenton Banking Co. v. Duncan*, 86 N. Y. 221, 228 (1881). See BIGELOW, ESTOPPEL, 6 ed., 603, 648 *et seq.*

<sup>18</sup> The market in the Middle West was better than that in the East, and the seller, a national organization, was alleged to have known that fact. The buyer, a local dealer, claimed that he himself did not know it. The opinion assumes the contrary, and upon that interpretation the situation is similar to that discussed under the buyer's first objection, *supra*, and the decision upon it is clearly right. It is, furthermore, doubtful if the seller would have been obliged to take the goods to the

seller could not be expected to give data as to widespread market conditions, and in many cases would not himself have such knowledge. Inquiry from him would probably be fruitless. It savors of refinement to say that failure to make such an inquiry, predestined to be unavailing, is a representation of complete approval as to the place of resale. On the other hand, the seller has given all the information that he could reasonably be expected to volunteer; and if he acts in good faith, the interests of the mercantile community may demand his protection strongly enough to warrant the resulting curtailment of the buyer's rights. This result is less harsh in view of the fact that, after all, it was the buyer's own default that created the necessity for the resale.

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THE RESPONSIBILITY OF AN INVOLUNTARY BAILEE. — When goods are thrust unexpectedly upon one under circumstances which make it impossible for him to decide whether or not he will take them into his possession, what is his responsibility toward them? The cases involving the point are not common, but the frequency with which such a bailee is made the object of a fraud urges a clear determination of his status. Story early styled him an "involuntary bailee,"<sup>1</sup> and intimated that he would have the same obligation of care toward the article while in his custody as a finder.<sup>2</sup> Later text-writers have assimilated the position of the two without further discussion.<sup>3</sup> The finder has in turn been rightly assimilated to the gratuitous, voluntary bailee.<sup>4</sup> The responsibilities of the latter include the exercise of at least slight diligence in the custody of the article, with a duty to redeliver to the bailor.<sup>5</sup> A misdelivery by such a bailee, though fraudulently procured and made without negligence on his part, is a conversion.<sup>6</sup> But is an involuntary

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Middle West to sell them had the buyer requested it. *Cf.* *Ginn v. Coal Co.*, 143 Mich. 84, 106 N. W. 867 (1906). It is a matter of degree. Had the better market been less distant, reasonable care on the seller's part might have demanded that he seek that market, and failure to do so would be evidence of bad faith. See *Anderson v. Frank*, 45 Mo. App. 482, 487 (1891).

<sup>1</sup> See STORY, BAILMENTS, 4 ed., §§ 442, 83a. (The fourth edition was the last to receive the personal supervision of Mr. Justice Story.)

<sup>2</sup> See § 83a. The learned author, it should be noted, was referring only to the care required in protecting the article, and not to the responsibility respecting a delivery.

<sup>3</sup> See HALE, BAILMENTS AND CARRIERS, 44; DOBIE, BAILMENTS AND CARRIERS, 52.

<sup>4</sup> *Burns v. State*, 145 Wis. 373, 128 N. W. 987 (1910); *Dougherty v. Posegate*, 3 Iowa 88 (1856). See *Smith v. N. & L. R. R.*, 27 N. H. 86, 90 (1853). *Cf.* *Cox v. Rixon*, 50 L. T. 222 (1871). See also 50 L. T. 233.

The finder is under no obligation to assume possession of the article, economically advisable as it might be to do so. Consequently, when he does take it into his possession, he voluntarily undertakes the duties of a depositary. In jurisdictions where finders have a statutory lien, they are like bailees for hire. See *Smith v. N. & L. R. R.*, *supra*, at 91. See HALE, *op. cit.*, 43; VAN ZILE, BAILMENTS AND CARRIERS, 2 ed., § 80.

<sup>5</sup> First judicially enunciated in *Coggs v. Bernard*, 2 Ld. Ray. 909, 914, 920 (1703). See Joseph H. Beale, Jr., "Gratuitous Undertakings," 5 HARV. L. REV. 222, 228. See also cases cited in note 6, *infra*.

<sup>6</sup> *Jenkins v. Bacon*, 111 Mass. 373 (1873); *Rubin v. Huhn*, 229 Mass. 126, 118 N. E. 290 (1918); *Hicks v. Lyle*, 46 Mich. 488, 9 N. W. 529 (1881); *Hubbell v. Blandy*,

bailee in the same situation? A recent decision<sup>7</sup> in New York holds that he is, and that consequently a misdelivery renders him liable in trover, without inquiry as to the care exercised.

The early statement by Story regarding the care required of an involuntary bailee to preserve the article while in his custody, is justified by the social interest in preventing the waste of goods. But it is another matter to impose the extraordinary liability for conversion upon an involuntary bailee who misdelivers without negligence.<sup>8</sup> To do so practically means that he who has goods thrust upon him insures that he will part with them to the bailor or the bailor's nominee only. This liability has been fastened upon a gratuitous, voluntary bailee, even where the bailment is for the bailor's sole benefit.<sup>9</sup> No cases have been found which indicate whether the suggested analogy between a finder and a gratuitous, voluntary bailee would be carried to this extent, but it is not unlikely that a misdelivery by a finder would be a conversion.<sup>10</sup> However, surely here the verge of legal severity is approached.<sup>11</sup> In the cases of the gratuitous, voluntary bailee and the finder, the interest in preventing further migration of property from its true owner prevails over the interest of the custodian in not being subjected to severe risks, because he has assumed possession. But that must be an unusual property interest which imposes a converter's liability upon one who has undertaken nothing, — in favor of a bailor who may himself have been at fault.<sup>12</sup> The personal interest of the bailee in being immune from unassumed, severe risks should not be so easily disregarded in favor of an interest in property.

There is little discussion in the cases on the liability of an involuntary

87 Mich. 209, 49 N. W. 502 (1891); *Wear v. Gleason*, 52 Ark. 364, 12 S. W. 756 (1890). See COOLEY, TORTS, 632. Cf. SCHOULER, BAILMENTS, 3 ed., § 58.

<sup>7</sup> *Cowen v. Pressprich*, 192 N. Y. Supp. 242 (Sup. Ct., App. Term). For the facts of this case see RECENT CASES, *infra*, p. 890. The majority of two rely principally on *Hiort v. Bott*, L. R. 9 Ex. 86 (1874). There G, a former broker for A, ordered of A a consignment of goods to be sent to B, a reliable purchasing house which knew nothing of G. The goods were shipped under a delivery order to the order of consignor or consignee. G, representing himself to be the agent of A, called upon B, and B, intending to correct the "error," indorsed the delivery order to G, who absconded. A recovered against B in trover. The case is not a fair authority for the liability of an involuntary bailee, since B could have resisted possession. This is pointed out in the dissenting opinion in the principal case, and seems clear from the opinion of Baron Cleasby in *Hiort v. Bott*, *supra*, at 91. See also the argument of counsel in *Hiort v. Bott*, *supra*, at 88.

<sup>8</sup> There was no allegation of negligence in the complaint in the case under discussion, and the case is decided solely on the theory of absolute liability for trover. Mr. Justice Lehman, dissenting, found no evidence of negligence, had there been an allegation.

<sup>9</sup> See cases cited in note 6, *supra*.

<sup>10</sup> See Coke's *dictum* to this effect in *Isaack v. Clark*, 2 Bulst. 306, 312 (1615). But cf. ST. GERMAIN, DOCTOR AND STUDENT, Dial. 2, c. 38, "If a finder delivers to another to keep that runneth away with them he will be discharged." The cases cited in note 4, *supra*, did not involve liability for misdelivery.

<sup>11</sup> See Morton, J., dissenting, in *Jenkins v. Bacon*, 111 Mass. 373, 380 (1873).

<sup>12</sup> In *Cosentino v. Dominion Express Co.*, 16 Man. L. R. 563, 567 (1905), the argument was made by counsel that an involuntary bailee, a finder, and a gratuitous, voluntary bailee should all be treated alike. Perdue, J. A., dissenting, adopted this view in discussing the care required to protect the article while in the bailee's custody. See pp. 572-575.

bailee for a misdelivery. In 1870, the Court of Exchequer held that a defendant, whom they classified as an involuntary bailee, had a duty of due care to effect a redelivery to the original owner, and having exercised such care, had no further liability for a misdelivery.<sup>13</sup> But there is no substantial authority in this country.<sup>14</sup> In a somewhat related situation — that of a carrier who becomes warehouseman by necessity when the consignee cannot be promptly found — there is a conflict of authority as to the liability for innocent misdeliveries.<sup>15</sup> Under modern conditions, the responsibility would seem appropriately to be that of an ordinary warehouseman.<sup>16</sup>

If the defendant bailee is to be held for his negligence only,<sup>17</sup> it would seem pertinent to inquire into the element of the plaintiff's fault. But an application of principles analogous to the doctrine of the "last clear chance" should prevent a negligent defendant from shielding his liability for a misdelivery under a plea of contributory negligence.<sup>18</sup> Where the responsibility for a misdelivery is absolute, as in the case of the gratuitous, voluntary bailee, and probably of the finder, the plaintiff's negligence could, of course, be no defense.<sup>19</sup>

On principle it seems that the interest of the involuntary bailee in being free from the extraordinary liability for conversion of goods, the

<sup>13</sup> *Heugh v. London & N. W. Ry. Co.*, L. R. 5 Ex. 51 (1870). In two earlier cases, *Stephenson v. Hart*, 4 Bing. 476 (1828), and *Duff v. Budd*, 3 B. & B. 177 (1822), the court had left it to the jury to determine with what care the defendant involuntary bailee effected his delivery, treating the liability as one based on negligence. An unsatisfactory *nisi prius* case relating to an involuntary bailee is *Howard v. Harris*, 1 Cab. & El. 253 (1884). Here an involuntary bailee refused to redeliver to the bailor, assigning no reason other than that the goods could not be found, and the court held that the plaintiff had not made out a case for the jury. See a criticism of this case in 2 BEVEN, NEGLIGENCE, 2 ed., 907. These cases probably represent the only English authority on the point.

<sup>14</sup> In *Krumsky v. Loeser*, 37 Misc. 504, 75 N. Y. Supp. 1012 (1902), a misdelivery by an involuntary bailee was held not to be a conversion. The opinion, however, does not adequately treat the problem. In *Weinstein v. Modern Silk Co.*, 170 N. Y. Supp. 529 (1918), there is a questionable *dichum* that, "It (defendant involuntary bailee) owed no obligation to the plaintiffs, because the latter's representative merely dropped the plaintiff's goods in defendant's premises." Foster, J., in *Hall v. Boston & Worcester R. R. Corp'n*, 14 Allen (Mass.) 439, 443 (1867), broadly declared that, "A misdelivery of property by any bailee to a person unauthorized by the true owner is of itself a conversion . . ." The majority opinion in the case under discussion concludes that *Heugh v. London & N. W. Ry. Co.*, *supra*, has been disapproved in the United States, but the citations there given do not bear out this contention.

<sup>15</sup> See *Oderdirk v. Fargo*, 61 Hun, 418, 16 N. Y. Supp. 220 (1891); *I. & St. L. R. R. Co. v. Herndon*, 81 Ill. 143 (1876); *Diamond Joe Line v. Carter*, 76 Ill. App. 470 (1898). See also 2 HUTCHINSON, CARRIERS, 3 ed., §§ 681-686.

<sup>16</sup> *I.e.*, a misdelivery is a conversion. *Hudmon v. Du Bose*, 85 Ala. 446, 5 So. 162 (1888); *P. & P. Union Ry. Co. v. Buckley*, 114 Ill. 337, 2 N. E. 179 (1885); *Fifth Nat. Bank v. Providence Warehouse Co.*, 17 R. I. 112, 20 Atl. 203 (1890). The carrier must contemplate the possibility of necessary temporary storage, when the consignee cannot be promptly found, and so cannot be said to have become warehouseman against its will.

<sup>17</sup> This view is intimated in SALMOND, TORTS, 5 ed., 347, footnote.

<sup>18</sup> *Sed quaere* what the result would be if the plaintiff intentionally thrust the article on the defendant without intending to make a gift. See *Weinstein v. Modern Silk Co.*, 170 N. Y. Supp. 529 (1918).

<sup>19</sup> The contrary view expressed in *Morris v. Third Ave. R. R.*, 1 Daly (N. Y.) 202, 205-206 (1862), is untenable.



possession of which he has not assumed, should prevail in the absence of some countervailing social interest calling for absolute liability; and that his responsibility should be limited to the exercise of reasonable care in the safe keeping of the goods and in effecting a return to the owner, with a corresponding lien for proper expenditures in so doing.

**JURISDICTION TO TAX INCOME AS AFFECTED BY CHANGE OF DOMICIL.**—When a taxpayer has acquired his domicile within the taxing state during the fiscal period for which an income tax is levied, the question has been raised as to the jurisdiction of this state to tax income received during the fiscal period but prior to the acquisition of the present domicile.<sup>1</sup> To arrive at an answer, it is necessary to consider the various forms of tax which may be imposed under the name of an income tax,<sup>2</sup> and the ability of the state to make the operation of each, in effect, retroactive.<sup>3</sup>

Income is property acquired by creation from other property or by transfer.<sup>4</sup> As a matter of theory, therefore, it is conceivable that an income tax may be laid as a personal tax upon the person receiving the income; as an excise upon the transaction by which it is gained; or as a property tax, either upon the property from which it has been created, or upon the income itself as property.

A personal tax may normally be levied at the domicile of the taxpayer at the time at which liability for the tax is created.<sup>5</sup> This is true even when the amount of the tax on the person is measured by the value of his property situated abroad,<sup>6</sup> except only if it be land<sup>7</sup> or tangible<sup>8</sup> personalty having a permanent<sup>9</sup> foreign *situs*.<sup>10</sup> But

<sup>1</sup> *Hart v. Tax Commissioner*, 132 N. E. 621 (Mass., 1921). For the facts of this case, see *RECENT CASES*, *infra*, p. 889.

<sup>2</sup> Often a single income tax law imposes more than one kind of tax. Thus a law which taxes the income of non-residents acquired within the state, and also the foreign acquisitions of residents, imposes either an excise or a property tax by the first provision and a personal tax by the second. The legislative intent as to the kind of tax must be ascertained by the practical effect. It not infrequently happens, however, that a limitation on the legislative power to impose one kind or another is created by some provision in the state constitution. See *Opinion of the Justices*, 220 Mass. 613 (1915).

<sup>3</sup> See *Rugg, C. J.*, in *Tax Commissioner v. Putnam*, 227 Mass. 522, 526, 116 N. E. 904, 907 (1917); *Maguire v. Tax Commissioner*, 230 Mass. 503, 512, 120 N. E. 162, 166 (1918).

<sup>4</sup> See *Shaffer v. Carter*, 252 U. S. 37, 50 (1919); *Opinion of the Justices*, *supra*, at 624.

<sup>5</sup> *Kuntz v. Davidson County*, 6 Lea (Tenn.) 65 (1880). See 31 HARV. L. REV. 786.

<sup>6</sup> The tax is usually said to be based on the doctrine *mobilia sequuntur personam*. This doctrine is entirely a fiction, however, and the real nature of the tax is a tax on the person. *McKeen v. Northampton*, 49 Pa. 519 (1865). See 32 HARV. L. REV. 168.

<sup>7</sup> *Louisville, etc. Ferry Co. v. Kentucky*, 188 U. S. 385 (1902); *Bittinger's Estate*, 129 Pa. 338, 18 Atl. 132 (1889).

<sup>8</sup> Intangible personalty, even though it has such a "business situs" in another state as to be taxable there, may be included in the property with respect to which the owner is taxed at his domicile. *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54 (1917).

<sup>9</sup> The owner is taxable with respect to tangible personalty which has not acquired a permanent situs abroad. *Coe v. Errol*, 116 U. S. 517 (1886); *Bemis v. Boston*,

<sup>10</sup> *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194 (1905).

when it is attempted to levy an income tax with respect to that part of the taxpayer's income which was accumulated before his change of domicile, the question is not merely one as to the taxability of income acquired abroad,<sup>11</sup> but is complicated by the fact that often ownership has ceased before acquisition by the taxing state of jurisdiction over the person. The fairness of a tax measured by property owned when the liability for the tax arises is apparent, since payment may be made out of that property. But it seems arbitrary and hardly according to "due process"<sup>12</sup> to make its amount dependent on the ownership of property with respect to which throughout the entire period<sup>13</sup> of ownership the taxpayer had no notice of the imposition or pending imposition of a liability.<sup>14</sup>

If the tax is in the nature of an excise,<sup>15</sup> it may be imposed only<sup>16</sup> at the place at which the income accrues.<sup>17</sup> The state is powerless to impose a tax on an act abroad<sup>18</sup> or a privilege conferred by foreign law,<sup>19</sup> and accordingly the state of the domicile may impose an excise only if the taxable operation takes place within its borders.

14 *Allen (Mass.)* 366 (1867). The test of exemption from a tax at the domicile seems to be that it will be granted if the property is subject to taxation abroad. See *New York Cent. R. R. v. Miller*, 202 U. S. 584, 597 (1905).

15 Taxability at the domicile with respect to income acquired and received abroad has under some circumstances at least long been recognized as proper. *Memphis, etc. R. Co. v. U. S.*, 108 U. S. 228 (1882). Taxability of income at the place of its creation is also undisputed. *Shaffer v. Carter*, *supra*. But this rule is somewhat anomalous, for ordinarily a fair degree of permanence within the jurisdiction is requisite. See J. H. Beale, "Jurisdiction to Tax," 32 *HARV. L. REV.* 587, 597 *et seq.* Accordingly, though the test indicated by the Supreme Court since the *Union Refrigerator Transit Co.* case of taxability at the domicile with reference to tangible property situated abroad was whether or not it was subject to taxation elsewhere, it seems doubtful whether this test will be applied to income. See *Maguire v. Tax Commissioner*, *supra*. Nevertheless, if the income is tangible and at once acquires a permanent *situs* abroad, the owner is not, consistently with the principle of the *Union Refrigerator Transit Co.* case, taxable with respect to it at his domicile. See *Union Ref. Transit Co. v. Kentucky*, *supra*, at 202.

16 As to the effect of the Fourteenth Amendment on the power of states to tax, see 1 COOLEY, *TAXATION*, 3 ed., 55 *et seq.*

17 Because income is often quickly dissipated, but nevertheless a tax is levied with respect to all that which is acquired throughout the fiscal period, liability for the tax must be created at the moment at which the income is acquired. Cf. *Mandell v. Pierce*, 3 Cliff. 134, 16 Fed. Cas. No. 9008 (D. Mass., 1868). There, the taxpayer having died within the fiscal period, his personal representative was required to make a return of the income received up to the time of his death.

The mere fact that if the state of the new domicile was allowed to impose a tax for the entire period a double liability would result, is no argument against the tax. See *GRAY, LIMITATIONS OF TAXING POWER*, §§ 163, 1377-1379.

18 But see *Stockdale v. Ins. Co.*, 20 Wall. (U. S.) 323, 331 (1873), *contra*. As to personal taxes on non-residents, see 34 *HARV. L. REV.* 542.

19 The federal income tax is of this nature. *Brushaber v. Union Pacific R. Co.*, 240 U. S. 1 (1915). See 29 *HARV. L. REV.* 536.

20 An excise cannot be levied on the receipt of income already acquired. See 35 *HARV. L. REV.* 70, 72.

21 *Shaffer v. Carter*, *supra*, at 52; *Stratton's Independence, Ltd. v. Howbert*, 231 U. S. 399 (1913).

22 *Robinson v. Norfolk*, 108 Va. 14, 60 S. E. 762 (1908).

23 *Westfeldt's Succession*, 122 La. 836, 48 So. 281 (1909); *Matter of Swift*, 137 N. Y. 77, 32 N. E. 1096 (1893). Cf. *Ins. Co. v. Comm.*, 87 Pa. St. 173 (1878); *Bullen v. Wisconsin*, 240 U. S. 625 (1915). But an excise may be imposed on the local act of

A tax is seldom imposed upon property measured exclusively by the value of the income it produces, because generally there is a provision in the state constitution requiring that taxes on property be on an *ad valorem* basis and prohibiting double taxation.<sup>20</sup> Nevertheless, such a tax is conceivable. But since property in another jurisdiction is not taxable,<sup>21</sup> the result in any case depends, not on the domicile of the owner, but on the *situs* of the property.<sup>22</sup> If the latter has changed, a problem somewhat similar<sup>23</sup> to that occasioned by change of domicile when the tax is on the person, might be raised. The amount of the income is material only to establish the measure of the tax. The time of its accumulation can, therefore, have no bearing on the jurisdiction of the state to levy a tax on the property itself. In the case of an ordinary *ad valorem* tax on property, the length of time the property has been within the jurisdiction has no influence on the amount<sup>24</sup> of the tax, and this principle cannot be altered by the fact that the income it produces is made the basis of its valuation. Thus, while the tax may be measured by the value of income accumulated abroad, the jurisdiction to levy it is determined not by any principles relating to the taxability of income but solely on ability to tax the property itself.

In the more usual type of income levied tax as a property tax, the tax is on the income itself.<sup>25</sup> Here, again, jurisdiction to tax depends upon jurisdiction over property, *i.e.*, the income, and not the domicile of the owner.<sup>26</sup> But if there is a change of domicile, and the taxpayer introduces a part of the income received at the old domicile into the new, there may be a question as to whether this is taxable under the income tax law of the new. The tax is laid upon all income received or accrued<sup>27</sup> during the preceding year and not merely upon that residuum which remains to the taxpayer on the day the return is made. Therefore, the intent of the statute is generally to affix the obligation to pay the tax at the instant the income is acquired.<sup>28</sup> Ordinarily, in order to lay a tax upon property, it is necessary to show that it is more than temporarily within the state.<sup>29</sup> But because of the peculiarly unstable character of this property, it seems sufficient that the state rendering protection at the

a non-resident with respect to property abroad. *People v. Reardon*, 184 N. Y. 431, 77 N. E. 970, *affd.*, 204 U. S. 152 (1906).

<sup>20</sup> See 1 COOLEY, TAXATION, 3 ed., 274; JUDSON, TAXATION, 2 ed., § 503, pp. 769 *et seq.*

<sup>21</sup> *State Tax on Foreign-Held Bonds*, 15 Wall. (U. S.) 300 (1872).

<sup>22</sup> *Louisville, etc. Ferry Co. v. Kentucky*, *supra*; *Bittinger's Estate*, *supra*.

<sup>23</sup> The problem is not the same. A tax on a person must be based on his ability to pay. A tax on property is not; it is on the property itself, measured by value.

<sup>24</sup> Time is important in determining whether jurisdiction has been acquired at all. But once acquired, the jurisdiction is complete.

<sup>25</sup> *Wilcox v. Middlesex County*, 103 Mass. 544 (1870). The law under which the tax was imposed in the principal case was a tax of this kind. See *Maguire v. Tax Commissioner*, *supra*. See *Maguire v. Trefry*, 253 U. S. 12 (1920).

<sup>26</sup> See 32 HARV. L. REV. 168.

<sup>27</sup> Whether it is income accrued or only income actually received depends generally upon the manner in which the law is administered.

<sup>28</sup> *Cf. Mandell v. Pierce*, *supra*. If the income is used to purchase property, this property is taxable in addition to the income, despite a constitutional prohibition against double taxation. *Lott v. Hubbard*, 44 Ala. 593 (1870).

<sup>29</sup> See note 11, *supra*.

vital moments of its creation<sup>30</sup> or its receipt<sup>31</sup> has jurisdiction to tax it, regardless of the intent of its owner as to its future location. If past accumulated income is brought into the state, however, the protection afforded is analogous rather to that given ordinary chattels than to that given peculiarly to income as income; and jurisdiction to tax should depend on the same principles as does that to tax ordinary personality.

It appears thus that, regardless of the character of the tax its laws impose, the jurisdiction of the state of the new domicile to tax income is limited, except in the rare case mentioned, either by the actual lack of jurisdiction or the prohibition on its exercise placed by the Fourteenth Amendment, to the levy of a tax on or with respect to only so much of the total income as was acquired after the acquisition of the new domicile.<sup>32</sup>

## RECENT CASES

**BANKRUPTCY — PREFERENCES — LIABILITY OF TRUSTEE FOR TAX LEVIED AFTER THE ADJUDICATION.** — In March, 1919, B was adjudicated a bankrupt. In September, 1919, Wisconsin passed a law levying a tax on 1918 incomes. Under the Bankruptcy Act, which provides for priority of payment of taxes due and owing from the bankrupt to the state, Wisconsin sought an order directing the payment of this tax. (1913 U. S. COMP. STAT., § 9648). *Held*, that the trustee in bankruptcy should pay the tax. *Matter of Borden Company, Bankrupt*, 47 A. B. R. 396 (7th Circ.).

The provision in the Bankruptcy Act for the payment of taxes does not specify the time when they must be due and owing, but this is interpreted to mean at the time of the adjudication. *First National Bank v. Aultman*, 12 A. B. R. 12 (N. D. Ohio). See *New Jersey v. Anderson*, 203 U. S. 483, 494; *In re Sherwoods*, 210 Fed. 754, 758 (2d Circ.). The principal case does not satisfy this requirement. Nor is it aided by the interpretation that it is sufficient if a tax is assessed though it is not yet collectible. See *In re William F. Fisher & Co.*, 148 Fed. 907, 912 (D. N. J.); *Matter of Ramirez*, 39 A. B. R. 320, 323 (D. P. R.). It is true that a trustee in bankruptcy is liable for current taxes on property in his possession. *Swarts v. Hammer*, 120 Fed. 256 (8th Circ.). This liability is generally treated as governed by the provision of the Bankruptcy Act relating to the payment of taxes. *In re Sims*, 118 Fed. 356 (W. D. Ga.). But it would seem better to treat it not as a tax but as an expense of administration. So treated it is clear that no analogy in support of the result of the principal case can be drawn from the trustee's liability for current taxes. Cf. *First National Bank v. Aultman*, *supra*; *Matter of Emmerman v. Ohio Steel Specialty Co.*, 13 A. B. R. 40 n. (N. D. Ohio).

**BANKRUPTCY — PROCEDURE AND PRACTICE — CLAIM FOR FEDERAL TAXES BARRED IF NOT FILED WITHIN A YEAR AFTER ADJUDICATION.** — X, then owing federal income taxes for the previous year, filed a voluntary petition in bankruptcy and was duly adjudicated a bankrupt. More than a year after the

<sup>30</sup> *Shaffer v. Carter*, *supra*.

<sup>31</sup> *Maguire v. Tax Commissioner*, *supra*; *Maguire v. Trefry*, *supra*.

<sup>32</sup> Conversely, in each case the state of the old domicile should have jurisdiction to tax that part, or with respect to that part, of the income which was acquired before the change. If the state of the old domicile purported to affix the liability as a tax on the parent property at the instant the income was created, it would in effect be a tax on the income. At all events it would be unobjectionable. See note 13, *supra*.

adjudication an order was entered barring the United States from participating in the estate. The Bankruptcy Act provides that "claims shall not be proved subsequent to one year after the adjudication." BANKRUPTCY ACT OF 1898, § 57 (n.); 30 STAT. AT L. 544, 561. *Held*, that the order be affirmed. *United States v. Lytle*, 66 N. Y. L. J. 1539 (C. C. A., 2d Circ.).

In spite of the mandatory provision of the statute, it has been held that claims due the government need not be proved within a year. *In re Stover*, 127 Fed. 394 (E. D. Pa.). See also *In re Prince & Waller*, 131 Fed. 546 (M. D. Pa.); *In re William F. Fisher & Co.*, 148 Fed. 907 (D. N. J.); *In re Cleanfast Hosiery Co.*, 4 A. B. R. 702 (S. D. N. Y.). One reason given is that statutes of limitations ordinarily do not bind the state. See *Magdalen College Case*, 11 Rep. 66 b, 74 b; WOOD, LIMITATIONS, 4 ed., § 52. See also *United States v. Heron*, 20 Wall. (U. S.) 251, 255. But because of the evident policy of having estates wound up speedily, the principal case properly disregards that argument. See *In re Muskoka Lumber Co.*, 127 Fed. 886 (W. D. N. Y.); *In re Sanderson*, 160 Fed. 278 (D. Vt.). Secondly, it is urged that the statute of March 3, 1797, giving the United States priority in all insolvent estates, makes its claim independent of the Bankruptcy Act. See 1 STAT. AT L. 512, 515. This argument prevailed under the Bankruptcy Act of 1867. *Lewis, Trustee v. United States*, 92 U. S. 618. But the Act of 1898 supersedes that statute where the two conflict. *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, 224 U. S. 152. The principal case therefore seems right, since the present statute provides that all claims must be filed within a year. A question remains as to the liability of the trustee due to the statute of March 2, 1799. See 1 STAT. AT L. 627, 676. Under previous bankruptcy acts, the United States could refrain from filing a claim, allow the assets to be distributed, and then hold the trustee personally. *United States v. Barnes*, 31 Fed. 705 (Circ. Ct., S. D. N. Y.). Cf. *United States v. Murphy*, 15 Fed. 589, 593 (Circ. Ct., D. Ind.). But the trustee can hardly be held for distributing an estate in which the United States has lost its right to participate.

**BILLS AND NOTES — ANOMALOUS INDORSER — INDORSEMENT BY CASHIER OF BANK AFTER DELIVERY TO PREVENT STOCK ASSESSMENT.** — The plaintiff bank was holder of a note which the bank examiner ordered stricken from its list of assets. This would have impaired the bank's capital and resulted in an assessment of stock and possibly receivership. It was agreed that the note should be retained as an asset upon indorsement by the defendant, the bank's cashier. The plaintiff bank, which remained solvent, now sues upon the indorsement. *Held*, that the plaintiff cannot recover. *Cripple Creek State Bank v. Rolleston*, 202 Pac. 115 (Colo.).

The defendant was clearly an indorser under the Negotiable Instruments Law. See N. I. L., § 63; 1912, 2 MILLS ANN. STAT., § 5113. *Lightner v. Roach*, 126 Md. 474, 95 Atl. 62; *Walker v. Dunham*, 135 Mo. App. 396, 115 S. W. 1086. Since the indorsement was made after delivery, he is not liable without new consideration. *American Multigraph Sales Co. v. Grant*, 135 Minn. 208, 160 N. W. 676; *Zadek v. Forcheimer*, 16 Ala. App. 347, 77 So. 941. See 1 WILLISTON, CONTRACTS, § 108. But consideration can be found in the requested non-action of the examiner. At least in the case of negotiable instruments, consideration need not move from the obligee or to the obligor. *Gay v. Mott*, 43 Ga. 252. See WILLISTON; *ubi supra*. The decision therefore is doubtful. In the first place, it may be questioned whether the defendant's promise could in fact be regarded as conditional upon the bank's insolvency. The purpose of the transaction was to protect creditors by having this note become a collectible obligation. This purpose would be defeated if the defendant's liability depended upon judicial speculation about the bank's financial condition when the note became due. Secondly, the

parol evidence rule might prevent showing such a condition. It is true that there may be a contingent delivery of an instrument. *Burke v. Dulaney*, 153 U. S. 228. See 4 WIGMORE, EVIDENCE, § 2409. But it would be a great extension of this rule to say that a promise unconnected with delivery could be only conditionally operative. And it is clear that if the promise is operative, an oral condition of performance is invalid. *Burns & Smith Lumber Co. v. Doyle*, 71 Conn. 742, 43 Atl. 483; *Northern Trust Co. v. Hiltgen*, 62 Minn. 361, 64 N. W. 909.

CONSTITUTIONAL LAW — POWERS OF LEGISLATURE: TAXATION — TAXATION OF INCOME OF EMPLOYERS OF CHILD LABOR. — An act of Congress imposed an annual tax upon income derived from industrial units in which during the year children had been employed otherwise than according to a schedule of ages and hours incorporated in the act. The plaintiff in the first of the cases below sought to enjoin the collection of the tax. The plaintiff in the second case sued to recover a tax paid under protest. *Held*, for the plaintiffs in both actions. *George v. Bailey*, 274 Fed. 639 (W. D. N. C.); *Drexel Furniture Co. v. Bailey*, 276 Fed. 452 (W. D. N. C.).

For a discussion of the principles involved, see NOTES, *supra*, p. 859.

CONSTITUTIONAL LAW — POWERS OF STATE LEGISLATURE — EXPULSION OF FOREIGN CORPORATION WHICH RESORTS TO FEDERAL COURTS. — A statute of Arkansas requires the Secretary of State to revoke the license of any foreign corporation which brings suit against a citizen of the state in a federal court, or removes a suit brought by such a citizen to a federal court, and imposes a penalty for doing business after such revocation (1907 ACTS OF ARK. 744, § 1; 1921 STAT. OF ARK., §§ 1831, 1832). The plaintiff, a foreign corporation licensed in Arkansas and doing exclusively domestic business there, seeks to enjoin the revocation of its license under the above statute. *Held*, that the statute is unconstitutional and that the injunction be granted. *Terral, Sec'y, v. Burke Construction Co.*, U. S. Sup. Ct., Oct Term, 1921, No. 93.

State statutes forbidding resort by foreign corporations to the federal courts have uniformly been held unconstitutional. *Insurance Co. v. Morse*, 20 Wall. (U. S.) 445; *Harrison v. St. Louis, etc. R. R. Co.*, 232 U. S. 318. And in the case of foreign corporations engaged in interstate commerce, states have been restrained from revoking a license because the corporation did so resort. *Hendon v. Chicago, etc. Ry. Co.*, 218 U. S. 135; *Wisconsin v. Phila. & Reading Coal Co.*, 241 U. S. 329. But the states were not thus restrained when the business conducted was exclusively domestic. *Doyle v. Continental Ins. Co.*, 94 U. S. 535; *Security Mutual Life Ins. Co. v. Prewitt*, 202 U. S. 246. Abandoning this distinction, the court now explicitly overrules the latter cases. These, however, were not clearly wrong. A state may absolutely debar a foreign corporation not engaged in interstate commerce. *Hooper v. California*, 155 U. S. 648. Cf. *Internat. Textbook Co. v. Pigg*, 217 U. S. 91. See 19 HARV. L. REV. 291. And may subject it, when admitted, to special tax burdens and regulation. *So. Bldg. & Loan Ass'n v. Norman*, 98 Ky. 294, 32 S. W. 952. See 3 COOK, CORPORATIONS, 7 ed., §§ 696-700. A license, if granted, is doubtless a property right protected by the Fourteenth Amendment, yet its revocation because of the exercise of a right under the Federal Constitution is not necessarily a denial of due process. It is not plainly unreasonable for a state to require that a foreign corporation do business, if at all, on terms of absolute equality with those organized under, and fully amenable to domestic law. On the other hand, the policy against indirect state impairment of any constitutional right may, as the court now agrees, forbid a leveling process of the sort attempted by the Arkansas statute. See *Harrison v. St. Louis, etc. R.R. Co.*, *supra*, at 328. Cf. *Ex parte Young*, 209 U. S. 123.

CONSTITUTIONAL LAW — SEPARATION OF POWERS — CURATIVE LEGISLATION AFTER JUDICIAL DETERMINATION. — On an information in the nature of *quo warranto* against the members of a local board of education, judgment was given for the defendants. The supreme court reversed this judgment on the ground that their election was void because women, who had participated, were not entitled by law to vote, and remanded the cause to the lower court directing that a judgment of ouster be entered. Before this was entered, the legislature passed an act providing that where all inhabitants, regardless of sex, had voted for a board of education, such election was thereby declared valid. The judgment of ouster having nevertheless been entered, an appeal, based on the statute, was prosecuted. *Held*, that the judgment be affirmed. *People v. Clark*, 133 N. E. 247 (Ill.).

Curative acts are usually valid if the enactment was originally within the power of the legislature. *Stockdale v. Ins. Co.*, 20 Wall. (U. S.) 323. See COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 134-139, 330-331, 528-546. Nor does the pendency of litigation affect this principle. *United States v. Heinssen & Co.*, 206 U. S. 370; *State v. Manning*, 14 Tex. 402. See 34 HARV. L. REV. 212. The intervention of a final judgment may, however, be material. If there has been no judgment, the operation of the statute is to clothe with *de jure* authority officers who have previously had an actual *de facto* existence. See *People v. Still*, 280 Ill. 553, 117 N. E. 784. Cf. *Pennsylvania v. The Wheeling and Belmont Bridge Co.*, 18 How. (U. S.) 421; *Western Union Tel. Co. v. Louisville and N. R. R. Co.*, U. S. Sup. Ct., Oct. Term, 1921, No. 259. But if a final judgment of ouster has been rendered, their existence even *de facto* has been terminated, and there is nothing upon which the statute can operate, unless it overturns the judgment. This would be an unconstitutional exercise of judicial power by the legislature. *People v. Owen*, 286 Ill. 638, 122 N. E. 132. Cf. *People v. Cowen*, 233 Ill. 308, 119 N. E. 335. See ILL. CONST., Art. 3. However, it seems that the legislature originally had power to make appointments to the offices in question. Cf. *People v. Morgan*, 90 Ill. 558; *People v. Hoffman*, 116 Ill. 587, 5 N. E. 596, 8 N. E. 788. It is probable that the present statute might with propriety have been construed as making appointments to them. The court, however, apparently overlooked this possibility. Despite the application by the court of the ordinary rule of presumption against a legislative intent to make a statute retrospective, it is evident that the statute was intended to supply a remedy for the situation in question. The decision seems, therefore, open to criticism.

EQUITY — JURISDICTION — INJUNCTION BY CROPPER AGAINST LANDLORD WHO SEEKS FORCIBLY TO OUST HIM FROM THE PREMISES. — The parties entered into a contract by which the defendant was to furnish the land and fertilizer, and perhaps the seed, and the plaintiff to furnish the tools and to perform the labor necessary to cultivate and harvest the crops. The crops were to be divided when harvested, and are now ready to harvest. The defendant, with others, attempted to kill the plaintiff, and by force to induce him to quit the contract. The plaintiff fears bodily harm if he attempts to continue the work, and prays that the defendant be enjoined from molesting the plaintiff and that a receiver be appointed to harvest the crop. *Held*, that the prayer be granted. *Bussell v. Bishop*, 110 S. E. 174 (Ga.).

Assuming, as the court does, that the plaintiff was an employee only, the appointment of a receiver to carry out the contract cannot be supported. The plaintiff had an action at law for breach of an implied promise not to hinder performance, or for breach of the defendant's express promise in the event the defendant refused to perform. See 2 WILLISTON, CONTRACTS, § 677. This remedy would have adequately protected the plaintiff's rights under the contract. The crop was ready for harvesting, and damages, therefore,

could have been accurately assessed. *Cf. Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416. With respect to the interference with the personal security of the plaintiff, the court, in harmony with Georgia's enlightened attitude toward preventive relief, properly restrained the defendant from further acts of violence. *Cf. Stark v. Hamilton*, 149 Ga. 227, 99 S. E. 861; *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68. The justification for such relief is that money damages cannot be an adequate remedy for injuries to the person. Unfortunately many courts are less enlightened. *Cf. Ashinsky v. Levenson*, 256 Pa. St. 14, 100 Atl. 491. See Roscoe Pound, "Equitable Relief Against Defamation," 29 HARV. L. REV. 640. This defect is remedied in some states by statutes giving protection to those threatened with physical harm. See 1920 OREG. LAWS, § 1819; 1919 MO. REV. STAT., §§ 3747, 3748.

**INSURANCE — ACCIDENT INSURANCE — INDEMNITY AGAINST CONSEQUENCES OF CRIMINAL NEGLIGENCE.** — The assured held a policy of indemnity against loss from liability incurred on account of accident. While in an intoxicated condition and driving his automobile at an unlawful rate of speed, he struck and injured X, who died from his injuries. As a result the assured was convicted and sentenced to imprisonment for an offense under the criminal code. He now seeks indemnity from the insurer to the amount of a judgment recovered against him by the dependents of X. *Held*, that the plaintiff may not recover. *O'Hearn v. Yorkshire Ins. Co.*, 21 Ont. W. N. 67 (Ont. Div. Ct.).

Public policy does not necessarily prohibit contracts indemnifying against the consequences of an illegal act unless made with the deliberate purpose of accomplishing the act. *Jewett Publishing Co. v. Butler*, 159 Mass. 517, 34 N. E. 1087; *Peterson v. Chicago & N. W. Ry.*, 119 Wis. 197, 96 N. W. 532. See 3 WILLISTON, CONTRACTS, § 1751. Accordingly, insurance of owners against the consequences of negligence in the maintenance or use of automobiles has been generally upheld in the absence of statutory inhibition. *Gould v. Brock*, 221 Pa. St. 38, 69 Atl. 1122; *Messersmith v. American Fidelity Co.*, 133 N. E. 432 (N. Y.). If, then, the contract of insurance is valid, the fact that the assured's tort may also amount to a statutory misdemeanor or even manslaughter is not ground for denying him relief. *Messersmith v. American Fidelity Co.*, *supra*; *Tinline v. White Cross Ins. Ass'n*, [1921] 3 K. B. 327. *Cf. Taxicab Motor Co. v. Pacific Coast Cas. Co.*, 73 Wash. 631, 132 Pac. 393. If denied in these cases, the indemnity dwindles to the vanishing point, in view of statutes making criminal well-nigh every negligent act of the automobile operator. See *Messersmith v. American Fidelity Co.*, *supra*, at 432. Furthermore, the real sufferer, if the principal case is followed, may often be the innocent victim of the accident. Allowing relief, on the other hand, will have but a remote tendency to encourage violations of the criminal law. The insurance affords no protection from criminal responsibility. *Cf. Patterson v. Standard Accident Ins. Co.*, 178 Mich. 288, 144 N. W. 491. Secondly, the mind of the man who acts negligently adverts to neither his civil nor his criminal responsibility. His case is clearly distinguishable from that of one who acts intentionally. In the latter case relief is properly denied. *Cf. Burt v. Union, etc. Ins. Ass'n*, 187 U. S. 362. See 21 HARV. L. REV. 530. But *cf. Murphy v. Metropolitan Life Ins. Co.*, 110 S. E. 178 (Ga.).

**INTERSTATE COMMERCE — WHAT CONSTITUTES INTERSTATE COMMERCE — STATE REGULATION AND PRICE-FIXING IN THE WHEAT INDUSTRY.** — The complainant, and other buyers of like character, are owners of elevators and purchasers of grain bought in North Dakota to be shipped and sold at terminal markets in other states. The grain is bought from the producer at Minneapolis prices with a margin of profit added. The elevator operators ship to the highest bidder, but it is very unusual to get an offer from a point within



the state. A North Dakota statute provides as to sales between wheat producers and elevator operators: (1) that each operator must secure a license as deputy inspector; (2) that every purchase shall be based upon the system of grading and inspection established by the state inspector; (3) that upon complaint of a producer the state inspector may set a reasonable margin of profit in view of the Minneapolis prices. (1919 LAWS OF NORTH DAKOTA, c. 138.) In the Circuit Court of Appeals, the complainant secured an injunction against the enforcement of this statute as in violation of the Commerce Clause. *Held*, that the decree be affirmed. *Lemke v. Farmers Grain Co.*, U. S. Sup. Ct., Oct. Term, 1921, No. 456.

Wherever products move from producer to consumer across state lines, there is a practical problem to determine the point at which the process becomes interstate commerce. The mere manufacture or production of a commodity for interstate trade is not interstate commerce. *Kidd v. Pearson*, 128 U. S. 1; *Arkadelphia Milling Co. v. St. Louis & Southwestern Ry.*, 249 U. S. 134, 149; *Crescent Cotton Oil Co. v. Mississippi*, U. S. Sup. Ct., Oct. Term, 1921, No. 41. But under the particular circumstances of the principal case, the majority properly emphasized the fact that purchasing grain prior to a regular course of interstate shipment and resale was closely connected with activities conceded to be interstate commerce. *Dahnke-Walker Milling Co. v. Bondurant*, U. S. Sup. Ct., Oct. Term, 1921, No. 30; *MacNaughton Co. v. McGill*, 20 Mont. 124, 49 Pac. 651. *Cf. Oklahoma v. Kansas Natural Gas Co.*, 221 U. S. 229. Since in regular course of business the wheat did arrive at an interstate market, it is unimportant that the complainant might have diverted any purchase to a local market. *The Eureka Pipe Line Co. v. Hallanan*, U. S. Sup. Ct., Oct. Term, 1921, No. 255; *Dahnke-Walker Milling Co. v. Bondurant*, *supra*. The margin of profit section, then, constitutes a direct burden on interstate commerce by limiting possible returns. But though the sales are treated as a step in interstate commerce, there is no reason to condemn state inspection laws in the absence of Congressional action. *Savage v. Jones*, 225 U. S. 501; *McLean v. Denver & Rio Grande Ry.*, 203 U. S. 38. The minority rightly contended that the inspection and profit sections are separable and so the former should stand. *Presser v. Illinois*, 116 U. S. 252. *Cf. International Textbook Co. v. Pigg*, 217 U. S. 91, 113. That this is a reasonable construction is emphasized by the fact that the legislation is directed at two distinct evils.

LEGACIES AND DEVISES — LAPSED BEQUESTS — EFFECT OF LAPSE WHERE THE ESTATE IS INSUFFICIENT TO PAY ALL THE LEGACIES. — The testatrix by her will left a fund to be "set apart in trust to form an annual prize to be given to any domestic going through the Hostel . . .," a charitable organization. The assets were insufficient to satisfy all the legacies, which abated ratably. After the death of the testatrix the Hostel changed its purposes and disclaimed any right to the fund. *Held*, that the fund be used to make up the deficiency in the other legacies. *In re Fitzgibbon*, 21 Ont. W. N. 319 (High Ct. Div.).

If the legacy had lapsed before it vested in possession, the lapse should not accrue to the benefit of the residuary estate until the legacies which had abated were paid in full. *In re Tunno*, 45 Ch. D. 66; *Eales v. Drake*, 1 Ch. D. 217. See THEOBALD, WILLS, 7 ed., 156 *et seq.* It seems, however, that the legacy did vest in possession. On the failure of the trust the claim of the legatees must, therefore, arise by way of "resulting trust." *Cf. Hopkins v. Grimshaw*, 165 U. S. 342. And it is important to consider whether such a trust would be too remote because of the Rule against Perpetuities. A distinction is made between determinable charitable trusts and charitable trusts in perpetuity. In the former cases a resulting trust to the residuary legatees is allowed upon the termination of the trust. *In re Blunt's Trusts*,

[1904] 2 Ch. 767; *In re Randell*, 38 Ch. D. 213. If there are unpaid legatees the trust might well be held to result to them. The Rule against Perpetuities does not apply here because the resulting trust is a vested interest. See GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 327 a, 603 i. But where the charitable trust is in perpetuity, a gift over, even to the residuary legatees, is void. *In re Bowen*, [1893] 2 Ch. 491. See GRAY, *op. cit.* §§ 603-603 i. The gift in the principal case was clearly in perpetuity. Though there was no gift over, it seems inconsistent for the court to declare a resulting trust in favor of the unpaid legatees when it would hold an express gift over to them void. A resulting trust, whether rightly or wrongly, is allowed in favor of the testatrix's heirs or next of kin. *Jenkins v. Jenkins University*, 17 Wash. 160, 49 Pac. 247. See *Hopkins v. Grimshaw*, *supra*, at 355. See GRAY, *op. cit.*, §§ 327 a, 603 a-603 i. But it is against the spirit of the rule to widen the class to whom the trust may result.

**LIBEL AND SLANDER — PRIVILEGED COMMUNICATIONS — REFUSAL TO RETRACT AND CONDITIONAL PRIVILEGE.** — The defendant published a partially erroneous article, criticizing chiropractors, who brought an action therefor. Malice was not proved. *Held*, that judgment be entered for the defendant. It was suggested that a refusal to retract might have changed the result. *Palmer School v. Edmonton*, 61 D. L. R. 93 (Alta. Sup. Ct.).

For a discussion of the suggestion, see NOTES, *supra*, p. 867.

**LIENS — ATTORNEY'S LIEN — COMPELLING DISCHARGED ATTORNEY TO GIVE UP PAPERS TEMPORARILY.** — A solicitor, who through no fault of his own was discharged from his employment in an action for the dissolution of a partnership, claimed a lien on certain partnership papers in his hands. His former employer sought to compel the solicitor to turn them over to his successor. *Held*, that he must do so, "subject to the lien," the papers to be returned after use. *Dessau v. Peters, Rushton & Co.*, [1922] 1 Ch. 1.

A trustee in bankruptcy desired the bankrupt's charter and minute book, held by the bankrupt's solicitor under claim of lien, and prayed that the solicitor be compelled to give them up, subject to the lien, and to be returned after use. *Held*, that the prayer be granted. *Re Andrew Motherwell, Ltd.*, 21 Ont. W. N. 108 (High Ct. Div.).

Usually a lien need not be surrendered until the debt for which it is security is discharged. *Davis v. Davis*, 90 Fed. 791 (Circ. Ct., D. Mass.); *In re Faithfull*, L. R. 6 Eq. 325; *Lord v. Wormleighton*, 1 Jac. 580. Cf. *Matter of Hollins*, 107 N. Y. 361, 90 N. E. 997; *Leszynsky v. Merrill*, 9 Fed. 688 (S. D. N. Y.); *Cunningham v. Widing*, 5 Abb. Pr. (N. Y.) 413. See 1 JONES, LIENS, 3 ed., §§ 113, 122 a, 135, 136. But where the papers upon which a solicitor claims a lien are needed to facilitate adjudication of the rights of third persons, as in administration and winding-up proceedings, the English courts subordinate the solicitor's rights to the interests of third-party litigants and compel him to release his lien temporarily. *In re Hawkes*, [1898] 2 Ch. 1; *In re Boughton*, 23 Ch. D. 169; *Belaney v. French*, L. R. 8 Ch. 918. Cf. *Newington Local Board v. Eldridge*, 12 Ch. D. 349. This emasculates the lien, for use in the immediate litigation may destroy the value of the papers to the client, and hence their security value to the solicitor. See *Davis v. Davis*, *supra*, at 792; *In re Faithfull*, *supra*, at 327; *Batten v. Wedgewood Co.*, 28 Ch. D. 317, 320.

On the other hand, the solicitor can have no greater right than his client could give him, and where the client could be made to produce papers on *subpoena duces tecum*, ordinarily the solicitor should be compelled to. *In re Cameron's Coalbrook, etc. R. Co.*, 25 Beav. 1; *Hope v. Liddell*, 7 De G., M. & G. 331; *Jackson v. American Cigar Box Co.*, 141 App. Div. 195, 126 N. Y. Supp. 58. See *Vale v. Oppert*, L. R. 10 Ch. 340, 342. But where the claim

of the solicitor is actually competing with the unsecured claims of third parties, as in bankruptcy proceedings, there seems no ground for depriving him of the advantage which his lien gives him. The tendency of some of the English cases to restrict the right to make the solicitor give up papers for use in litigation recognizes this. *In re Rapid Transit Co.*, [1909] 1 Ch. 96; *Boden v. Hensby*, [1892] 1 Ch. 101; *In re Capital Ins. Ass'n*, 24 Ch. D. 408.

**RAILROADS — REGULATION OF RATES — POWER OF INTERSTATE COMMERCE COMMISSION OVER INTRASTATE RATES.** — Section 15a of the Interstate Commerce Act, as amended by the Transportation Act of 1920, requires the Interstate Commerce Commission to prescribe rates so that the carriers as a whole or in groups shall earn an aggregate net income equal to a reasonable return on the aggregate value of their properties engaged in transportation. (41 STAT. AT L. 488.) Section 13 of the Act empowers the commission to fix intrastate rates when it finds such rates cause an undue discrimination against interstate commerce. (41 STAT. AT L. 484.) In conformity with the Act, the commission ordered increased passenger rates for the carriers in the group of which the Wisconsin carriers were a part. The Wisconsin Railroad Commission refused to grant this increased intrastate rate on the ground that a state statute prescribed a lower maximum. The Interstate Commerce Commission found that there was an undue discrimination against interstate commerce, and ordered the intrastate rates increased. The carriers filed a bill in equity to enjoin the state commission from interfering with this order. An interlocutory injunction was granted. The state commission appealed. *Held*, that the decree be affirmed. *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy Railroad Company*, U. S. Sup. Ct., Oct. Term, 1921, No. 206.

For a discussion of the principles involved, see NOTES, *supra*, p. 864.

**SALES — IMPLIED WARRANTIES — PLACE AT WHICH GOODS MUST BE SALABLE.** — The plaintiffs bought mineral waters from the defendants f. o. b. London, for resale, as the defendants knew, in Argentine. There was no reliance on the seller's judgment. The goods were analyzed on their arrival in Argentine by the government and found to contain salicylic acid and, therefore, were unsalable under Argentine laws. The plaintiff sues for a breach of the seller's implied warranty of merchantability. *Held*, that the warranty of merchantability did not embrace legal salability. *Sumner, Permain & Co. v. Webb*, [1922] 1 K. B. 55.

Goods merchantable at one place may not be so at another. If the goods are merchantable at the place where they are when title is taken there is no breach of the warranty of merchantability. *Collins v. Tigner*, 5 Del. 345, 60 Atl. 978. *Cf. Perkins v. Whelan*, 116 Mass. 542. See WILLISTON, SALES, § 212. But if the goods are not merchantable at the place where title passes, though merchantable at the place the buyer contemplates using them, there has been a breach of the warranty, since merchantable goods have not been furnished, but goods that *would* be merchantable *if* somewhere else. Thus the seller's knowledge of contemplated use elsewhere is immaterial. If the buyer desires a warranty that the goods be merchantable at a place other than that where title is taken, he should not only make known to the seller that the goods are to be used at such other place, but he should rely upon the seller's judgment to furnish goods reasonably fit for such purpose. SALE OF GOODS ACT, § 6 & 57 VICT., c. 71, § 14 (1); UNIFORM SALES ACT, § 15 (1). Any such reliance on the seller's judgment was negated on the facts in the principal case and the only question, therefore, was whether the goods were merchantable in London where title passed. *Congdon v. Kendall*, 53 Neb. 282, 73 N. W. 659. See WILLISTON, *op. cit.*, § 280. Since no English drug law was violated, the discussion of whether or not legal salability is an element in merchantability seems

quite unnecessary. When the latter question is squarely raised, it is to be hoped that the English court will renounce its present views and return to those expressed in the *Niblett* case. *Niblett v. Confectioner's Materials Co.*, 125 L. T. R. 552 (C. A.). See 35 HARV. L. REV. 477.

**SALES — RIGHTS AND REMEDIES OF SELLER — EFFECT OF NOTICE TO BUYER OF INTENDED RESALE BY UNPAID SELLER.** — The plaintiff sold goods to the defendant, retaining a lien for the purchase price. Upon the defendant's default, the plaintiff gave him notice of intention to resell, naming the time, place, and terms of the resale. The defendant made no objection. The plaintiff brought suit for the difference between the resale price and the contract price. In answer, the defendant asserted that the circumstances of the resale made it unreasonable. *Held*, that judgment be entered for the plaintiff for the full amount claimed. *Pride v. Marshall*, 131 N. E. 183 (Mass.).

For a discussion of the principles involved, see NOTES, *supra*, p. 870.

**SALES — WARRANTIES: REMEDIES FOR BREACH — BUYER'S VOLUNTARY RESCISSION OF SUB-CONTRACT.** — The plaintiff sold a horse to the defendant with warranty of age. The defendant resold it without warranty of age. On ascertaining that the horse was older than supposed, the sub-purchaser complained to the defendant, who voluntarily rescinded the sub-contract. In an action brought for the purchase price, the defendant counterclaims for damages in breach of warranty. *Held*, that the counterclaim be dismissed. *Pointer v. Robinson*, [1922] 1 W. W. R. 91 (Alta.).

The dismissal of the counterclaim was wrong. The court seems curiously to have confused direct and consequential damages. The defendant counterclaims for damages directly sustained by reason of the failure of the horse to conform to the warranty, and the seller must make good the statements the truth of which he warranted. See WILLISTON, SALES, § 613. The defendant does not claim consequential damage, nor is there any. The existence of the sub-contract and the cause or effect of its rescission are, therefore, immaterial in the present controversy between the original buyer and seller. *Williams v. Agius*, [1914] A. C. 510; *Union Selling Co. v. Jones*, 128 Fed. 672 (8th Circ.); *Hallam v. Bainton*, 60 C. S. C. 325, [1920] 2 W. W. R. 296. The counterclaim should be allowed both at common law and under the Sales Act. See UNIFORM SALES ACT, § 69. See WILLISTON, SALES, §§ 603 *et seq.*

**SALVAGE — RECOVERY WHEN REQUESTED SERVICE CONFERS NO BENEFIT.** — The steamer D answered the distress call of the steamer M and stood by for two days, making unsuccessful attempts to get a towline aboard. When she had finally succeeded she was dismissed because of the arrival of a vessel sent by the owners of the M to do the towing. The latter ship towed the M to safety. *Held*, that the D was entitled to a salvage award. *The Manchester Brigade*, 276 Fed. 410 (E. D. Va.).

Salvage awards for unsolicited service ordinarily depend on benefit conferred. *The Huntsville*, 12 Fed. Cas. No. 6916 (E. D. S. C.); *The City of Puebla*, 153 Fed. 925 (N. D. Cal.); *The Edward Hawkins*, Lush. Adm. Rep. 515. A requested service stands differently. A request indicates immediate danger, or chance of success not great enough to call forth volunteers. Or again, the request may be the means of communication of the danger; that is, in this last case, possible relief is not in the immediate neighborhood and capable of judging for itself the chances of success, but must be called from a distance. In all these cases in order that salvage will be attempted, and promptly enough, some reward not contingent upon success must be offered. The law recognizes this by permitting a salvage recovery when a requested service has not proved beneficial, if the property is otherwise saved. *The*

*Undaunted*, Lush. Adm. Rep. 90; *The Melpomene*, L. R. 4 Adm. 129; *The Sabine*, 101 U. S. 384, 390 (*semble*). For ease in administration, whether or not in fact a request indicates one of the three situations above enumerated, is not gone into. Normally it does. In the cases cited the failure to succeed was due to accident, storm, or the like. If due to wilful abandonment salvage is not allowed. *The Algitha*, 17 Fed. 551 (D. Md.). Cf. *The Henry Steers, Jr.*, 110 Fed. 578 (E. D. N. Y.). The case of dismissal, if not for misconduct, seems assimilable to the former rather than to the latter class of cases. The principal case, therefore, is sound. *The Maude*, 3 Asp. Mar. L. Cas. 338. See KENNEDY, CIVIL SALVAGE, 2 ed., 41.

**SPECIFIC PERFORMANCE — PARTIAL PERFORMANCE WITH COMPENSATION — REFUSAL OF WIFE TO JOIN IN DEED TO COMMUNITY PROPERTY.** — The plaintiff contracted to transfer land worth \$15,000 to the defendant, who in return was to assume a mortgage of \$6000, and deliver notes to the amount of \$4000 and a deed to lots valued at \$5000. All the land in question was community property, which by statute the husband cannot convey unless the wife join in the deed. (1919 IDAHO COMP. STAT., c. 184, § 4666.) The plaintiff tendered a deed duly executed by himself and wife. The defendant, whose wife would not join in a deed, refused to accept the conveyance. The trial court ordered that the defendant perform within thirty days, or that judgment for \$9000 be entered against him. *Held*, that the judgment be reversed. *Childs v. Reed*, 202 Pac. 685 (Ida.).

The decision cannot be supported upon the ground that there is absence of mutuality of remedy. The defendant can be amply protected by a decree which is conditional on the plaintiff's performance. *Logan v. Bull*, 78 Ky. 607, 617. Cf. *Mullens v. Big Creek, etc. Iron Co.*, 35 S. W. 439, 442 (Tenn. Ch. App.). See 16 HARV. L. REV. 72; 34 HARV. L. REV. 336. But the case may be supported upon another ground. Since the sale was not executed, at law the plaintiff can recover not the value of his land but merely damages for the breach of contract. *Bensinger v. Erhardt*, 74 App. Div. 169, 77 N. Y. Supp. 577. See 3 WILLISTON, CONTRACTS, § 1399. *Contra*, *Gray v. Meek*, 199 Ill. 136, 64 N. E. 1020. The trial court must, then, have proceeded on a theory of specific enforcement with compensation. Such relief would subject the defendant to an affirmative liability which was never contemplated; it would be a remaking of the contract on a much more elaborate scale than is done in cases where a vendor is compelled to remit a portion of the purchase price. See *Sternberger v. McGovern*, 56 N. Y. 12. See also 25 HARV. L. REV. 731. But see *Mundy v. Irwin*, 20 N. Mex. 43, 145 Pac. 1080. Furthermore, the plaintiff, to satisfy the judgment against the husband, might levy execution upon the very land which the wife refused to convey. *Holt v. Empey*, 32 Ida. 106, 178 Pac. 703. The policy of the statute which requires her consent to a conveyance of community property would seem to forbid that she be subjected to the strong indirect pressure which a money judgment would involve. Cf. *Ries's Appeal*, 73 Pa. St. 485.

**STATUTES — INTERPRETATION — ENLARGING THE SCOPE OF ONE STATUTE TO CONFORM WITH THE POLICY OF ANOTHER.** — A mother sued under a statute for the negligent killing of her illegitimate child. (1911 MD. ANN. CODE, Art. 67, § 2.) Another statute gave mutual rights of inheritance to a mother and her illegitimate children. (1911 MD. ANN. CODE, Art. 46, § 30.) The defendant demurred. *Held*, that the demurrer be sustained. *Smith v. Hagerstown & Frederick Ry. Co.*, 114 Atl. 729 (Md.).

The word "child," both at common law and as used in death acts, is a word of art meaning "legitimate child." *Dickinson v. Northeastern Ry Co.*, 2 H. & C. 735, 9 L. T. R. 299; *McDonald v. Pittsburgh, C. C. & St. Louis Ry.*

*Co.*, 144 Ind. 459, 43 N. E. 447; *Alabama & Vicksburg Ry. Co. v. Williams*, 78 Miss. 209, 28 So 853. Some courts have held that a statute giving mutual rights of inheritance to an illegitimate child and its mother manifests a broad policy or the legislature to abridge the legal distinction between legitimate and illegitimate offspring, and have accordingly enlarged the sense of the death statute to include the case of the illegitimate child. *Marshall v. Wabash R. R. Co.*, 120 Mo. 275, 25 S. W. 179; *Security Title Co. v. West Chicago R. R. Co.*, 91 Ill. App. 332. The argument is that statutes should be construed as beneficially as possible and that the courts should hesitate to restrict the scope of progressive legislation. See SEDGWICK, *STATUTORY CONSTRUCTION*, 2 ed., 308, 311. See Roscoe Pound, "Common Law and Legislation," 21 HARV. L. REV. 383, 407. But incapacity to inherit is only one consequence of illegitimacy. It would not, therefore, seem proper to find in a statute aimed at this evil an expression of general policy which would justify the court in enlarging the scope of the death act. *Atkinson v. Anderson*, 21 Ch. 100. See *Commonwealth v. Herrick*, 6 Cush. (Mass.) 465. The harsh result of the principal case is unavoidable. *Robinson v. Georgia Railroad, etc. Co.*, 117 Ga. 168, 43 S. E. 452.

**TAXATION — GENERAL LIMITATIONS ON THE TAXING POWER — FEDERAL AGENCY: STATE TAXATION OF INCOME FROM LEASES OF INDIAN LANDS.** — By statute Oklahoma taxes the entire net income of every person in the state from whatever source derived, except such as is exempt by some law of the United States or of the state. (1915 OKLA. SESSION LAWS, c. 164.) The defendant was an instrumentality used by the United States to carry out its duties to the Indians. Proceedings were instituted under the statute to hold the defendant liable for the net income which he derived as lessee of restricted Indian lands. *Held*, that the tax is invalid. *Gillespie v. Oklahoma*, U. S. Sup. Ct., Oct. Term, 1921, No. 322.

Where a state purports to levy a tax on income derived from interstate commerce, a distinction is taken between a tax on gross and one on net income. The former is in reality an excise upon the act of engaging in interstate commerce and therefore prohibited. See Thomas R. Powell, "Indirect Encroachment on Federal Authority," 32 HARV. L. REV. 374, 377. But a tax on net income may be upheld as a property tax on the net income itself. *United States Glue Co. v. Oak Creek*, 247 U. S. 321. In the principal case, it was argued that whereas in previous cases invalidating taxes on income derived from Indian lands, the taxes had been on gross income, the present tax should, by analogy, be upheld. But property engaged in interstate commerce is subject to state taxation. *Marye v. Baltimore & O. R. R. Co.*, 127 U. S. 117, 123; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18. On the other hand, the leases from which the present income was derived are not. *Indian Territory Illuminating Co. v. Oklahoma*, 240 U. S. 522. This differentiates the cases, for where property from which income is derived is not taxable, the income itself must be exempt. *Opinion of the Justices*, 53 N. H. 634; *State Bank v. Commonwealth*, 9 Bush. (Ky.) 46. Cf. *Peck & Co. v. Lowe*, 247 U. S. 165; *Weston v. City Council of Charleston*, 2 Pet. (U. S.) 449. The court was, therefore, correct in refusing to follow the supposed analogy.

**TAXATION — WHERE PROPERTY MAY BE TAXED — INCOME — EFFECT OF CHANGE OF DOMICIL.** — A was domiciled in New York until January, 1918, when she acquired a domicile in Massachusetts. An income tax was assessed and collected in Massachusetts based on a return showing the income A had received in 1917. She brings proceedings for abatement on the ground that it was beyond the jurisdiction of Massachusetts to levy the tax. *Held*, that

A is entitled to the abatement. *Hart v. Tax Commissioner*, 132 N. E. 621 (Mass.).

For a discussion of the principles involved, see NOTES, *supra*, p. 876.

**TROVER AND CONVERSION — MISDELIVERY BY A BAILEE — INVOLUNTARY BAILMENT.** — The plaintiff, under a contract to deliver the X bond to the defendant, delivered the Y bond instead. The delivery was made by a messenger, who dropped the bond through a receiving slot on to the defendant's desk. The latter promptly opened an opaque window opening into the corridor from which the delivery was made, and gave the bond to a stranger, who answered when the defendant called the name of the plaintiff's firm. The plaintiff sued for a conversion. *Held*, that the plaintiff recover. *Cowen v. Pressprich*, 192 N. Y. Supp. 242 (Sup. Ct.).

For a discussion of the principles involved, see NOTES, *supra*, p. 873.

**WILLS — CONSTRUCTION — DETERMINATION OF CLASSES.** — The testator devised a part of his estate to M for life, and then to her issue, and if she should leave no issue, then to the testator's next of kin, to be divided among them equally, *per stirpes*. M was one of three next of kin at the testator's death. Upon the death of M, without issue, the trustee brings a bill for construction of the above will. *Held*, that although the next of kin as a class are determined at the death of the testator, M is excluded therefrom. *Close v. Benham*, 115 Atl. 626 (Conn.).

Where there is a gift over to the testator's heirs or next of kin after a life estate, and no contrary intent appears, the class is determined as at the death of the testator, thus giving the words their natural meaning and conducing to the early vesting of estates. *Holloway v. Holloway*, 5 Ves. 399; *Stokes v. Van Wyck*, 83 Va. 724, 3 S. E. 387. See THEOBALD, WILLS, 7 ed., 340. The fact that the life tenant is the sole heir or next of kin does not militate against this rule of construction. *Himmel v. Himmel*, 294 Ill. 557, 128 N. E. 641; *Dove v. Torr*, 128 Mass. 38. And if, as in the principal case, he is only one of several next of kin, there is still less reason for deducing from the terms of the devise an intent to exclude him from the class. *Tuttle v. Wookworth*, 62 N. J. Eq. 532, 50 Atl. 445; *In re Winn*, [1910] 1 Ch. 278. The testator may well have desired to limit the remainder to the life tenant's issue, before throwing open the estate upon default of such issue, to the general heirs of the life tenant. See KALES, ESTATES, FUTURE INTERESTS, ETC., 2 ed., § 572. In fact the general rule is sometimes followed in spite of special context suggesting a contrary intent. *Brown v. Brown*, 253 Ill. 466, 97 N. E. 680. See 8 ILL. L. REV. 121. See also KALES, CASES ON FUTURE INTERESTS, 372, n. It is not, however, followed where obvious incongruity would result, *e. g.*, where the first taker is given a fee, divested of it by the condition, and then as sole heir re-vested in it by the gift over. *Welch v. Brimmer*, 169 Mass. 204, 47 N. E. 699. See 11 HARV. L. REV. 346. The instant case, in excluding the life tenant from among the next of kin, is an example of the undesirable tendency in some American courts to invent an intent where none appears, instead of applying a settled rule of construction. See GRAY, NATURE AND SOURCES OF LAW, 2 ed., 173-176. See also 30 HARV. L. REV. 372.

## BOOK REVIEWS

STORIA DEL DIRITTO ITALIANO. By Giuseppe Salvioli. Eighth edition. Turin: Unione Tipografico-Editrice Torinese. 1921. pp. xv, 851.

This new edition of a well-known work is much more than a new edition. It is a new book, recast and rewritten from end to end, and in its new form is indeed a model of what a history of a particular body of modern law should be. Paraphrasing the author's statement in the preface, his design is to keep always in touch with the social basis on which Italian law has been formed, with the atmosphere in which it exists and with Italian society in its economic, political, religious and moral life. Hence, he tells us, he has sought to write "the social, economic and juridical history of the Italian people, at least in its main lines, as an organic and indivisible whole." To write the history of law in this way, as both a part of jurisprudence and a part of sociology, one must be philosopher and economist and sociologist as well as historian and jurist. Professor Salvioli rises entirely to the high measure of the task which he set himself.

He does not tell the story of Italian law merely as the culmination of a long development of Roman law with some contaminations from Germanic law nor in terms of a gradually Romanized body of Germanic law by which Roman law was more and more absorbed and assimilated. Nor is his selection and interpretation of materials governed consciously or subconsciously by notions of a "juridical consciousness" or the "spirit of the people" or the "genius of the race" or by hard and fast laws of evolution. He is thoroughly aware of all that has been achieved in recent criticism of history-writing. Without falling into a mere chronological recital of detailed events and doctrinal phenomena as equally significant and equally insignificant, he avoids the "exaggerations of historicism." "Historical method in the moral sciences," he says, "is what the experimental method is in the biological sciences." Through it we may make jurisprudence an inductive science, founded upon generalizations of past experience. Hence one aim in the writing of legal history is to show the "bonds that unite the legal precepts of the past to those of today" and by investigating the origins, the development and the component elements of the legal precepts that have obtained among a people, and the forces that have modified them, to enable us to shape and apply legal materials intelligently and effectively in view of the social, economic, political and moral conditions of today. Legal history must hold a chief place in the prolegomena to all projects for improvement of the law; and the demand for improvement of law is always with us. The law of the day, formed historically with reference to demands of the past, always contains elements and precepts that are ill-adjusted to or even run counter to the social and moral requirements of the time. A merely analytical or rationalist critique of these will not suffice for purposes of law reform, as American experience with codes of civil procedure has illustrated abundantly. Nor will an idealistic historico-analytical critique avail. As a rule it does no more than intrench legal institutions and legal precepts by finding a historical idea behind them. The broader historical method that sees in legal institutions and rules and doctrines, not a simple picture of an evolution of pre-existing legal materials by the inherent force of something within them, but a complex picture of a diversified mass of historically given legal materials, "springing from the social soil," upon which jurists and law-makers work partly with their inventive faculties but chiefly with methods of trial and error acquired by experience, so that legal precepts conform on the whole and in the end to "the economic structure of a people, its grade of civilization, its political organization and its moral and religious ideas"—this method gives a solid foundation for a science of law and an assured basis for doing things effectively in keeping the law abreast of the requirements of a continually changing social order.



Attention of the future historian of Anglo-American law may be directed particularly to the weight given to religious influence (e. g., pp. 12, 631 ff.). Under the reign of rationalism and later under the reign of mechanical positivism it became fashionable to ignore this. The American legal historian who feels, as he must, Puritan ideas at work on every side in the shaping of American law as it stood in the nineteenth century, will do well to note how Italian law in its formative period responded in so many connections to the pressure of religious ideas. During the ascendancy of the ethical idealistic interpretation of legal history the moral element was given prominence. But it was put in terms of a narrowly conceived idea of right so that the significance of religious and moral ideas of the time and place was not brought out. The historian of English equity also, when he treats of the doctrinal development of the subject, must reckon with the moral ideas of writers on theology, with the results worked out by casuists and probabilists, and with the applications of religious ideas to practical morals, which were part of the atmosphere in which equity was long administered, if he is to understand equity doctrine aright. Here too he may get more than one hint from Professor Salvioli's story of the effect of these upon the development of the Italian law of obligations.

In the actual treatment of Italian legal history, Professor Salvioli has followed a systematic rather than a chronological method; he has not told the story century by century nor "period" by period, but has set off ideological types, as it were, and has not hesitated to tell of them as overlapping in point of time. Thus in Part I, treating of the sources, we have (1) the Germanic period (A. D. 568-1100), (2) the feudal period (888-1100), (3) the communal period (1100-1450), (4) the science of law, based on the Roman law of Justinian (1100 to the present) and (5) legislation (1400-1920). Then follows a history of public law (Part II) in which he takes up successively (1) the political ordering of Italy, under three heads, namely, the "Germanic intermezzo" between Roman administration and the rise of modern political ideas on Byzantine lines upon the basis of Justinian's texts, the Italian revival, and the rise and development of political theory, and (2) the social ordering of Italy, under four heads, namely, Germanic society, society in the feudal epoch, society in the communal epoch, and modern society. The discussion of the economic and class organization of society and its relation to legal institutions, under each of these heads, is most enlightening. Next comes a doctrinal and institutional history of private law (Part III) in which, however, the story is not told as one of the development of each doctrine or of each institution by force of an inherent faculty or as the unfolding of an inherent idea, nor, on the other hand, as a series of unique events unconnected with each other or with anything else. One is made to feel how thoroughly the doctrinal and institutional legal history of a people is but a part of its whole history, and how completely social and economic and political and legal history are but ways of looking at that history from particular standpoints and for particular purposes. Finally there is a history of penal law (Part IV) and of procedure (Part V). There is a full general bibliography (from which Holdsworth's *History of English Law* is missing) and rich special bibliographies on every point, which of themselves make the book exceptionally valuable for general purposes.

ROSCOE POUND.

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THE LAW OF SALES. By John Barker Waite. Chicago: Callaghan & Co. 1921. pp. xii, 385.

Owing to its brevity Professor Waite's treatise on Sales will appeal primarily to the lay reader and to the law student, rather than to the trained

practitioner, despite the hope expressed in the preface that it will be equally useful to all three. The opening chapters on general principles and transfer of title are admirable for this purpose. They will be especially helpful in making it clear how far the various questions involved are of fact or of law. But, unfortunately, with the more complex questions raised by inspection and warranty the discussion becomes far less clear. Failure to inspect is discussed in one breath as a waiver of condition to a suit by the seller, and in the next as a factor in defending a suit brought by the buyer. Similarly on page 175 we are told that a warranty is something that "does not relate to title" and that "the goods could not be rejected for breach of it." Yet on page 182 the reader is told that "there is rather hopeless conflict as to whether property purchased can be returned for breach of warranty." It is no answer that the trained lawyer might detect Professor Waite's meaning despite such apparant conflicts — the student will probably be quite at sea. As if to make sure of this result the author, for some unexplained reason, has placed the discussion of actions by the buyer for damages for breach of warranty in a section entitled "Title, but not Possession, Acquired by Buyer."

The point, however, which will probably cause most disagreement with the author is his almost complete disregard of the various Uniform Acts. From the beginning to the end of the text there is not a single word of comment on the Sales Act, and with one exception (p. 206) the footnotes are confined to a bare citation to the proper sections. It is true that the Act appears in the Appendix, and that the author in his introduction to it states that it is unnecessary to comment on it, as "the reader can interpret it equally well for himself." But this assumption, whether or not it is true for the lawyer, is more than doubtful for the student or layman. Will such readers notice that Sec. 5 (3) may conceivably have some bearing on the doctrine of potential ownership? Or that Sec. 62 introduces a wholly new notion as to stoppage *in transitu* against a *bona fide* purchaser for value of a non-negotiable bill of lading? Or that Sec. 20 (4) raises some very interesting problems as to the possible "negotiability" under certain circumstances of goods formerly represented by a negotiable bill of lading indorsed in blank? As for the Bills of Lading Act, it is referred to exactly once (p. 211 n.), where the reader is told to see "the related provisions" of that act — a rather vague direction, as the act is seemingly cited as foundation for the statement that according to some authority "the buyer of a bill of lading in possession of the seller is no better off than he would have been had the seller merely possessed the goods themselves." Not a single reference is made to the Warehouse Receipts Act so as to give the reader notice of it and enable him to try his hand at interpreting it for himself. But the most surprising feature is probably the fact that the author is able to pass through the entire topic of conditional sales without any hint of the Uniform Act on that subject. The increasing importance of these Acts will mean a sharply limited period of usefulness for Professor Waite's book.

E. W. PUTTKAMMER.

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**WILLS, ESTATES, AND TRUSTS.** A manual of law, accounting, and procedure, for executors, administrators, and trustees. By Thomas Conyngton, Harold C. Knapp, and Paul W. Pinkerton. New York: The Ronald Press Company. 1921. Vol. I, pp. xviii-355; Vol. II, pp. xii, 356-825.

What Mr. Newhall has done for Massachusetts these co-authors have endeavored to do for all jurisdictions; and they have succeeded in producing a valuable practical manual of general principles of the law of Wills, Estates, and Trusts. The two volumes contain about seven hundred pages of text, and in addition to a collection of forms, between five hundred and six hundred

judicial decisions cited in the appendix. The book, therefore, brings the reader in closer touch with the trend of the cases than most manuals. The first volume in two parts covers the making of a will and the settling of an estate, and in the last part the difficult questions of taxation. The second volume discusses trusts, banks, and trust companies as trustees, and contains a particularly useful treatment of accounting for estates of decedents by Mr. Pinkerton, C. P. A. The forms in Part VII are also to be commended. It is a book from which to get hints and good advice, practical and ethical, even though larger treatises may have to be resorted to for the preparation of a brief. And the lawyer who wishes to make sure that he has overlooked no general point of importance will find these clearly written little volumes of considerable assistance. We question, however, whether it would not have been better to confine the scope of the book to a single jurisdiction as Mr. Newhall has done. The price, eight dollars, seems high. J. W.

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- THE CONFERENCES OF 1899 AND 1907.** Index Volume. The Proceedings of the Hague Peace Conferences. pp. viii, 272. New York: Oxford University Press.
- THE CONSCRIPTION SYSTEM IN JAPAN.** By Gotaro Ogawa. Carnegie Endowment for International Peace. pp. xiii, 245. New York: Oxford University Press.
- HISPANICAE ADVOCATIONIS LIBRI DUO.** By Alberico Gentili. Classics of International Law. Volume I, pp. 44a, 274; volume II, pp. XI, 284. New York: Oxford University Press.
- PROBLEMS OF PEACE AND WAR.** Transactions of the Grotius Society. Volume VII. pp. xlii, 166. London: Sweet and Maxwell, Ltd.
- THE HISTORY AND NATURE OF INTERNATIONAL RELATIONS.** Georgetown Foreign Service Series. Edited by Edmund A. Walsh. pp. 299. New York: Macmillan and Company.
- HISTORY OF PUBLIC POOR RELIEF IN MASSACHUSETTS.** By Robert W. Kelso. pp. 200. Boston: Houghton, Mifflin Company.
- GENERAL THEORY OF LAW.** By N. M. Korkunov. Second edition. pp. xxviii, 524. New York: Macmillan and Company.
- THE HAGUE RULES 1921 EXPLAINED.** By Sanford D. Cole. pp. xii, 114. London: Effingham Wilson.

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## EDWARD BRINLEY ADAMS

EDWARD B. ADAMS, who since September 1, 1913, has been Librarian of the Harvard Law School, died suddenly in Cambridge on March 24, 1922. He was born at Waltham May 6, 1871, and was the only son of Benjamin F. D. Adams and his wife Catherine Brinley. Both his father and his mother were of old New England stock, and he counted among his ancestors Peter Faneuil, who gave his name to Faneuil Hall, and Israel Putnam, whose vigorous character and daring exploits make him one of the most romantic figures of Revolutionary times. His ancestors belonged to that natural aristocracy which was typical of early New England, and which without great wealth, and with no legal privilege or special economic advantage, took and maintained a position of leadership in the community by sheer ability and force of character. Originally chiefly farmers, like most of the early New Englanders, they became clergymen or lawyers, doctors or merchants, as occasion served, were soldiers in time of war, active in town meetings in peace, and maintained a persistent tradition of intellectual ambition and active public service.

B. F. D. Adams, the father of Edward Adams, was a physician settled in Waltham, and had early become one of the leading men in New England, known and respected not only for his medical ability, but for his active and energetic public spirit. He was a leader not only in private practice, but in every form of public work connected with his calling, and the breakdown of his health in 1883 came as the result of too long-continued overwork. He contracted

tuberculosis of the lungs and found himself compelled to move with his family to Colorado Springs. His health benefited greatly by the change of climate, and until his death in 1895, although he never resumed practice as a physician, he led an active though necessarily a careful life.

The removal of his family from Massachusetts to Colorado had a marked effect on Edward Adams' development. His father and mother applied in their new environment the traditions brought from New England, and in a young and growing community such as Colorado was in those days, they naturally took a position of leadership. There was nothing worth while going on in which they did not have a part; no one of interest came to Colorado Springs who did not visit their house. The growing reputation of the place as a health resort brought people there not only from all parts of the United States, but from Europe as well, and gave the social life a cosmopolitan character unusual in America. To the New England background of the Adams' household was added something of the freedom of the West and something of the older European civilization. The European element no doubt was relatively small, but its effect was great on a mind as sensitive as that of young Adams. His culture always had a cosmopolitan character. He was able hospitably to receive a new idea, no matter from what source it came, and was free throughout his life from the tendency too common to New Englanders of applying the provincial yardstick to every intellectual or moral question.

The last two years of his preparation for college were at the Browne and Nichols School in Cambridge, then recently founded by two young men, George H. Browne and Edgar H. Nichols, each of whom was a gifted teacher full of that enthusiasm for imparting knowledge which is the first requisite of good teaching. The number of pupils in the school was so small as to allow full effect to the contact between the teachers and the pupils, and his time at this school gave added stimulus to the intellectual curiosity which was part of Adams' inheritance. He entered Harvard in 1888, fitted to enjoy and to take full advantage of every opportunity which the college gave. His four years there were years of rapid and harmonious development. He was not only eager to learn from books, interested in music, in art, in politics, and in every form of human activity, but he was as keen in his interest

in men and women as in his interest in ideas, and he brought to his friendships the same delighted zest that he did to his intellectual activities. The outstanding thing that those who knew him in those days remember, was his extraordinary sensitiveness to impressions of every kind, and his keen and vigorous response to every sort of suggestion. Whether he was riding horseback, an exercise in which he delighted and excelled, or reading poetry, or going to the opera, or merely walking with a companion, he flung himself into whatever he did with an infectious delight.

He was never widely known in college, for he was too sensitive, too shy, and too deeply interested in what he was about to take the necessary trouble to cultivate a wide circle of acquaintances or to convert many from acquaintance to friendship, but he was liked and respected by those who knew him, and had an inner circle of real friends with whom he delighted to share his life as only a young man can. He graduated with honors in June, 1892, and entered the Law School in the following autumn.

In his first year in the Law School, Adams not only led his class in scholarship but, which by no means invariably follows, was recognized by his fellow students as a man of brilliant ability. In those days the Law School was still small enough so that substantially every man in each class knew something of every other, and the good men were known to practically every one who was in the school. There was then a unity of companionship and interest that to some extent has necessarily ceased with the present larger numbers. The student who showed up well in class, or who was intelligent in the constant discussion that went on outside the classroom, had his ability generally recognized far more easily than is the case today. If he had a vigorous personality and was a pleasant companion, as in Adams' case, he became one of a fellowship that not only worked hard but found ample time for the healthy pleasures of youth, which tasted all the better for the work with which they were intermingled. It was the time of the great faculty. Ames, Gray, and Thayer were in their prime; Judge Smith had just brought to the school a living example of the highest tradition of the American bench; Williston and Beale, as young and eager disciples, were just beginning their work as professors. The hard-fought battle of the partisans of the case system with its opponents was still fresh in men's minds, and this faculty were united by

common beliefs and the remembrance of a common victory. And because the place was still small the students not only knew each other, but knew the professors to a degree which has now become impossible. Students and professors alike were united in a common intellectual activity and a common point of view. Those questions of the ultimate wisdom of the common law, and of the ultimate value of the American Constitutional system, which as a result of the economic and class conflicts of the present time are today vexing the souls of student and professor alike, had not yet begun to make themselves felt. There was complete intellectual freedom; there were even keen differences of opinion between student and student and professor and professor. The boast of the school was that it taught men to think and to reverence nothing but truth. But the differences related to comparatively minor points and did not affect the fundamental harmony of the school. One must allow something for the pleasant afterglow in which every man views the things of his youth; but when such allowance has been made I believe it must be admitted that to have been a student in the Harvard Law School in the nineties was a great and rare opportunity. We were learning from teachers of unusual vigor and unusual personal charm doctrines, of the truth and intellectual value of which we had no doubts; we believed that the knowledge we were acquiring would be a weapon with which we could win our places in the world, and we were getting this training in a group of men whose common purpose and common characteristics made friendship between them easy and delightful.

Adams threw himself into the life of the school with the enthusiasm natural to his character. He learned all it had to teach, either from books or men. He gained friends, and he took his part in all the school activities. He was a member of the Pow-Wow Club, then the leading law club of the place; was an editor of the Law Review, and a member of the Phi Delta Phi, which in those days at least was a social organization, giving dinners that were more gay than serious over which the Eighteenth Amendment had as yet cast no blighting shadow. More important than these formal organizations, he was always a welcome member in the informal and shifting groups that met daily for work or for play. No one who was then in the school will fail to remember his lithe and wiry figure and his eager and

vivid personality; and among these few would have doubted that he would be one of those who in future life would naturally seek out the more combative side of his chosen profession and become a great and successful advocate and perhaps a leader in public affairs. What seemed to be his natural pathway was the Colorado bar, where his family's wide acquaintance would have made a start comparatively easy. Then in the summer of 1894 came one of those accidents which alter the whole course of a man's life.

While spending his vacation in Colorado Springs he was riding in the evening with some friends, and at a gallop turned in at the gateway of the Country Club across which a careless steward had stretched a piece of wire to bar out intruding cattle. His horse fell with him, and he sustained injuries from which he lay unconscious for nearly a month, and which kept him a helpless invalid for close upon a year. He was unable to return to the Law School until the autumn of 1896, and he graduated with the class of 1897. It was years before he was able to lead a normal, active life. Indeed he never fully recovered from the effects of the injury. His mind was as clear as ever and his grasp of ideas as firm as it had been before, as was shown by his work in the school, where he continued to maintain a high scholastic position; but he never regained his old power of rapid and forcible expression, and something of the old self-confidence and combativeness had permanently left him. His sensitive and delicate organization had sustained a shock that made it unfit to stand rough usage or to deal with the rougher sort of professional work. It is probable that the effect of the injury was ultimately the cause of his sudden and untimely death.

Adams would not have been Adams if he had yielded without a struggle. He tried active practice, first in Colorado, and later in Boston, where he was for a time counsel to the Police Commission and later to the Metropolitan Park Commission, and where he also carried on his private practice. He tried for a year the experiment of teaching in the Harvard Law School, where in 1902-1903 he conducted the course in Real Property. But it was manifest to his medical advisers, and ultimately even to himself, that he could not stand the physical strain of practice or of teaching. It seemed for a time as if his unusual character and great ability were likely



to be without adequate expression in his profession. In 1909 an opportunity came. There was a vacancy in the office of Librarian of the Social Law Library. That library occupies a room in the Court House in Boston and is used both by the Bench and by the Bar in such a way as to make it in effect, though not in form, a public institution. The managing committee is made up from among the leading lawyers of the city. To these Adams was well known, and there was no hesitation in his choice when they learned that he would accept the position. Four years of successful administration made him equally the obvious person to succeed Mr. Arnold as Librarian of the Harvard Law School when the latter resigned. Indeed the only doubt as to his appointment arose from the characteristic over-conscientiousness, which made the then Dean Thayer hesitate whether he was justified in yielding to his own judgment of Adams' superior fitness for the position, in view of the deep regard and affection in which he held him. He was appointed Librarian September 1, 1913, and from then until his death gave constant and devoted service to the library of the school. How valuable that service was, only those intimate with the Law School can easily realize. The library is an essential part of the machinery of the school; the amount required for its upkeep and necessary growth constitutes, after the salaries of the professors, the largest single item in its budget. The care and arrangement of its contents, and the wise selection of what additions should be made, call for the exercise of the greatest judgment and discretion. This judgment and discretion Adams possessed to a high degree. He had a wide and discriminating knowledge of legal literature. He was tireless in his efforts to acquire the technical knowledge that at first he lacked, and he brought to his work a legal ability and a breadth of culture far exceeding that of the average librarian. Before all, he gave to his work a zeal and enthusiasm for the Law School which inspired everything he did. Of him it could be said without a tinge of exaggeration that he loved the Law School with complete devotion, and that he would willingly have given his life if by so doing he could have better served it. It is probable that his constant exertion strained to the utmost his slender physical strength and that he would have lived longer if he had been content to work less. He had the capacity to sink his personal ambition in the work which he was doing, and to give himself to the school

without hope of personal reward or desire for personal distinction. It has been the glory of Harvard that it has always been able to inspire in some rare souls that complete and generous self-devotion. Adams is typical in this of what is noblest in the University, and he would have asked nothing more than to merge his personality in the greater life of the institution.

*Arthur D. Hill.*

BOSTON, MASS.

## REVIEW IN THE SUPREME COURT OF THE UNITED STATES OF THE DISTRICT COURT AND CIRCUIT COURT OF APPEALS

**T**HE jurisdiction of the Supreme Court of the United States to review judgments of the District Court and Circuit Court of Appeals should be easy to determine and free from doubt. In many cases it is very far from that. Confusion has resulted from reading into the statute words which are not there.

The act of Congress gives the Supreme Court jurisdiction of appeals and writs of error (a) to review certain judgments of the District Court,<sup>1</sup> and (b) to review certain judgments of the Circuit Court of Appeals.<sup>2</sup>

To state these statutes without quoting them, they define the jurisdiction as follows (using the word "appeal" to include both appeals and writs of error):

By section 238 of the Judicial Code, direct appeals to the Supreme Court from the district courts may be taken (1) in any case in which the jurisdiction of the District Court is in issue where the jurisdictional question alone is certified to the Supreme Court; (2) from final sentences and decrees in prize causes; (3) in any case that involves the construction or application of the Constitution of the United States, or in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question, or in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States.

By section 128 of the Judicial Code, the Circuit Court of Appeals is given appellate jurisdiction over the district courts "in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise provided by law"; and, except as provided in sections 239 and 240 (which sections provide

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<sup>1</sup> Sec. 238, Judicial Code.

<sup>2</sup> Secs. 128 and 241, Judicial Code.

for *certiorari*), the judgments and decrees of the Circuit Court of Appeals are made final "in all cases in which the jurisdiction (*i. e.*, of the District Court) is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States"; excepting cases arising under the patent, copyright, revenue, and criminal laws, and admiralty cases.

By section 241 of the Judicial Code, all judgments or decrees of the Circuit Court of Appeals *not made final* by section 128 are reviewable in the Supreme Court by appeal or writ of error where the matter in controversy exceeds one thousand dollars, besides costs.

No appeal from the District Court to either appellate court depends on the amount involved.

*The first inquiry* is to determine what cases may or must go direct from the district courts to the Supreme Court. Passing questions of the jurisdiction of the District Court and prize causes, section 238 says that a case may go (the act does not say must go) direct to the Supreme Court which *involves* "the construction or application of the Constitution of the United States." The word "involves" is that used in the first clause, "is drawn in question" is the equivalent expression in the second clause, and "claimed to be in contravention of the Constitution" is the equivalent expression in the third clause. The act requires for direct appeal that there must be *actually involved or actually drawn in question* the Constitution or the validity or construction of a treaty. By the plain terms of the statute that is the test, and the ground on which the pleader rested the jurisdiction of the District Court is immaterial. The case may go direct if it actually involves the construction or application of the Constitution of the United States, no matter what was the ground of jurisdiction, and, no matter what the ground of jurisdiction, it cannot go direct if the Constitution of the United States or the construction or validity of a treaty is not actually involved.<sup>3</sup> Direct appeal lies where, to use the language of Mr. Justice Brandeis, "the writ of error presents a constitutional question substantial in character and properly raised below."<sup>4</sup>

<sup>3</sup> *Ansbro v. United States*, 159 U. S. 695, 697 (1895); *Lampasas v. Bell*, 180 U. S., 276, 282 (1901).

<sup>4</sup> *Sugarman v. United States*, 249 U. S. 182, and cases cited p. 184 (1919).

Nor does the act make it material whether the Constitution is the sole question involved or not. It is not required to be the sole question. Notwithstanding it is only one of a number of questions, the case with all its questions may be taken direct to the Supreme Court provided, and only provided, a constitutional or treaty question is involved.<sup>5</sup>

The language of the statute and the decisions of the Supreme Court establish these propositions:

1. A case grounded as to jurisdiction entirely on diverse citizenship, or entirely on an act of Congress, may nevertheless *involve* a constitutional question, and if so is appealable direct to the Supreme Court.

2. A case grounded as to jurisdiction entirely on the Constitution may be found to turn wholly on other questions and not really to involve the Constitution, and if so it cannot be appealed direct to the Supreme Court.

3. A case grounded as to jurisdiction upon the Constitution and also upon another ground is similarly appealable direct where it *involves* the Constitution of the United States; and otherwise it cannot be appealed direct regardless of the ground upon which the District Court took jurisdiction.

*The second inquiry* is to determine what cases may or must go from the district courts to the Circuit Court of Appeals, and this is to be determined by section 128 of the Judicial Code, which replaces section 6 of the act of March 3, 1891.

The language of this section providing for appeals to the Circuit Court of Appeals "in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight," is open to two interpretations. It might have been contended that the words "cases other than those in which appeals and writs of error may be taken direct to the Supreme Court" had the effect to divide cases into two distinct classes, not overlapping each other: one class which must be taken by direct appeal to the Supreme Court, and another class which must be taken to the Circuit Court of Appeals. But that interpretation has been conclusively rejected, and it is now well settled that, generally speaking, cases which involve

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<sup>5</sup> *Sugarman v. United States*, 249 U. S. 182 (1919).

constitutional questions are appealable at the option of the appellant either direct to the Supreme Court or to the Circuit Court of Appeals.<sup>6</sup> This has been decided in several cases where it has been held that two appeals or writs of error, one to the Supreme Court and the other to the Circuit Court of Appeals, cannot be prosecuted at the same time.<sup>7</sup> In the well-considered case of *Macfadden v. United States*,<sup>8</sup> which involved constitutional as well as other questions and which had been taken to the Circuit Court of Appeals and appealed from that court to the Supreme Court, the court said:<sup>9</sup>

"Assuming, without decision, that the constitutional questions were real and substantial, it is clear that a writ of error might have been sued out originally directly from this court under clause 5.<sup>10</sup> But this was not done, and by the appeal to the Circuit Court of Appeals the right of direct appeal here was lost.<sup>11</sup>

"Section 6 of the act provides that the Circuit Courts of Appeal shall exercise appellate jurisdiction 'in all cases other than those provided for in the preceding section of this act,' and the fact that there were in the case questions which would have warranted a direct appeal to this court does not deprive the Circuit Court of Appeals of its jurisdiction.<sup>12</sup> In the case at bar the Circuit Court of Appeals has assumed jurisdiction and rendered judgment. May the petitioner have a writ of error directed to that judgment? The answer to this question depends upon whether the judgment of the Circuit Court of Appeals was final. The act contemplated that certain judgments of the Circuit Court of Appeals might be reviewed on writ of error in this court, and that certain other judgments could not be so reviewed. The line of division is marked in § 6 of the act. It is to be observed that the line of division between cases appealable directly to this court and those appealable to the Circuit Court of Appeals, made by § 5 of the act, is based upon the nature of

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<sup>6</sup> *Macfadden v. United States*, 213 U. S. 288 (1909); *Lemke v. Farmers Grain Co.* 42 Sup. Ct. Rep. 244 (1922).

<sup>7</sup> *Macfadden v. United States*, 213 U. S. 288 (1909); *United States v. Jahn*, 155 U. S. 109 (1894); *Robinson v. Caldwell*, 165 U. S. 359 (1897); *Carter v. Roberts*, 177 U. S. 496 (1900); *Loeb v. Columbia Township Trustees*, 179 U. S. 472 (1900); *Boise Water Co. v. Boise City*, 230 U. S. 84 (1913).

<sup>8</sup> 213 U. S. 288 (1909).

<sup>9</sup> *Ibid.*, p. 293.

<sup>10</sup> *Loeb v. Columbia Township Trustees*, 179 U. S. 472 (1900).

<sup>11</sup> *Robinson v. Caldwell*, 165 U. S. 359 (1897).

<sup>12</sup> *American Sugar Co. v. New Orleans*, 181 U. S. 277 (1901).

the case or of the questions of law raised. But the line of division between cases appealable from the Circuit Court of Appeals to this court and those not so appealable, drawn by § 6, is different, and is determined, not by the nature of the case or of the questions of law raised, but by the sources of jurisdiction of the trial court, namely, the Circuit Court or the District Court, whether the jurisdiction rests upon the character of the parties or the nature of the case. *Huguley Mfg. Co. v. Galtton Cotton Mills*,<sup>13</sup> where it was said by the Chief Justice, citing cases, 'The jurisdiction referred to is the jurisdiction of the Circuit Court as originally invoked.' The difference in the test for determining whether a case is appealable from the trial court directly to this court, and the test for determining whether a case is appealable from the Circuit Court of Appeals to this court, is important, and a neglect to observe it leads to confusion."

The same ruling was made in the latest case on the subject.<sup>14</sup>

*The third inquiry* is to determine what cases are appealable from the Circuit Court of Appeals to the Supreme Court. This is determined by sections 128 and 241 of the Judicial Code. Section 128 says that (excepting the remedy by *certiorari*) "the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States." Section 241 gives an appeal from the Circuit Court of Appeals to the Supreme Court in all cases in which the judgment of the Circuit Court of Appeals is not made final by the act, where the matter in controversy shall exceed one thousand dollars, besides costs. By the language of the statute and by well-considered decisions<sup>15</sup> the ground of jurisdiction of the District Court is immaterial as a test of appeal from that court, either direct to the Supreme Court or to the Circuit Court of Appeals. By the terms of the statute the test there is not the sources of jurisdiction of the trial court, but the nature of the questions actually involved in the case. If constitutional or treaty questions as defined in section 238 are actually involved, the case may go direct to the Supreme Court. But if it is appealed to the Circuit Court of Appeals, section 128 makes the judgment

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<sup>13</sup> 184 U. S. 290 (1902).

<sup>14</sup> *Lemke v. Farmers Grain Co.*, 42 Sup. Ct. Rep. 244 (1922).

<sup>15</sup> *Macfadden v. United States*, 213 U. S. 288 (1909).

of that court final where the jurisdiction of the District Court depended entirely upon citizenship of the parties. It will be observed that cases are appealable from the Circuit Court of Appeals to the Supreme Court if the jurisdiction of the District Court depended wholly or in part upon any federal question. It need not have been a constitutional question.

In spite of the caution of the court in *Macfadden v. United States*<sup>16</sup> that the difference between the test for determining whether a case is appealable from the trial court direct to the Supreme Court and the test for determining whether a case is appealable from the Circuit Court of Appeals to the Supreme Court is important and that neglect to observe it leads to confusion, the court itself in at least three cases seems to have been guilty of precisely this neglect and to have introduced the very confusion which it cautioned against in *Macfadden v. United States*.<sup>17</sup>

In *Union & Planters' Bank v. Memphis*,<sup>18</sup> a case where jurisdiction of the Circuit Court was grounded entirely on the Constitution but which had been appealed to the Circuit Court of Appeals and came from that court to the Supreme Court, Chief Justice Fuller said:

"Diversity of citizenship did not exist, and the jurisdiction of the Circuit Court rested solely on the ground that the cause of action arose under the Constitution of the United States. The appeal lay directly to this court under section five of the Judiciary Act of March 3, 1891, and not to the Circuit Court of Appeals."

Substantially the same language was repeated by Chief Justice White in *Raton Water Works Co. v. City of Raton*,<sup>19</sup> and similar expressions were used by Mr. Justice Day in *Lemke v. Farmers Grain Co.*<sup>20</sup>

In *Lemke v. Farmers Grain Co.*<sup>21</sup> Mr. Justice Day says that when the jurisdiction of the District Court rests solely upon attack upon a state statute because of its alleged violation of the federal Constitution, a direct appeal to the Supreme Court is the only method of review; and that where the jurisdiction of the District Court is invoked upon other federal grounds as well as attack on the consti-

<sup>16</sup> 213 U. S. 288 (1909).

<sup>18</sup> 189 U. S. 71, 73 (1903).

<sup>20</sup> 42 Sup. Ct. Rep. 244 (1922).

<sup>17</sup> *Ibid.*

<sup>19</sup> 249 U. S. 552 (1919).

<sup>21</sup> *Ibid.*



tutionality of a state statute, an appeal may be taken to the Circuit Court of Appeals. The court there took jurisdiction to review the judgment of the Circuit Court of Appeals in a case which involved a constitutional question, assigning as a reason that the *jurisdiction of the District Court* was rested on other grounds as well as the Constitution.

As before shown, the language of the statute is that a direct appeal to the Supreme Court lies in all cases which *involve* the construction or application of the Constitution, and these cases are those which actually present a constitutional question. The grounds of jurisdiction of the District Court are not made a test by the statute and are immaterial.

Nor does the statute distinguish between cases where the sole question is one of the Constitution and cases involving other questions as well. For direct appeal what the statute requires is that the case shall involve some constitutional question.

Mr. Justice Day's statement in the next sentence, that where *jurisdiction is invoked* upon other federal grounds as well as constitutional grounds an appeal may be taken to the Circuit Court of Appeals with ultimate review in the Supreme Court, involves the same inaccuracy, *i. e.*, that the question of direct appeal to the Supreme Court, or appeal to the Circuit Court of Appeals, depends in any respect on the grounds on which the jurisdiction of the District Court was invoked. It is well settled that the federal courts are not confined in deciding cases to the grounds of jurisdiction alleged in the bill. For example, in a suit which plaintiff has grounded as to jurisdiction on the Constitution of the United States every other question arising in the case, although not growing out of the Constitution, may nevertheless be decided.<sup>22</sup> Accurate statement is that where a case *involves* a constitutional question and also other questions, appeal will lie either to the Supreme Court or to the Circuit Court of Appeals regardless of the grounds of jurisdiction of the District Court; with an appeal from the Circuit Court of Appeals provided the jurisdiction of the District Court was invoked wholly or in part because of a *federal* question, constitutional or

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<sup>22</sup> *Davis v. Wallace*, 42 Sup. Ct. Rep. 164 (1922); *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618, 620 (1904); *Siler v. Louisville & Nashville R. R. Co.*, 213 U. S. 175, 191 (1909); *Louisville & Nashville R. R. Co. v. Garrett*, 231 U. S. 298, 303 (1913); *Greene v. Louisville & Interurban R. R. Co.*, 244 U. S. 499, 508 (1917).

otherwise. Why is this principle less applicable to a case involving a sole constitutional question than to cases involving that question plus others? If cases involving a constitutional question plus other questions are appealable to either court but not to both, why is this less true of cases involving a constitutional question alone? Nothing in the statute suggests any such distinction. Both kinds of cases are appealable solely because a constitutional question is involved. The distinction made by Chief Justice Fuller in *Union & Planters' Bank v. Memphis*,<sup>23</sup> by Chief Justice White in *Raton Water Works Co. v. City of Raton*,<sup>24</sup> and by Mr. Justice Day in *Lemke v. Farmers Grain Co.*,<sup>25</sup> is between cases where the jurisdiction of the District Court was invoked solely on a constitutional ground and cases where it was invoked on such a ground plus others, or solely on other grounds. But this is a bad distinction, for according to the language of the statute the ground of jurisdiction of the District Court has nothing to do with the case, being material only to determine what appeals will lie from the Circuit Court of Appeals to the Supreme Court.

In the three cases last cited the court seems to have applied as the test to determine appealability from the District Court a test not contained in the statute touching that subject, a test borrowed from a statute touching an entirely different subject, *viz.*, determining what cases are appealable from the Circuit Court of Appeals to the Supreme Court; the very fallacy the court so clearly pointed out in *Macfadden v. United States*. The grounds of jurisdiction of the District Court are nowhere referred to in the relevant statutes otherwise than as determining what judgments of the Circuit Court of Appeals are final.

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ST. PAUL, MINNESOTA.

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<sup>23</sup> 189 U. S. 71 (1903).

<sup>24</sup> 249 U. S. 552 (1919).

<sup>25</sup> 42-Sup. Ct. Rep. 244 (1922).

## LABOR COPARTNERSHIP IN INDUSTRY

**T**HOUGH the courts often dislike it, business men will continue to experiment with new forms of business organization designed to suit their particular needs. At present perhaps the most insistent need of industry, a matter indeed of world-wide concern, is the achieving of an orderly adjustment of the respective functions of capital and labor. American lawyers, especially those whose practice lies in the field of corporate organization, should, therefore, follow with interest experiments which are being undertaken in the solution of this problem.

In the commercial and industrial development of the past century the corporation has proved its immense utility as a device for uniting in common enterprise the capital of many investors, large and small. It is needless to restate here the advantage of doing business under the corporate form. At the same time experience has disclosed certain weaknesses in the corporation, especially the large industrial corporation, organized with the traditional charter provisions. As a business grows older and expands it is likely that an increasing proportion of its capital stock will come to be held by utter strangers, who are unacquainted with its processes and have no appreciation of its problems. The permanent welfare of the company will not receive its surest promotion with the voting power lodged in such an electorate.

Furthermore, the general incorporation laws were passed to enable investors in business enterprise to reap the profits without being subjected to unlimited liability and without, necessarily, participating personally in the conduct of the business. The recognition of the interest and proper position of labor in the enterprise — and by labor is meant for present purposes not merely the manual workers, but the whole clerical, technical, and managerial force as well — was not one of the objects of the legislation. Naturally enough, labor (in this broad sense) would have little incentive to put forth extraordinary efforts merely to increase the corporate dividends. Hence, with industry organized on a corporate basis

innumerable schemes for "bonuses" and "profit sharing"<sup>1</sup> have been devised, somewhat fitfully and sporadically, to supply this incentive.<sup>2</sup>

Some of these profit-sharing experiments have met with fair success, others not; but in general, profit sharing, *without more*, has neither satisfied labor with its position in industry nor demonstrated to capital that the results obtained justified a continuance of the scheme. After an exhaustive review of a variety of profit-sharing plans under trial throughout the United Kingdom, the report of the British Ministry of Labour states in summary:

"On the whole, it must be concluded that, if the employer looks to a scheme of profit-sharing to stimulate his workpeople to increased exertion, *and to maintain the stimulus for a period of years*, he is not unlikely to be disappointed."<sup>3</sup>

Profit sharing is not the ultimate solution of the difficulty because, more fundamentally, the demand of labor is for a definite participation in the management. In the growth of large corporations managerial employees and workmen alike have been reduced too much to the position of mere hirelings, with no personal interest

<sup>1</sup> See REPORT ON PROFIT-SHARING AND LABOUR CO-PARTNERSHIP IN THE UNITED KINGDOM, [Cmd. 544] 1920, issued by Ministry of Labour; PROFIT SHARING IN THE UNITED STATES: BULLETIN OF THE UNITED STATES BUREAU OF LABOR STATISTICS, 1917, whole No. 208, containing a full bibliography.

<sup>2</sup> The case for profit sharing is put in a most arresting fashion by Mr. A. Hopkinson, M.P., an English employer of labor, speaking in the House of Commons. HANSARD'S PARLIAMENTARY DEBATES (Commons), 21 October, 1920. The following extract may be given here. "I know very well, from experience in the army, both as an officer and in the ranks, that you cannot get men, and particularly any Englishmen or Scotsmen, to obey orders unless they have the firm conviction that the man who gives those orders is in some way better than themselves. I will give just a little example, rather an amusing one, of what I mean. I was serving in the ranks in France, and my corporal came to me once and said, 'You know, when an officer comes from a good family, or knows his work, or is a gallant fellow, or is even good-looking, it's all right, but when he is none of these things it is perhaps a little bit hard upon us.' It was that remark of my corporal that made me think out what is the justification in industry for the position of the employer, and as a result of those thoughts—I may be wrong—I have come to the conclusion that the only thing that can put the employer on that pedestal from which he can give commands with full justification is that he, unlike his men, should not take all that he might."

<sup>3</sup> REPORT ON PROFIT-SHARING AND LABOUR CO-PARTNERSHIP IN THE UNITED KINGDOM, [Cmd. 544] 1920, pp. 27-28

in the business. Profit sharing alone cannot remedy this detachment; more basic measures must be discovered to bring to the industrial corporation and to its employees the benefits of a *de facto* copartnership from the lack of which both are suffering. "As the workmen saw it, good wages, short hours, welfare and considerate treatment were no better than the good treatment of a horse, so long as they were denied a status in the direction of their own labor."<sup>4</sup> The Whitley Reconstruction Committee appointed in October, 1916, by the British Prime Minister "to make and consider suggestions for securing a permanent improvement in the relation between employers and workmen," reported:

"We are convinced, moreover, that a permanent improvement in the relations between employers and employed must be founded upon something other than a cash basis. What is wanted is that the workpeople should have a greater opportunity of participating in the discussion about and adjustment of those parts of industry by which they are most affected."<sup>5</sup>

It is worth while to quote an extract from the report of a "Conference of Operatives and Manufacturers on the Pottery Industry"<sup>6</sup> (England), which considered the industrial situation after the war. Commenting on the topic of "Defects in the Industry from the Point of View of the Operatives" the report states:

"Even where these specific grievances are absent, many of the operatives feel that the conduct of the industry is inconsistent with the democratic principles which are widely and passionately held in the district. They are denied the right of self-government since they have no control of the conditions under which they work; they claim not to be 'hands,' instruments under the control of a superior, but partners in an important social task, with a different but not an inferior social status to their employers."

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<sup>4</sup> FRANK WATTS, AN INTRODUCTION TO THE PSYCHOLOGICAL PROBLEMS IN INDUSTRY. George Allen & Unwin, Ltd., 1921, p. 148. This book may be consulted generally for a consideration of the psychological factors involved.

<sup>5</sup> INTERIM REPORT ON JOINT STANDING INDUSTRIAL COUNCILS, March 8, 1917. The various reports of this committee, and related documents, may be conveniently obtained in a pamphlet entitled THE INDUSTRIAL COUNCIL PLAN IN GREAT BRITAIN, compiled by the Bureau of Industrial Research, 289 4th Avenue, New York City.

<sup>6</sup> Contained in the compilation cited in the previous note.

While this demand for a voice in management has undoubtedly a psychological prompting, as indicated in the foregoing quotations, it is defended, also, on grounds of practical business efficiency. Thus:

"It is not merely a vulgar desire to be masters of the situation rather than somebody else. It is at root based on the conviction that the workers in a trade are likely to arrive at sounder decisions on management than those which at present emerge from the decisions of shareholders' meetings, where the choice of directors may easily result in the election of a group of amateurs." <sup>7</sup>

Why are the non-voting preferred shareholders willing that control should be vested in the common shareholders? The argument is that the common shareholders will be the first to suffer from bad management; therefore their efforts will be redoubled to promote the success of the business, and thus, consequentially, to promote the interests of the preferred shareholders. Now it is urged that this logic should be carried a step further; that more satisfactory results in the large may be anticipated if all those whose coöperation is essential to success are directly identified with the fortunes of the business, and are vested with a responsibility for its good management.<sup>8</sup> But in this country there has been little disposition in industry to experiment along these lines beyond the constitution of advisory committees of workers, and the encouragement of employees to become holders of stock, thus offering them the minority stockholders' theoretical participation in the management. And a recent writer <sup>9</sup> has said of the situation in England, that "there seem to be no important industrial businesses in this country where the workers have any control which is effective against the general body of share-holders; the former are merely a permanent minority, which may satisfy the theory of co-management, but which is immaterial in practice." <sup>10</sup>

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<sup>7</sup> G. R. Stirling Taylor, "A New Basis for Industrial Corporations," 2 JOUR. SOC. COMP. LEG., 3d Series (1920), p. 210.

<sup>8</sup> "The Abdication of the Capitalist," 24 THE NEW REPUBLIC, 112 (Sept. 29, 1920).

<sup>9</sup> G. R. Stirling Taylor, 2 JOUR. SOC. COMP. LEG., 3d Series (1920), p. 213, *supra*, note 7.

<sup>10</sup> I have not referred to the various coöperative societies in all parts of the world, many of which have had local successes. They have had little influence upon the general position of labor in industry. In many of the coöperative societies, especially

In France a notable instance of labor copartnership in industry is found in the fascinating history of the Godin establishment,<sup>11</sup> a "Coöperative Association of Capital and Labor" at Guise, employing over two thousand workers in the manufacture of stoves and cooking utensils. Jean-Baptiste André Godin started his business in 1846. In 1880, he reorganized it on the basis of a limited liability society "*en commandite simple*," and gradually the workers, from their share of the profits, bought out Godin's interest, receiving in exchange share certificates entitling the holders to a fixed return of five per cent per annum. The governing body of the society, called the General Assembly, elects a manager with plenary powers, who holds office during good behavior; that is, he can be dismissed by the Assembly if he involves the society in certain losses, or violates the statutes of the society. This General Assembly is composed of those workers (*associés*) who hold a certain minimum of capital stock, and who for five years have lived in the "*familistère*," the society's community center, consisting of dwellings, theater, schools, stores, and library. The Assembly also elects a Council of Management, which administers the internal affairs of the *familistère*, and assists in an advisory capacity the elected manager of the business. The yearly profits, after deductions to cover the fixed five per cent interest on capital, paid in cash, and allowance for maintenance of various mutual insurance funds, and of the schools, are distributed among the workers, in proportion to their earnings, in savings certificates, which become payable in cash when a worker retires. The company, as thus organized, has amply justified the faith of its founder.<sup>12</sup>

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of consumers, the employees stand in about the same position as do the employees of a corporation or joint stock company, so far as participation in profits and control is concerned. See generally, COÖPERATION IN MANY LANDS, L. SMITH-GORDON and C. O'BRIEN, Coöperative Union, Ltd., Manchester (1919); see also REPORT ON PROFIT-SHARING AND LABOUR CO-PARTNERSHIP IN THE UNITED KINGDOM, [Cmd. 6496] 1912, which states (p. 84) that even among the productive associations of workers, for which figures were available, "not quite three out of five of the employees were, in 1910, members of the association for which they worked." Figures for 1918 showed that 68.2 per cent of such employees were members. See REPORT ON PROFIT-SHARING AND LABOUR CO-PARTNERSHIP IN THE UNITED KINGDOM, [Cmd. 544] 1920, pp. 122-137.

<sup>11</sup> For a fuller account, and for further references, see C. R. FAY, CO-PARTNERSHIP IN INDUSTRY, Cambridge Univ. Press (1913), pp. 38 *et seq.*; TWENTY-EIGHT YEARS OF CO-PARTNERSHIP AT GUISE, Translation from the French of Madame Dallet, M. Fabre, and M. and Madame Prudhommeaux, by Aneurin Williams, London, 1908.

<sup>12</sup> Maison Leclaire should also be mentioned as another French success in the field

The influence of Godin is discernible in the French legislation of 1917, authorizing a new form of limited company, called *Société Anonyme à Participation Ouvrière*.<sup>13</sup> Provision is made for capital shares and labor shares. The labor shares are to be held by a separate incorporated association representing all the working staff for the time being. Dividends on these shares are paid to all the members of the association in accordance with its rules. As soon as an employee quits, he ceases also to be a member of the coöperative association holding the labor shares. In the General Assembly, the voting strength of the labor shares and of the capital shares is in the same proportion that each class of shares bears to the whole capital stock; and labor and capital are represented on "Le Conseil d'Administration" in the same ratio.<sup>14</sup>

The Dennison Manufacturing Company at Framingham, Massachusetts,<sup>15</sup> an industrial plant with over three thousand employees, represents a pioneer American effort to meet the problem of enlisting both from managerial and non-managerial employees a proprietary interest in the welfare of the business, and of utilizing to the utmost their accumulated knowledge and business experience. In its essential aspects, the organization calls to mind the work of Godin at Guise. Here, as in the case of the Godin factory, the transformation into an industrial copartnership was a gradual development over a considerable period of years. At its very start, in 1844, Aaron L. Dennison was the sole proprietor and, indeed, literally, "the whole works." In 1855, E. W. Dennison, who had succeeded him, formed a partnership with Albert Metcalf, under the name of "Dennison & Company." At this stage the two partners had the sole ownership and control of the business,

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of industrial copartnership. Its organization differs in detail from the Godin factory, but its basic principles are similar. See C. R. FAY, *COPARTNERSHIP IN INDUSTRY* pp. 58 *et seq.*

<sup>13</sup> *ANNUAIRE DE LEG. FRAN.* (1917), pp. 107-112.

<sup>14</sup> Reference may also be had to other French and Italian legislation along related lines commented upon in G. R. Stirling Taylor, "A New Basis for Industrial Corporations," 2 *JOUR. SOC. COMP. LEG.*, 3d ser. (1920), pp. 215-219, *supra*.

<sup>15</sup> I am indebted to Mr. Elliott D. Smith of the Dennison Mfg. Co. for explanations of the organization, and for copies of the various documents relating thereto. The organization is described in JOHN R. COMMONS, *INDUSTRIAL GOVERNMENT*, The Macmillan Co. (1921), chap. vi.



and the profits were theirs. In 1878 the concern was organized as a normal business corporation with a single class of common stockholders who had all the voting power, and among whom all the profits were divided. To some extent employees were offered inducement to become stockholders, but the character of the organization was in nowise affected thereby. When the company was reorganized in 1911, the business was on a sound basis; money could be borrowed at ordinary rates to finance its development; and hence it was considered fair to limit to the ordinary interest rate the return of those who were connected with the business solely as investors. The common stock formerly held by investors was exchanged at its fair market value (which was many times its par value) for first preferred stock carrying a preferential cumulative dividend of eight per cent, payable quarterly as declared. This transaction was thus a fair business bargain, not an altruistic sacrifice, for the investors exchanged at its market value common stock with an indeterminate dividend for preferred stock with a fixed dividend. All further profits, after the payment of dividends on all the capital stock, were to be invested in the business, and against them were to be issued so-called "managerial industrial partnership stock," to the managerial employees, proportionate to their salaries. "Managerial employees" include directors, and all those who have served with the Company for an aggregate period of five years; "and whose position with the Company . . . requires the exercise of managing ability and control over methods of manufacturing or marketing, such as any executive, department-head, principal foreman, chief-clerk, branch-manager, or principal salesman; or whose work shows the use of a high degree of imagination, tact or business judgment, and who shall have contracted in writing with this company for extra remuneration."<sup>16</sup>

As soon as the outstanding managerial industrial partnership stock, so issued, amounted to one million dollars, it was provided that the whole voting power should vest in this class of stockholders, where it now lies.<sup>17</sup> This managerial industrial partnership

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<sup>16</sup> The application of this provision in determining who are "managerial employees" is left to the directors subject to revision at the annual meeting of the industrial partnership stockholders.

<sup>17</sup> The preferred stockholders are safeguarded, however, by a provision revesting the control in them if their dividend becomes in arrears for a specified period.

stock is entitled to a cash dividend not to exceed twenty per cent (the average has been about ten per cent since the plan went into effect); it is expressly non-assignable, and when one of the holders leaves the employ of the company it must be exchanged for non-voting, transferable, "second preferred stock," of equal face value, entitled, after the payment of the first preferred dividends, to a preferential cumulative dividend of seven per cent per annum, as provided in the by-laws.

Thus far, in the development of the organization, no provision was made for participation in profits and management by the larger group of non-managerial employees. The next step was taken in 1919, when a committee elected by these employees drafted a plan, which was accepted, of a "general works committee,"<sup>18</sup> consisting of about sixty representatives of the employees, elected by departments. This works committee is competent to discuss any factory problem or policy, and its recommendations are referred to various small standing conference committees, composed of an equal number of representatives from the management and from the employees. The recommendations of these conference committees, in turn, are referred back to the works committee and to the management for final approval. Although from a legal standpoint the powers of this works committee are merely advisory, in practice the committee exercises an important and effective influence in factory management. In general it fulfills the function described by the Whitley Reconstruction Committee, as follows:

"Work committees, in our opinion, should have regular meetings at fixed times, and, as a general rule, not less frequently than once a fortnight. They should always keep in the forefront the idea of constructive cooperation in the improvement of the industry to which they belong. Suggestions of all kinds tending to improvement should be frankly welcomed and freely discussed. Practical proposals should be examined from all points of view. There is an undeveloped asset of constructive ability — valuable alike to the industry and to the State — awaiting the means of realization; problems, old and new, will find their solution in a frank partnership of knowledge, experience and goodwill. Works committees would fail in their main purpose if they existed only to smooth over grievances."<sup>19</sup>

<sup>18</sup> For a discussion of similar shop organizations of employees, in various industries, see JOHN R. COMMONS, *INDUSTRIAL GOVERNMENT*, *supra*, chap. xxii.

<sup>19</sup> SUPPLEMENTAL REPORT ON WORKS COMMITTEES, contained in compilation cited

Last year, a further important feature was introduced into the Dennison organization. The works committee drafted a plan, which has been put into operation provisionally for a period of five years, for the issue of stock to the non-managerial employees out of surplus earnings. This so-called "employee industrial partnership stock" is issued to all non-managerial employees of over two years' service, in proportion to their length of service; it is non-voting because, in the language of the committee that drafted the plan, "the Works Committee gives the employees a just share in the management of the problems which affect the employees"; it is entitled to a cash dividend, equivalent in amount to that declared on the managerial industrial partnership stock; it too is non-assignable, and when an employee leaves the company it must be exchanged for non-voting transferable "second preferred stock" drawing a dividend of seven per cent per annum. The foregoing are the main features of the present Dennison organization, though, for the sake of brevity, important details of the carefully drafted instrument have been omitted here.<sup>20</sup>

In essence then the plan is:

1. Return on invested capital: A fixed rate, not to be exceeded, on both classes of preferred stock, held by persons who are simply investors in the business; a variable rate not to exceed twenty per cent on industrial partnership stock held by those whose personal services are devoted to the conduct of the business.
2. Distribution of profits: After payment of the fixed dividend on the first and second preferred stock, one-half of the remaining net

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in note 5, *supra*. The committee recommended the constitution of works committees in each factory, as part of a triple form of organization, representative of employers and employed, consisting of national Joint Industrial Councils, Joint District Councils and Works Committees, "each of the three forms of organization being linked up with the others so as to constitute an organization covering the whole of the trade, capable of considering and advising upon matters affecting the welfare of the industry, and giving to labour a definite and enlarged share in the discussion and settlement of industrial matters with which employers and employed are jointly concerned." See Final Report, July 1, 1918.

<sup>20</sup> For instance, provisions as to dissolution; provisions as to the option in the company to buy up and retire at any time the first and second preferred stock, thus enabling the company to cease expanding its capitalization at any time this may be desirable, by buying in each year the same amount in preferred stock that is issued each year in industrial partnership stock; provisions for holding part of the profits as a temporary surplus, if it is undesirable in any particular year to issue any more industrial partnership stock.

profits may be used in the payment of cash dividends on the industrial partnership stock, as above provided. The balance of the net profits is then distributed in the form of industrial partnership stock, two-thirds to managerial employees, and one-third to the non-managerial employees, as extra remuneration for their services.<sup>21</sup>

3. Control of management: Legal control of the corporation through ownership of the voting stock at all times remains in the hands of the active body of managerial employees (at present 368 in number) who are most conversant with the business, and most responsible for its success. Actual participation in the management is shared also, to a limited degree, by the other employees through their general works committee.

Thus, it may be said that the preferred shareholders are somewhat in the position of deferred creditors of the business, the proportion of the preferred stock to the whole capital stock being a steadily decreasing ratio; that the business is owned and the profits divided by the employees, the managerial employees being in effect senior partners, the rest of the employees being junior partners with an interest in the business and with responsibilities commensurate with their importance. The corporate form carries with it corporate advantages as to limited liability, the holding of property, perpetual existence, suing and being sued, etc. But psychologically and substantially, the Dennison Manufacturing Company is an industrial copartnership with limited liability. There is even the "*delectus personae*," one of the features ordinarily distinguishing a partnership from a corporation; for the industrial partnership stock is non-assignable, and the holders of it cannot by transfer introduce strangers into the active body of associates who control the business and reap its profits. A further advantage of the organization is the assurance of continuity in management and policy, because the voting control is exercised by a conscious entity of the older and more responsible employees, the group personality of which will survive the slow changes in personnel. One of the suggested advantages of doing business under the form of a declaration of trust, with transferable certificates representing the beneficial interest, is that the declaration may provide a self-perpetuating body of trustees, thus securing the permanency of management which is

<sup>21</sup> Incidentally, the corporation thus escapes paying the higher surtaxes on corporate income.

often impossible in a corporation whose stock is rapidly changing hands.<sup>22</sup> It appears that the Dennison company achieves this end while still retaining the corporate shell.

Might the salient features of this "industrial copartnership" in corporate form be introduced into a business conducted under a different type of organization; for instance, a factory organized as a limited partnership under the common statutory provisions, the invested capital being contributed by A and B, general partners, who are unlimitedly liable and manage the business, and by C, D, E, and F, registered as limited partners? Of course it would be simple enough to introduce a plan of profit sharing by contract between the owners and the employees, but under the usual strict statutory provisions for registry of the names of the partners, and of their capital contributions, it would seem impossible to take the employees gradually into coownership of the business. The statutory limited partnership is not adapted to a business with a constantly fluctuating group of proprietors.<sup>23</sup>

It is true that statutes in some states, and the Uniform Limited Partnership Act adopted in several states,<sup>24</sup> provide for the admission of additional limited partners, but the requirements for an amendment of the certificate upon every change of membership, or in the amount of the capital contribution of a limited partner, must be strictly observed, else all the associates will be visited with the liability of general partners. Furthermore, even with this difficulty out of the way, the statutes forbid limited partners to take any part in the management;<sup>25</sup> and associates with the power of control accorded to the managerial employees of the Dennison Manufacturing Company would automatically become general partners. In this connection the use of the limited partnership device which was made by Messrs. Gilbert Brothers, boot manufacturers of Nantwich, England, is worthy of note.<sup>26</sup> The employees constituted a society registered under the Industrial and Provident Societies Act, under the name of "Gilbert Bros.' Employees, Ltd." This

<sup>22</sup> SEARS, TRUST ESTATES AS BUSINESS COMPANIES, 2 ed., §§ 7 and 8.

<sup>23</sup> See ROWLEY, MODERN LAW OF PARTNERSHIP, §§ 1000 *et seq.*

<sup>24</sup> See TERRY, UNIFORM STATE LAWS, p. 533; BURDICK, PARTNERSHIP, 3 ed., p. 412.

<sup>25</sup> BURDICK, PARTNERSHIP, 3 ed., 411.

<sup>26</sup> See an account in the REPORT ON PROFIT-SHARING AND LABOUR CO-PARTNERSHIP IN THE UNITED KINGDOM, [Cmd. 544] 1920, *supra*, pp. 109-113. The scheme has now been abandoned, and the factory transferred to other owners.

society, as a body corporate, became a limited partner with Messrs. Gilbert, as general partners, under the provisions of the Limited Partnership Act of 1907. After the payment of salaries to the general partners, and five per cent on their invested capital, the remainder of the profits were paid to the society for the account of its members. The capital thus received, after the payment of five per cent to the members on their respective shares, and of certain other expenses, was applied by the society to increase its capital as a limited partner in Gilbert Brothers, Ltd. An elected committee of the society was empowered to examine into the state and prospect of the partnership business, and to advise with the general partners thereon and (in so far as the same is permitted by the Limited Partnership Act, 1907) to meet and confer with the general partners, whenever occasion required, upon all differences and questions concerning the capital of the partnership, and the managers' salaries. Thus the employees indirectly acquired an interest in the business and divided its profits as in the Dennison plan, but necessarily their participation in the management was of a limited advisory character.

Another type of organization, which perhaps is susceptible of being molded to effectuate an "industrial copartnership," is the much discussed business trust. Some enthusiasts for this modern device (or rather, modern adaptation of an old device) profess to believe that the business trust at no remote date is destined to crowd out the corporation "as a business instrumentality for ordinary enterprises."<sup>27</sup> Constitutional advantages in the matter of doing business in foreign jurisdictions,<sup>28</sup> supposed advantages regarding taxation,<sup>29</sup> freedom from inquisitorial legislation applicable to corporations,<sup>30</sup> continuity of management,<sup>31</sup> and other consid-

<sup>27</sup> R. J. Powell, "The Passing of the Corporation in Business," 2 MINN. L. REV. 401.

<sup>28</sup> R. J. Powell, *supra*, 2 MINN. L. REV. 401, 412; GUY A. THOMPSON, BUSINESS TRUSTS AS SUBSTITUTES FOR BUSINESS CORPORATIONS, § 14; SEARS, TRUST ESTATES AS BUSINESS COMPANIES, 2 ed., §§ 176-178.

<sup>29</sup> Cf. under the federal revenue laws, Crocker v. Malley, 249 U. S. 223 (1919); Chicago Title Co. v. Smietanka, 275 Fed. 60 (1921); Hecht v. Malley, 276 Fed. 830 (1921); Malley v. Bowditch, 259 Fed. 809 (1919).

<sup>30</sup> This would be likely to prove a fleeting advantage if the use of business trusts ever became so common as to crowd out the corporation. See Home Lumber Co. v. State Charter Board, 107 Kan. 153, 190 Pac. 610 (1920), holding a business trust subject to corporate restrictions on selling stock and securities.

<sup>31</sup> SEARS, TRUST ESTATES AS BUSINESS COMPANIES, 2 ed., § 7.

erations, have all been urged in favor of the business trust.<sup>32</sup> On the other hand, it has been doubted whether the business trust is readily adaptable to conducting an active and expanding industrial enterprise.<sup>33</sup> Certainly, so far, the device has been used more for holding and investment companies,<sup>34</sup> and for the management of real estate,<sup>35</sup> than for the conduct of industrial ventures. Its use in this field is not uncommon, however, and some large manufacturing plants are conducted as business trusts.<sup>36</sup> It is frequently made use of in some parts of the country in the organization of oil companies.<sup>37</sup>

Assuming, then, that the promoters of an industrial enterprise, after weighing all the advantages and disadvantages, decide to organize as a business trust, may the main features of industrial copartnership be incorporated in the formal declaration of trust? It is not uncommon for a declaration of trust to provide for the issue of different classes of beneficial certificates, preferred and common, with varying powers in the holders thereof.<sup>38</sup> The declaration could therefore provide for first preferred certificates, second preferred certificates, managerial industrial partnership certificates, and employee industrial partnership certificates, with the respective powers and privileges accorded to the corresponding shares of stock in the Dennison Manufacturing Company. Care would be necessary in delimiting the powers of the voting certificate holders, the principal employees, to whom the managerial industrial partnership certificates would be issued, because the courts will look behind the form of the trust and see the substance of a partnership wherever the effective control and direction of the business is lodged in the association of beneficiaries. Thus, in one of the leading cases, where the beneficiaries of a business trust were empowered to meet at

<sup>32</sup> See especially, the careful discussion by H. L. Wilgus, "Corporations and Express Trusts as Business Organizations," 13 MICH. L. REV. 71, 205.

<sup>33</sup> See "The Massachusetts Trust as a Substitute for Incorporation," 89 CENT. L. J. 275; THOMPSON, BUSINESS TRUSTS AS SUBSTITUTES FOR BUSINESS CORPORATIONS, § 16.

<sup>34</sup> *Kimball v. Whitney*, 233 Mass. 321, 123 N. E. 665 (1919); *WRIGHTINGTON, UNINCORPORATED ASSOCIATIONS*, § 18.

<sup>35</sup> SEARS, TRUST ESTATES AS BUSINESS COMPANIES, § 179.

<sup>36</sup> See SEARS, TRUST ESTATES AS BUSINESS COMPANIES, 2 ed., v to vii; also § 184.

<sup>37</sup> *Davis v. Hudgins*, 224 S. W. 73 (Tex. Civ. App., 1920).

<sup>38</sup> *Rhode Island Hospital Trust Co. v. Copeland*, 39 R. I. 193, 98 Atl. 273 (1916); SEARS, TRUST ESTATES AS BUSINESS COMPANIES, 2 ed., § 197.

any time upon the written petition of holders of one-tenth of the certificates, and at such meetings to authorize or instruct the trustees in any matter, to remove any trustee and appoint another in his place, and to alter or amend the declaration of trust, such beneficiaries were held to be, in fact and in law, partners.<sup>39</sup>

This is a clear case on one side of the line. On the other side are clear cases like *Williams v. Milton*,<sup>40</sup> and *Crocker v. Malley*,<sup>41</sup> where the beneficiaries simply draw their dividends, are not associated together for collective action, and have no power in the selection or control of the trustees. Between these two extremes it cannot be said that the cases thus far have marked out a definite dividing line. Where under the declaration the trustees are given full powers of management, it has been urged that the mere latent power in the certificate holders to alter or amend the trust, and thus in the future to vest the conduct of affairs in themselves, should not constitute the beneficiaries partners.<sup>42</sup> The contrary view has been taken, however.<sup>43</sup> A power in the certificate holders by a vote to terminate the trust is not significant.<sup>44</sup> Certainly the bare power to fill vacancies among trustees caused by death or resignation is not sufficient to turn the beneficiaries into partners.<sup>45</sup> Further, it seems that the power in the certificate holders to elect trustees periodically for substantial terms should not make them partners, if the trustees, during their terms of office, have full discretion and control; and it has been so held.<sup>46</sup> This point, however, cannot be said to be finally

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<sup>39</sup> *Williams v. Boston*, 208 Mass. 497, 94 N. E. 808 (1911) (see the original papers); *Frost v. Thompson*, 219 Mass. 360, 106 N. E. 1009 (1914). But cf. *Cox v. Hickman*, 18 C. B. 617, 624 (1856), 3 C. B. (N. S.) 523 (1857), 8 H. L. C. 268 (1860); *SEARS, TRUST ESTATES AS BUSINESS COMPANIES*, 2 ed., §§ 67, 79; *Hart v. Seymour*, 147 Ill. 598, 35 N. E. 246 (1893).

<sup>40</sup> 215 Mass. 1, 102 N. E. 355 (1913).

<sup>41</sup> 249 U. S. 223 (1919).

<sup>42</sup> *WRIGHTINGTON, UNINCORPORATED ASSOCIATIONS*, p. 58. See *Bingham v. Graham*, 220 S. W. 105 (Tex. Civ. App., 1920). Cf. a case under the Federal Bankruptcy Act. *In re Associated Trust*, 222 Fed. 1012 (1914).

<sup>43</sup> *Simson v. Klipstein*, 262 Fed. 823 (1920). Criticized in *SEARS, TRUST ESTATES AS BUSINESS COMPANIES*, 2 ed., § 94.

<sup>44</sup> *Davis v. Hudgins*, 225 S. W. 73 (Tex. Civ. App., 1920). But see *SEARS, TRUST ESTATES AS BUSINESS COMPANIES*, 2 ed., § 91.

<sup>45</sup> *Smith v. Anderson*, 15 Ch. D. 247, 284 (1880). Cf. *Mallory v. Russell*, 71 Iowa, 63, 32 N. W. 102 (1887).

<sup>46</sup> *Home Lumber Co. v. State Charter Board*, 107 Kan. 153, 190 Pac. 610 (1920); *WRIGHTINGTON, UNINCORPORATED ASSOCIATIONS*, p. 57.



settled in Massachusetts.<sup>47</sup> In *Dana v. Treasurer*,<sup>48</sup> the certificate holders were held to constitute a partnership where the declaration of trust empowered them to elect four trustees at each annual meeting to serve three-year terms, and by a two-third vote to alter, amend, or terminate the trust at any regular or special meeting. It does not appear what would have been held if only the power to elect trustees for three-year terms had been given. In *Kimball v. Whitney*,<sup>49</sup> where the powers conferred were essentially the same as in the *Dana* case, the court expressly left the question open. Until the law of business trusts is more clearly defined it cannot be affirmed with confidence, therefore, that trust certificate holders with powers equal to those conferred on the holders of the managerial industrial partnership stock in the Dennison Manufacturing Company would not, in some jurisdictions, at least, be held to be partners.<sup>50</sup>

It is not to be supposed that any one plan of organization would

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<sup>47</sup> In *Hoadley v. County Commissioners*, 105 Mass. 519 (1870), legal title to the property was held by a trustee, but the management of the business was vested in an executive committee of shareholders elected by the whole body of shareholders and apparently removable at any time. *Whitman v. Porter*, 107 Mass. 522 (1871), is meagerly reported and cannot be taken as decisive. In *Phillips v. Blatchford*, 137 Mass. 510 (1884), a trustee held legal title, but the business was conducted by a board of managers elected by the certificate holders from among their number; the certificate holders, in special meeting which might be called at any time, were empowered to give detailed instructions to such managers. See original papers in the case. In *Ricker v. American Loan & Trust Co.*, 140 Mass. 346, 5 N.E. 284 (1885), the shareholders could remove the board of managers at any time. In *Sleeper v. Park*, 232 Mass. 292, 122 N.E. 315 (1919), the original papers disclose that the trustees were removable at any time, and subject to the instructions of the shareholders, given by a two-third vote, "in all particulars."

<sup>48</sup> 227 Mass. 562, 565, 116 N.E. 941 (1917).

<sup>49</sup> 233 Mass. 321, 123 N.E. 665 (1919).

<sup>50</sup> Even though held to be partners, however, they would probably not run any risk of contractual liability, for the usual trust agreement requires the trustees expressly to stipulate in all contracts that the beneficiaries shall not be personally liable. It seems that such a stipulation is valid. *Bank of Topeka v. Eaton*, 100 Fed. 8 (1900), 107 Fed. 1003 (1901); *BURDICK, PARTNERSHIP*, 3 ed., pp. 40-41, *SEARS, TRUST ESTATES AS BUSINESS COMPANIES*, 2 ed., §§ 77-88; *Wrightington*, "Modern Business Organizations," 24 *CASE & COMMENT*, 184; *Wrightington*, "Voluntary Associations in Massachusetts," 21 *YALE L. J.* 311, 313-321.

Of course if partners, they could not escape direct tort liability, though they could be indemnified by insurance. In *Sleeper v. Park*, 232 Mass. 292, 122 N.E. 315 (1919), as the beneficiaries were held to be partners, it seems they would have been liable to the plaintiff for personal injuries, but suit was brought only against the trustees.

be fitted in all its details to every industrial undertaking. This much may be said, however, that the Dennison experiment demonstrates the great adaptability of the corporate form in the hands of resourceful men. No doubt other resourceful men, interested in the problem and not constitutionally averse to trying something which has not been done before, will adapt and improve upon the methods outlined, or perhaps devise some new method yet unthought of, for introducing into industry an adjustment to the immediate advantage of the workers, both with brain and hand, by whom the invested capital is utilized, and which, by reason of the hoped-for by-product of industrial peace and efficiency, may prove to be to the ultimate interest of the investors themselves.

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## THE CHANGE IN TRUST POLICY—II\*

## V

WE have seen that there exists no sound legal basis for the judicial policy of distinguishing between "good" and "bad" trusts. It remains to inquire whether this new public policy may not, however, be industrially sound. If there is an economic basis for the changed attitude toward business enterprise, we may very well overlook the lack of legal precedent and find satisfaction in the ease with which our legislative wants are recognized and filled by the courts. The question is, therefore, whether the law as interpreted in the Steel Corporation case is likely to promote "prosperity" not only in the narrow sense of profit-making but also in the sense of the general welfare of society. During the last twenty years this question has been much discussed both pro and con, and the defenders of the economic expediency and social legitimacy of good industrial trusts have not been confined to the business community. They may be found in plenty among professional economists, supposedly disinterested. It will not do in this place to recount all the arguments for either side, but it may nevertheless be worth while to examine specifically the records of two important combinations, — The United States Steel Corporation and the International Harvester Company, the continuance of which has been sanctioned<sup>1</sup> by the courts under the new policy. What is

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\* The first installment of this article appeared in 35 HARV. L. REV. 815.

<sup>1</sup> The International Harvester Company, it is true, was found by the lower court to be an unlawful combination under the Sherman Act (214 Fed. 987 (1914)). This was in 1914, and an appeal was then taken to the Supreme Court. The case was twice argued, and then continued on motion of the government, which feared the consequences of dissolution and extensive financial reorganization during the war. Finally the Attorney-General was induced under these circumstances to enter into an agreement (July, 1918) by which consent was given to a modification of the dissolution decree of the district court and upon motion of the Harvester Company the appeal was dismissed by the Supreme Court (248 U. S. 587 (1918)). The effect of the substitute decree is to leave the Harvester Company practically untouched in its position of dominance in the industry. See Report of Federal Trade Commission on THE CAUSES OF HIGH PRICES OF FARM IMPLEMENTS (1920), pp. 653-680.

there in the history of the United States Steel Corporation and the International Harvester Company to support the view that a continuation of their concentrated power works in the public interest? Has the carrying on of fifty to seventy per cent of the productive operations in their respective industries by these corporations resulted in a greater benefit to our industrial society than would have resulted from the early restoration of their constituent elements to their original competitive status? This will be a test upon the results of which we may base some conclusion relative to the wider question stated above.

There are three sets of facts that seem worthy of examination in applying this test. They are: (I) the facts concerning the origin of these corporations; (II) the facts concerning their growth; (III) the facts concerning their consequences. These same classes of facts might be otherwise described as: (I) facts about the constitution of these corporations; (II) facts about their relations to other business units in their respective industries; (III) facts about their relation to the public whom their operations concern. The first two sets of facts bear indirectly upon the primary issue. The last bears directly upon it. The evidence to be gained from the first set of facts is negative and inferential. The evidence offered by the last two sets of facts is positive and inductive. We shall examine them in order.

## VI

The United States Steel Corporation was formed by the consolidation of twelve<sup>2</sup> previously independently organized concerns. Although these concerns ostensibly operated independently, there were three large groups of "interests" brought into the corporation, — the Carnegie interests, the Moore interests, the Morgan interests. Each of these comprised units (at one stage or another of the whole productive process of the industry) which were in direct competition with units (engaged in similar stages of the process) controlled by the other groups. The extent of the integration previously accomplished within the several groups varied, but all the groups were to some degree integrated "from the ground up."

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<sup>2</sup> This includes three concerns taken in almost immediately following the organization of the corporation and a fourth acquired shortly afterwards.

That is to say, each interest controlled units which furnished other units with at least a part of their raw materials, and also contained certain units which were in some part engaged in making finished steel products and selling them directly to final users or distributors. If we divide up the complete productive process of the industry roughly into three stages: (a) the extraction and transportation of raw materials, (b) the production of pig iron and its conversion into steel, (c) the forming of these materials into finished and semi-finished products, we find that the different interests stood in different relations to the several stages.<sup>3</sup> The Carnegie interests had largely been devoted to the first two stages and had carried their integration to a high degree, *i.e.*, had coördinated their operations in these two branches of the industry fairly closely. The Moore interests included a group of properties very largely devoted to the last two stages and chiefly to the last one. In other words, the degree of coördination between the operations of the Moore units in the third stage and in the second stage was not so high as between the first and second stages in the case of the Carnegie interests. The Morgan interests represented a somewhat better balanced integration of the three stages than either of the other groups. They were not in the (then) center of the steel industry, however, and the magnitude of their operations in all branches combined was not so great as that of either of the other two interests.

It thus appears that the formation of the United States Steel Corporation did not involve in essence an economic integration of the industry, for that had already been marked out as the pathway of development and had been partially achieved. The formation of the corporation involved rather a combination of integrations. These integrations were themselves the product in some instances of consolidations of competing units, notably so in the case of the Moore group.<sup>4</sup> In other instances the integration had come about as the result of a "natural" process of industrial evolution, *i.e.*, expansion by aggressive business competition, as in the case of the

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<sup>3</sup> United States Bureau of Corporations, *REPORT ON THE STEEL INDUSTRY* (1911), p. 100.

<sup>4</sup> *Ibid.*, p. 89: "The National Steel Company . . . was distinctly a combination of previously competing concerns."

Carnegie interests.<sup>5</sup> That economic integration<sup>6</sup> was not greatly furthered by the consolidation<sup>7</sup> of these groups of interests must be manifest from a consideration of their situation. They were geographically so far separated from one another that neither in the transportation of ore nor in the transformation of raw materials into pig, nor in the conversion of pig into steel, nor in the manufacture of the steel into finished forms could considerable economies have been anticipated from joint ownership. There was no possibility<sup>8</sup> of the operations of one supplementing or permitting the closer time coördination of the operations of another to any important degree. The plants of the Chicago district continued to receive their raw material in the same way from the same sources, produce the same grades of iron and steel, and roll the same varieties of finished and semi-finished products as they had theretofore. And the same holds true substantially of the corporation's proper-

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<sup>5</sup> BUREAU REPORT (1911), p. 85-86: "The Carnegie Company was the largest single unit in the steel industry. . . . All of its manufacturing properties were concentrated in or near Pittsburg, this compactness of plant being a conspicuous feature of its organization. Its great size had been attained chiefly by the expansion of its own plants, or by the addition of concerns in correlated industries, such as coal and transportation, rather than by the absorption of competitors."

<sup>6</sup> Meaning the linking up of successive processes of production whereby real costs are reduced, usually at least in part through the elimination of certain time losses.

<sup>7</sup> Some evidence in point is furnished by the Census of Manufactures for 1914, which shows that the percentage of all classified iron and steel products (from steel works and rolling mills) which in the form of ingots, blooms, billets, slabs, and bars (partly finished products) were not produced in the works where consumed, and consequently required reheating, has remained stationary for every census since 1899 (two years prior to the organization of the Steel Corporation). The percentage has fluctuated within a three-point range close to 25 per cent: 1899 — 25.7; 1904 — 27; 1909 — 24.1; 1914 — 25.3. Integration between the mines and the blast furnaces and between the blast furnaces and steel mills may have been advanced, but the census contains no data apposite.

<sup>8</sup> BUREAU REPORT (1911), p. 83: "It is worth pointing out that the technical economies of integration were chiefly connected with combining and coördinating the successive stages of *manufacture*." (*Italics mine.*) Page 108: "So far, however, as the integration of manufacturing processes themselves were [*sic*] concerned, the advantages of such a system were probably about as fully realized by the larger and better equipped plants of some of the constituent concerns [as was possible of realization under the consolidation]." The Bureau Report immediately following the first of the above quotations mentions as a distinct class of economies from integration the savings of "profits" previously paid to others on materials purchased. Later the Bureau declares that the "economies" derived from this last source were the chief socio-economic advantages gained by the combination. It grants that the savings affected in this direction must have been considerable. The argument involves a kind

ties in the Pittsburgh district and in eastern Ohio,<sup>9</sup> though here some operative economies were made possible by a rearrangement of plant facilities. What joint ownership did produce and undoubtedly was expected to produce was, not economies in operation through closer integration to any substantial degree, but advantages in the marketing of products as the result of the diminution of the competition<sup>10</sup> confronting each constituent in its particular market area. In short, the corporation was expected to succeed not so much from the power which consolidation might give it to reduce costs as from the power which consolidation might give it to raise or maintain prices.

The International Harvester Company was not, like the Steel Corporation, a combination either of combinations or of integrations. It was a combination of five of the leading manufacturers of harvesting machinery<sup>11</sup> in 1902. Each of the constituent concerns had built up its own trade under conditions of rigorous competition. Though each possessed patent rights of more or less value,

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of specious reasoning that has become familiar of recent years in the attack on the existing distributive organization (particularly on middlemen). Either the raw materials were sold to the blast furnace operators at a fair competitive price prior to the organization of the corporation or they were disposed of under monopolistic conditions. If the former, it is not apparent how the combine could have reduced the costs of its materials to its blast furnaces without sacrificing something on the capital and managerial ability donated to getting out and transporting the raw materials, unless indeed the larger scale of these operations reduced somewhat the insurance costs or risk-profits incident thereto. If, on the other hand, the latter assumption be correct, which is very doubtful, it follows just as certainly that the acquisition or lease of these iron and coal mines and limestone quarries and shipping facilities could not have been made save upon terms that gave their prior owners the full discounted value of the calculable returns from these properties operated as a monopoly. Consequently the "profits" saved from the hands of the security holders of these mining companies became essential for meeting the demands for income from the holders of the securities of the combination. In whatever way they are regarded these particular "commercial economies" of integration evaporate in the rays of economic analysis.

<sup>9</sup> BUREAU REPORT (1911), pp. 273-275.

<sup>10</sup> *Ibid.*, p. 12: "A more important matter is that a period of violent competition among all of these concerns was imminent . . . and that the United States Steel Corporation was organized for the specific purpose of preventing the new competition thus threatened as well as eliminating that already existing among these concerns."

<sup>11</sup> REPORT OF THE BUREAU OF CORPORATIONS ON THE INTERNATIONAL HARVESTER COMPANY (1911), pp. 46-50. These included all of the largest concerns favorably located for marketing their product in the Western and Middle Western states. The only competitor of formidable size was D. M. Osborne & Company, located in Auburn, New York. The plants of this company were purchased in 1903.

these were incidental advantages in the competition with the other manufacturers rather than the foundation of substantial monopoly for any single unit in the production of this class of machinery. After the expiration of the basic patents of the seventies, at least, no particular concern was especially favored by the exclusive right to use any special device or method.

The question of economic integration, therefore, was only of secondary significance in the formation of the combination. Only as the larger-scale purchasing of raw materials made feasible the acquisition of sources of these materials and the undertaking of their transformation through prior stages could economic integration have influenced the consolidation. To some extent this was done. But the company has not contended, nor do the facts indicate, that its position was made greatly more secure or that very considerable savings were effected in this direction. Its subsidiary iron and steel company, the Wisconsin Steel Company, has proved a profitable venture,<sup>12</sup> but this may fairly be attributed in part to fortunate ore investments, whence came considerable unearned increment, and in part also to the favorable situation created in the iron and steel industry by the formation of the United States Steel Corporation by the same banking interests responsible for the organization of the Harvester Company.

On the other hand, the Wisconsin Lumber Company, which is the subsidiary furnishing the other principal raw material of the implement industry, has not proven capable even of "paying its way" <sup>13</sup> for most of the period since its organization. So far as yielding technical economies in the manufacture of iron, steel, and wood into finished farm implements is concerned, however, there is not one bit of evidence that the use of these subsidiary companies has been an advantage to the International Harvester Company. Its process of production is just as long (in time) and requires as many steps as it would were it to supply itself with its requirements for these raw materials entirely from the general market, as it is

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<sup>12</sup> BUREAU REPORT, pp. 268-269. REPORT OF FED. TRADE COM. (1920), pp. 670-673. Assuming the quasi-monopolistic condition in the iron and steel industry to exist, as we shall attempt in this paper to demonstrate that it does, it is obvious that an industry which frees itself from the exactions of those in control of the supply of its primary raw material will benefit thereby.

<sup>13</sup> BUREAU REPORT, p. 270, and REPORT OF FED. TRADE COM. (1920), p. 673.



actually forced to do in part by technical considerations.<sup>14</sup> There remain the possible economies in production through the interchange of methods and designs, and the specialization of plant. The former, it must be admitted, could hardly fail to constitute somewhat of an economic gain wherever rival producers join forces. But manifestly the gain is temporary. And here, at least, the short-run gain is the long-run loss. Moreover, in an industry even so far stabilized as was the harvesting machinery industry in 1902, these advantages would hardly be sufficient to warrant the mere organization expenses of such a consolidation. The latter sort of productive economies, namely those arising from specialization of plant, are contingent upon the degree to which the limit of economy from large-scale production has been approached under competitive conditions. Considering the length of the period in which the tendency toward concentration of ownership had been manifesting itself in this industry, considering the size of the constituent concerns, and considering finally the extent to which this industry is affected by transportation costs, the principal factor determining the economic limit to large-scale production, it can scarcely be doubted that there was little to be gained in this direction from combination. This inference is confirmed by the actual course of events.<sup>15</sup> The substantial gains sought by consolidation consequently could only have been anticipated from the elimination of competition in the marketing of the product<sup>16</sup> of the industry.

It is significant that while the opinion of the leading executives in the several constituent concerns was unanimous that the competition preceding the consolidation was "fierce," "ruinous,"<sup>17</sup> *et cetera*, it was not producing any marked change in the relative standing<sup>18</sup> of these five largest manufacturers, nor was there apparent any distinct tendency for new investments to shun the field. It would seem rather difficult to explain why, in an industry so hampered by the "excess" of competition, the capital investment as appraised by promoters actively engaged in the business, who

<sup>14</sup> BUREAU REPORT, pp. 253-254, 268.

<sup>15</sup> *Ibid.*, pp. 145-146. Three of the original five plants have continued their former line and in two the manufacture of harvesters was discontinued, but only upon the entrance into new lines of production some years after the consolidation. If anything, the tendency has been away from rather than toward a specialization of the use of plant equipment.

<sup>16</sup> *Ibid.*, pp. 3, 70.

<sup>17</sup> *Ibid.*, pp. 3, 59-62.

<sup>18</sup> *Ibid.*, pp. 63-66.

were attempting to launch a harvester trust a decade before, should have increased from \$35,000,000 in 1890 to \$132,000,000 in 1902. While \$72,000,000 of this latter figure is mainly composed of good will and patent values,<sup>19</sup> the capitalization of the abortive American Harvester Company must have included something of these elements. Moreover, the 1890 valuation covers a much more comprehensive list of plants engaged in the industry than were brought within the consolidation in 1902. Of course the number of companies engaged in the manufacture of harvesting machines declined in the decade 1890-1900, as did the number of companies engaged in most other lines of manufacture. This tendency is generally attributed to the economy of large-scale manufacture and there seems no reason to differentiate the process qualitatively in this industry<sup>20</sup> from the same process manifesting itself elsewhere. In short, there is nothing in the experience of the concerns forming the harvester trust prior to the combination that demonstrates the failure of competition to do aught but what is expected of it by society, namely, maintain an expanding supply of product adjusted to the demand, reduce costs, and transmit the benefit of industrial action to the purchasing public at prices free of monopolistic elements.

The significant fact about the origin of these two trusts is that they were both formed by combination, not by independent, normal growth. At least in these industries there is no proof that a single competitor could win control of the market by his industrial superiority in an outright contest. Even Mr. Carnegie, whose visits to Pittsburgh it is said never failed to throw a chill into his competitors, was only the most formidable figure in the trade. In 1900 he controlled less than twenty per cent<sup>21</sup> of the steel output of the United States. The same was true<sup>22</sup> of the McCormick in-

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<sup>19</sup> These were not included in the ultimate capitalization of the International Harvester Company.

<sup>20</sup> The fact that there were but few failures of firms engaged in the manufacture of harvesters in a decade (BUR. REP., p. 62), which witnessed an almost unexampled depression in the agricultural industry upon which the harvester industry is wholly based, is fairly conclusive evidence that the competition was not so "destructive" but that enterprises fairly well located and managed could survive.

<sup>21</sup> BUREAU REPORT, STEEL INDUSTRY, p. 87.

<sup>22</sup> BUREAU REPORT, INTERNATIONAL HARVESTER COMPANY, p. 65. The McCormicks controlled about 37 per cent of the country's output of binders in 1902.

terests in the harvesting industry. Whatever may have been the motive of those responsible for the organization of these dominant concerns it is clear that they were "made"; they did not "grow."

## VII

The facts concerning the relations of these two trusts to other establishments in their respective industries are especially enlightening. There can be little doubt that they are the best examples which our experience affords of trusts endeavoring to maintain and advance their position by the fullest utilization of the legitimate advantages gained through combination, rather than by aggressive elimination of outside firms through uncompromising trade warfare. The latter policy was without an exception, so far as the writer has been able to discover, the policy embraced by the industrial combinations organized in the nineteenth century. Certainly it was the characteristic policy of all the older trusts.<sup>23</sup> But with the beginning of the new century we are introduced to the new policy of "live and let live — who can." The old policy toward so-called "independents" seems to have lost favor, if indeed it may not be conjectured that for certain farsighted financiers its futility in face of the public attitude had not already been proven. Certain it is that the United States Steel Corporation from its start and the International Harvester Company after a short period of experimenting have refrained from those bullying, bludgeoning tactics toward the smaller concerns in their industries which brought such opprobrium upon the tobacco trust and the cash-register trust. The government in its brief in the Harvester case<sup>24</sup> could establish no general malfeasance along this line. Aside from a few tentative efforts at suppression by local price-cutting, isolated instances of dealer-threatening, etc., in 1902-1904 the only evidence adduced of unfair competitive methods was that the trust had retained the five distinct selling organizations of its con-

<sup>23</sup> After the disclosures made by the Industrial Commission and by the courts in prosecutions under the Sherman Act it requires no more than a mention of such trusts as the following to call to mind the nefarious practices which place them within this class: The American Tobacco Co., The Standard Oil Co., Distillers' & Cattle-feeders' Trust, Addystone Pipe Combination, American Sugar Refining Co., National Wall Paper Company, and National Cash Register Company.

<sup>24</sup> Parts IX and X, SEN. DOC., No. 558, 63d Congress, 2d Session.

stituents and adhered more closely than had formerly been the custom to the policy of making agency contracts exclusive. With respect to the first of these contentions, both of which had undoubtedly a factual basis, it may be strongly questioned that it constituted a ground of complaint for anyone. It is hard to understand how it prejudices the competitive opportunity of an "outsider" for a trust to employ ten salesmen instead of six. If ten is no more than can economically be employed to transact the business done, must the trust cripple itself in order to show its benevolence and fairness toward its small competitor? If ten is more than can economically be employed in transacting the business secured, how can their employment be other than a tremendous competitive opportunity to the small outsider? But the government hints that by this means all the best selling agents throughout the country were, so to speak, "monopolized" by the Harvester Company, thus depriving small competitors of good local representation.<sup>25</sup> Since when, it may be asked, have salesmen for agricultural machinery become so rare and so difficult to train? The existing supply of implement dealers in any year is not inelastic and certainly not irreplaceable. One might think from the argument of the government that farm machinery dealers were "born" and not "made," and "born" at that only at comparatively long intervals.

With regard to the other contention it is true that for certain goods, only to be marketed economically in conjunction with many other wares, the preëmption of the established channels of trade by exclusive factor agreements may constitute a serious aggression upon independent producers. It is difficult to understand, however, what objection there can be to local retail distributors of heavy, intricate, and expensive machinery of slow turnover agreeing to represent only a single manufacturer, or in this case only a single line of implements. The cost of distribution is bound to be large and the manufacturer would seem to be justified in taking the greatest precaution (as the exclusive agency contract does) to

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<sup>25</sup> It is to be granted, of course, that the company would have created a very severe test for itself in its "trial period" by abruptly severing its connections with, say, 65 per cent or 70 per cent of the dealers previously engaged in distributing the products of its members. A great many of these would have made strong efforts to establish connections with outside manufacturers and could unquestionably have carried with them a large part of the trade they had previously enjoyed.

assure that every "outlet" for his product is fully cultivated. This method of distribution is almost universal for this class of goods, it had been the common practice in the marketing of harvesting machinery before the consolidation, and there appears no reason for believing that it operated to cripple the "outside" manufacturers in efforts to extend their market and increase their sales.<sup>36</sup>

We come, then, to the question: What has been the record of trust accomplishment under the "live and let live — who can" policy? Have these trusts, conducted we may assume with moderation and fairness toward the "independent" competitors, proved their "fitness to survive" and justified their sponsors? The answer is yes, and no. They have not been reduced to bankruptcy. They have made profits.<sup>37</sup> They continue to "lead the field" in their respective industries. Nevertheless they have not been able to "hold their own" in the trade. Both have "lost ground" to outside competition, notwithstanding what may be deemed fairly able management; this despite their vaunted economies in manufacture and marketing.

The tendency for the trusts to fall behind the small competitors in the rate of increase of production and of sales is not equally manifest in both industries, nor is the same tale to be told in both domestic and foreign trade, nor in relation to all of the products in the two industries. Some of these differences and the reservations they require will be made clear by an examination of the subjoined tables. The general conclusion reached above, however, is also well supported.

Percentages of total United States production made by The International Harvester Company and by other companies of three representative products of the original line of International Harvester

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<sup>36</sup> Nevertheless this is made one of the prominent "concessions" secured by the Attorney-General in the consent decree of November, 1918. The manifest ease of evading this requirement, coupled with its insignificance in this industry, only help along the conviction one gains from studying the other provisions of the decree that the whole deal was a fiasco.

<sup>37</sup> For a survey of the profitableness of industrial trusts, see article, "A Statistical Test of the Success of Consolidations," by A. S. Dewing, 36 *QUART. JOUR. OF ECONOMICS*, p. 84. The lack of "success" of trusts there exhibited tends to confirm the argument in this section.

Company for the first full year of operation of the International Harvester Company, and for certain subsequent years:

(From Bureau Report on International Harvester Company and  
Federal Trade Commission Report on Farm Machinery.)

	1903		1909		1918	
	Int.	Ind.	Int.	Ind.	Int.	Ind.
Binders . . . . .	94.2	5.8	87.1	12.9	65.3	34.7
Mowers . . . . .	87.7	12.3	80.7	19.3	59.5	40.5
Rakes . . . . .	80.	20.	69.1	30.9	57.5	42.5

Percentages of total United States production of certain selected products produced by the United States Steel Corporation and by other companies for specified years:

(From Annual Statistical Reports of American Iron and Steel Inst.)

	1902		1910		1914		1920	
	U. S. S.	Ind.	U. S. S.	Ind.	U. S. S.	Ind.	U. S. S.	Ind.
Pig iron . . . . .	44.3	55.7	43.	57.	43.	57.	39.3	60.7
Steel ingots and cast- ings . . . . .	65.7	34.3	54.7	45.3	50.3	49.7	45.7	54.3
Bess steel rails . . .	65.4	34.6	60.2	39.8	50.6*	49.4	58.*	42.
Plates and sheets . .	59.4	40.6	48.	52.	42.8	57.2	39.8	60.2
Wire rods . . . . .	71.5	28.5	67.3	32.7	56.9	43.1	56.	44.

\* Percentage of total production of steel rails by all processes.

The persistent tendency which these figures disclose strongly indicates, when taken in conjunction with the "live and let live — who can" policy pursued toward independent competitors, that the size and power of these combinations rest upon something different from economic superiority. It shows that the outside companies have been either taking away from the combination the business that formerly went to it, or in the case of the steel in-

dustry getting more of the new business than the combination could attract, and there is no reason for believing that this has been brought about by other than economic causes. We have seen that the circumstances of their origin support the conclusion that they were not the products of natural industrial development. But even if this be not granted,<sup>28</sup> certainly their histories as producers point to the view that they were both the result of financial conspiracy.

### VIII

In endeavoring to measure the economic effect of these combinations upon the consuming public who directly or indirectly contribute to the purchase of their products one is confronted at the outset with a most difficult problem. How are their economic consequences to be gauged? What method, if any, will lead us to an unassailable verdict on this most crucial issue of all,—the course of prices for their products? But if they have risen, so have prices in general; and if they have risen more or less than prices in general, either result may be explained by hypotheses about relative changes in demand or conditions of supply, the legitimate effects of which it is impossible even approximately to ascertain. May the verdict then be rested on their rates<sup>29</sup> of profit? But high profitableness is not *per se* condemnable. An active, expanding enterprise under freest competition may be making profits much above the ordinary, and yet from the social point of view no less than the private be clearly entitled to them.<sup>30</sup> High profits may be either earned<sup>31</sup> or unearned. On the other hand, low profits may accompany the most favored monopoly, if it be managed with ineptitude or carelessness, as the history of more

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<sup>28</sup> There is not the slightest inclination, however, to minimize the evidence here reviewed as to the nature of the motives which induced their organization.

<sup>29</sup> "Rate of profit" is here and in following pages used in accordance with market terminology, *viz.*, the rate of return upon both risk-bearing and risk-exempt capital considered together, *i.e.*, the ratio of net earnings to total capital investment.

<sup>30</sup> A good example of what the present writer feels to be a rather uncritical use of price and profits data is furnished by a chapter on the International Harvester Company in JONES, *THE TRUST PROBLEM IN THE UNITED STATES*.

<sup>31</sup> As Mr., now Justice, Brandeis declared in 1911 before the Senate Committee on Interstate Commerce (HEARING, p. 1245): "There is no profit too great to be approved, if it is the result of the exercise of brains and character, under conditions of industrial liberty." Quoted by A. M. Kales, 30 HARV. L. REV. 862.

than one patented monopoly attests. Moderate profits are no unfailing criterion of reasonable social service in industry.

There is, indeed, no well-defined and reliable method of determining the social effects of industrial combination. Even more, the writer after some years of experience in pursuing and studying such inquiries is not only wary but skeptical of the "inductive proof" of the workings of social arrangements.<sup>32</sup> These problems are far too complex, certainly, to be solved by any such facile and simple expedients as were projected above and as are commonly employed. The provision of a technique for this sort of study is one of the pressing needs<sup>33</sup> yet unfilled by professional economists. What is needed is an exhaustive survey of alternative methods, and an analysis of their assumptions, their range of applicability, and their legitimate objectives. All this is quite beyond the scope of the present paper. But in attempting to get at a serviceable test of the direct economic consequences of the organization of the two combinations under review it is hoped to exhibit some of the pitfalls that must be avoided as well as some of the means of circumventing them.

There are two main lines of procedure from which to choose in any given instance. One may be styled direct, inasmuch as the record of the industrial combination itself is examined with a view to determine its service from its prices or its profits. The other may be termed indirect, since the effort is made to determine the status of the combination by comparing the condition of the industry as a whole in different periods and with other industries. The first mode of procedure requires the determination of (a) the extent of the capital investment employed by the combination; (b) the amount of earnings for successive periods; (c) the grade of executive ability engaged in the conduct of the business; (d) the degree of risk in the industry (*e.g.*, susceptibility to sudden changes in productive processes or in relative demand for products). The second mode of procedure requires the determination of (a) the gross pecuniary productivity of the industry during a series of years; (b) the proportion of earnings of capital to gross pecuniary

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<sup>32</sup> For example, what have been the effects of prohibition? the Versailles Treaty? the federal operation of the railroads?

<sup>33</sup> The want, moreover, is not confined to our own country. No more has been done elsewhere. Cf. MARSHALL, *INDUSTRY AND TRADE*, chaps. II, VII, *et passim*.



productivity, also during a series of years; (c) like data for other representative industries; (d) the specific causes for the changes of proportion out of the many conditions potentially effective. The International Harvester Company, for reasons that will become evident, appeared more amenable to the first method of treatment, whereas this procedure was clearly ill adapted for the United States Steel Corporation and resort was consequently had to the indirect method.

For the value of the properties transferred to the International Harvester Company, we may rely on the Bureau of Corporations Report (1911) and the accounts of the company. The determination of the capital investment of the concerns entering the harvester trust was relatively an easy matter, since the assets consisted chiefly of replaceable plants and good will was excluded<sup>34</sup> in the actual capitalization of the company. Consequently the discrepancies between the valuation of the properties of the company by the Bureau and by the company itself were minor. The same may be said of the net profits of the company.<sup>35</sup> The Bureau found no substantial understatement of earnings; in fact, for the period covered by the Report of the Bureau (the first nine and one-fourth years of operation), the statement of earnings published by the company was only 0.57 per cent less than the computation made by the Bureau. Such discrepancy as results in the *rate* of earnings of the company as computed by itself and by the Bureau would be practically eliminated, moreover, if proper account were taken of the change in the "value of the dollar." There is no defense for continuing to use original investment rather than replacement value (minus depreciation, plus betterments) as the basis for determining the rate of profits. Under the pecuniary organization of a private-enterprise system there is no ground either in equity or expediency for the reckoning of the investment in replaceable capital in 1911 in terms of the "larger" 1902 dollar while the earnings in the later years are in terms of the "smaller" dollar of those years.

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<sup>34</sup> This, it may be noted, is not inconsistent with the statement, *supra*, in which reference was made to the proposed valuation of good will by the promoters.

<sup>35</sup> BUREAU REPORT, chaps. III and V.

Consequently there is little reason for believing that the picture of the profitableness of the International Harvester Company presented in the following table is other than a reasonably true representation of actual conditions.

1903 — <sup>36</sup>	1909 — 13.4	1915 — 7.8
1904 — 5.3	1910 — 12.7	1916 — 10.6
1905 — 7.0	1911 — 11.5	1917 — 18.5
1906 — 6.7	1912 — 10.5 <sup>37</sup>	1918 — 19.5
1907 — 7.3	1913 — 10.6	
1908 — 8.7	1914 — 7.6	

It is evident that the profits of the company have been moderate, *i.e.*, substantially on a competitive level. But this fact means nothing at all unless considered with reference to the degree of risk involved in the manufacturing operations of this industry, and with reference to the grade of executive capacity evinced by the responsible management of the enterprise. We have had very little investigation of the risks connected with various industries, but a cursory examination of the salient facts about the farm machinery <sup>38</sup> industry will convince anyone that the hazards of the industry are relatively small. Its products are non-perishable. Their demand is not subject to fashion or style influences. Their market is extremely broad, being in fact, even for relatively small concerns, international. And most important of all, the principal kinds of machines have been free from radical improvements for over a quarter of a century now. Indeed, it may be said to be rather singular that a group of products of this character—fairly intricate machinery (many traversing parts), fairly bulky, indelicate, and requiring only approximate precision, and thus well-adapted to mass production by machine methods—should have become so stabilized both in structure and in processes of production.

<sup>36</sup> For reasons for omitting the first fifteen months of operation from this table, see BUREAU REPORT, p. 233.

<sup>37</sup> The figure for 1912 was taken from the report of the company after making certain corrections corresponding to those made by the Bureau in prior years. The rates shown for the years 1913–1918 are those given by the Federal Trade Commission in its Report on THE CAUSES OF HIGH PRICES OF FARM IMPLEMENTS, p. 103. The foreign business was in the hands of the International Harvester Corporation after 1913, but the results of the operations of both companies are here consolidated.

<sup>38</sup> The business of the International Harvester Company has expanded into this complete line since its organization, and this fact will be referred to again later on.

In regard to the executive ability of the management of the Harvester Company, it seems permissible to base a judgment upon an examination of the record of its component elements under the preceding period of competition. This is legitimate here, since no considerable changes occurred in management personnel or organization by the formation of the Harvester Company.<sup>39</sup> Its legitimacy is still further strengthened by the fact that in this case the owners of the constituent properties forming the combination retained as a group the financial control,<sup>40</sup> which has enabled them to continue to exercise the essential entrepreneurial function of choosing the responsible executive heads. For present purposes and considering the available data, the varying grades of administrative ability may be arranged in the simple scale — inferior, normal, superior.

Of the several organizations brought into the International Harvester Company, there can be little doubt that the most efficient<sup>41</sup> was the McCormick organization. But the Deering concern was also aggressively and successfully managed. These two had been steadily growing and improving their position in the industry relative to all other units. Their executive heads had evinced an administrative capacity that may reasonably be classed as of a superior order. But the experience of the Champion, Milwaukee, and Plano organizations<sup>42</sup> under severe competition had not been such as to indicate high managerial efficiency. If then it be concluded that the combination included elements of supra-normal and inferior executive capacity, as the available facts seem to indicate,<sup>43</sup> it is clear that the company as a whole was not blessed by an exceptional management at the start. This fact must be considered, also, in conjunction with the further fact of the handicap suffered by the company in early years from petty jealousies, family pride, nepotism, and such influences inimical to efficiency. Later,

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<sup>39</sup> REPORT OF BUREAU OF CORPORATIONS (1911), pp. 87-88.

<sup>40</sup> It may be noted that neither of these conditions obtained in the organization of the United States Steel Corporation.

<sup>41</sup> Most efficient, that is, for profit-making. That is the only sensible standard to apply in our society.

<sup>42</sup> The subsequent purchase of the properties of D. M. Osborne & Company was made on terms which changed the responsible management, and also gave the former stockholders no interest in the Harvester Company. REPORT OF BUREAU, pp. 137-139.

<sup>43</sup> *Ibid.*, pp. 156-160.

however, this seems to have been overcome to a degree through insistence from the financial control, referred to in the preceding paragraph.

From the foregoing it may be concluded that the moderate but growing profits obtained by the International Harvester Company have been made possible by a fair average grade of administrative efficiency in its management. Accordingly it would seem that no great influence detrimental to the public interest has been made out, so far as the character of the price policy of the company is deducible from its profits record. Such is indeed the case. But it was not to have been expected that the rate of profits for either of these combinations pursuing the "live and let live — who can" policy would be extremely high. Moreover, this company since its formation has sought to expand its control over the entire agricultural implement industry, rather than exploit to the full the advantages of its commanding position in that section of the industry which gave birth to it. Thus it has from the first maintained a vigorous competition in one branch of the industry after another, and often in several at once, as it extended the scope of its operations. In these new lines of production it has been content, and sometimes for long periods has been forced, to accept extremely low profits in order to push ahead toward its ultimate goal. This policy of expansion, though, has not by any means necessitated the sacrifice of the possibility of securing high profits on the original lines. It may well have served, on the other hand, to cover up such possibly high profits, since the figures given above make no differentiation between the results of its activities in what may be tentatively termed the "controlled lines" and the "competitive lines." It is extremely doubtful whether such differentiation could accurately be made,<sup>44</sup> for the elements of cost jointly incurred are considerable in view of the policy pursued of maintaining several distinct complete-line organizations and non-specialization of plants.<sup>45</sup>

On account of the large proportion of irreplaceable and non-duplicable mineral rights and site values in the property invest-

<sup>44</sup> Though the company attempts it for its own administrative purposes.

<sup>45</sup> Different implements of each line are made in a single plant, as a rule. The Milwaukee plant is "specialized" only in so far as its output is confined to gas engines, cream separators, etc., which have no relation to field crops.

ment of the United States Steel Corporation it is not practicable<sup>46</sup> to attempt any calculation of the rate of profit of this concern. But if the course of development of this industry as a whole exhibits signs of the repressive effect of monopolistic influences, there will be no need of searching far for their source. For data upon the progress of the entire industry, the reports of the Census of Manufactures will be depended upon. The invested capital figures given in these reports are wholly unserviceable for any purpose, as the Bureau of the Census itself warns. The figures for "value added to product" are fairly accurate, and for the successive census years since 1899, at least, are fairly comparable, while those of 1889 have fortunately been adjusted to correspond with the later figures. The figures upon "wages paid" are also fairly dependable. A major difficulty, however, is that the classification of industries adopted by the Census Bureau does not coincide and cannot be arranged to coincide with the full range of activities of the Steel Corporation. It is only on an arbitrary basis that different branches of the business of the corporation may be divided and separately treated; and consequently the returns compiled by the Census Bureau rest in part only on objective market facts. Two branches only of the iron and steel industry will be analyzed.

If from the "value added to product" (which is comparable to the "gross income" of a single enterprise, less all "expenses" except wages) there be deducted the wages paid, the remainder constitutes the income upon capital, save for deductions for taxes. Now, it is clear that in any advancing industry, the percentage which return to capital forms of "value added" will be steadily mounting, assuming no change in relative tax burden or in the normal rate of interest upon capital. The reason is that technological improvements "save labor,"<sup>47</sup> and thus reduce the share of the joint product attributable to its coöperation. The tendency set up by this influence might be accelerated by the establishment of a monopoly and its vigorous, unbridled exploitation. But such an

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<sup>46</sup> The discrepancy between the Bureau's figures for this essential item in 1902 and the corporation's figures amounted to nearly half of the total capitalization of the corporation, namely \$600,000,000.

<sup>47</sup> It is sometimes said that technological improvements of a certain kind "save time"; but that is only another way of expressing the same thing. . . . It is ultimately reducible to "labor saving," taking the industrial process as a whole.

influence could not in any case be of more than secondary significance as compared to such a decisive influence as the state of technology, much less if the "live and let live — who can" policy be the one pursued by a combination that is only *quasi*-monopolistic in point of ultimate and possibly, also, actual power. Likewise the tendency toward an increase in the percentage consequent upon improving technology might be offset by the growth of a powerful labor organization within the industry. At best this influence could only affect the percentage decimally, and no one conversant with labor conditions in the steel industry would assign to the influence any potency whatever there.

The following table gives the percentages of return to capital to value added to product in several different industries for certain census years:

Year	Blast Furnaces	Steel Mills	Auto- mobile	Boots and Shoes	Flour Mills
1889	58.9	35.6	...	...	...
1899	75.6	50.5	39.0	35.4	77.8
1904	64.3	47.4	58.8	43.8	78.8
1909	65.3	50.3	61.5	44.1	81.5
1914	57.2	42.7	68.3	44.8	80.4
1919	...	...	...	...	...

The large increase of the percentages in two branches of the steel industry in the decade 1889-1899 stands in sharp contrast to the decline since the organization of the Steel Corporation. The effect of free competition in a new industry is strikingly brought out by the course of the percentage in the automobile industry. The development and refinement of the machine process in this industry is well known. The data for flour-milling indicate a steady though not considerable or uninterrupted improvement in this industry which has long been practically automatic. The technological progress in the boot and shoe industry which made it one of the notable examples of the transformation of American industries in the latter part of the nineteenth century appears to have slowed down markedly shortly after the organization of the United Shoe Machinery Company.

Concerning the influences responsible for the decline in the percentages, which are either not observable or not appreciable in the

industries other than iron and steel, there is matter for interesting speculation. The decline can hardly be assigned to technological retrogression. Modern industry has no "lost arts," though it undoubtedly has a few suppressed patents. The business cycle, however, may be held accountable for some part of the declines. It is beyond question that wages constitute a greater share of the gross income of a manufacturing enterprise during depression than during prosperity, other things being equal. This is due to the fact that wages "resist" liquidation more tenaciously than other price categories.<sup>48</sup> A more important factor would seem to be the arbitrary manner in which the value of materials used is determined upon in a large section of both of the given branches of the iron and steel industry. When materials used are not purchased in the open market but are taken over from a preceding process, representing a separate industry in the census classification, but only another department of the operations of an integrated enterprise, their price is determined solely by the accounting policy of the concern, and that is a shifting, arbitrary thing. Consequently the change in "value added to product" may be taken out of all its fundamental economic relation to change in the wages paid by the simple device of making the "value of materials used" either a greater or a less proportion of "total value of products." There are good grounds for believing that the Steel Corporation which represents a large section of both these branches of the industry has chosen to make its principal profits appear in the operation of its raw material properties. The concentrated holding of mines, ore leases, coking coal lands, etc., coupled with the natural limitation upon the supply (which in any case with the progressive using up of exhaustible resources would have persistently forced up their prices), have enabled the prices of iron ore and coking coal to be advanced, it may be presumed, to levels which would make the return upon capital invested in the blast furnace and steel works and rolling mills below the competitive rate were it not for the fact that a large section of these branches of the industry is "supported" by the more lucrative returns elsewhere gained by the same enterprises. There is a clear presumption of this from the fact of the

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<sup>48</sup> It would still remain to be explained, however, why the countervailing forces were so much stronger than this in the automobile and shoe industries and so much weaker in the iron and steel industry.

decline in percentages noted above, in the absence of any evidence of such a technological improvement as dispenses with the need of considerable capital equipment in these particular branches of the industry. The foregoing argument presents the most plausible hypothesis, it seems to the present writer, for the explanation of the persistent decline in the percentages of return upon capital to "value added to product" in these branches of iron and steel manufacture.

It is to be recognized, of course, that this evidence is not conclusive regarding the state of the industrial arts in the iron and steel industry as a whole. And it is only by inference that the tendency the data reveal can be ascribed to the organization of the United States Steel Corporation. Nevertheless there does not appear to have been any outstanding technological advance in the process of steel making in the last two decades,<sup>49</sup> and the inference seems altogether fair and reasonable that this slowing up of progress, in which the public has such a vital concern, is in part due to the repressive and inhibitive forces which monopoly exerts by the fact and to the extent of its existence. The failure to reach a clear and decisive issue to our inquiry along this line, though there is no intention to minimize its probative force, only goes to confirm the position taken in the first paper of this series. There it was maintained that the attempt to apply the "rule of reason," while abstractly it may seem quite sound and justifiable, concretely encounters such obstacles as to make its adoption as a general rule of social policy perilous to the public interest. That position is vindicated by the investigation in this second paper. While it may not be possible by inductive argument to establish conclusively the balance of net social disadvantage against the new policy, when the evidence of the facts tends strongly to support that view and deductive pre-

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<sup>49</sup> Three developments may be mentioned: the utilization of lower grades of iron ore, the substitution of by-product for beehive coke ovens, and the installation of electric steel plants. The first and second have been made possible by the advance of metallurgical and chemical science, in large part independent of the encouragement of industry, and the steel industry in the United States was even tardier than its European competitors in adopting the by-product process. The United States Steel Corporation is entitled to no credit for originating or perfecting electric steel making. The manufacture of steel in electric furnaces has had a phenomenal growth here in the last ten years, however, and its ultimate significance cannot now be safely foretold. See Annual Reviews published in the first week of each calendar year by the IRON AGE; THORPE'S DICTIONARY OF APPLIED CHEMISTRY, Vol. II, p. 103; also J. N. PRING, THE ELECTRIC FURNACE, § 11.



sumption<sup>50</sup> as well as instinctive reaction buttress the same view, the conclusion appears well founded. Since the possibility of benefit is so meager<sup>51</sup> and the risks are so great, particularly when long run considerations are in view, the public interest certainly lies in a repudiation of the experimental policy.

## IX

In summary, the first section of this paper tended to establish the fact that these combinations were the artificial product of business conspiracy, not the outgrowth of the selective and adaptive evolution of industrial organization. The second section tended to prove that these combinations thus originating were incapable of maintaining their position in the face of unhindered competition, pointing to the conclusion that when the power of preponderant combinations in manufacturing industries is not used ruthlessly their size is a handicap as against the vigor and versatility of smaller rivals. And in the third section the argument tended to demonstrate the adverse effect upon the public from high, if not exorbitant, prices and from retarded technological progress of these huge consolidations of interests approaching monopoly within their respective industries. There is nothing inconsistent, it should be unnecessary to explain, between the outcome of these several lines of inquiry, particularly between the second and third. When a preponderant part of the production in a particular industry is under one control, smaller concerns may frequently take advantage of the prices set by the big business rather than risk extermination

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<sup>50</sup> Against the control of the supply of a product by private combination.

<sup>51</sup> I cannot forbear quoting, somewhat in the authoritarian manner in which lawyers were wont formerly to bring in selections from Bracton or Coke or Blackstone or Cooley, a statement of the dean of my own profession, Dr. Alfred Marshall:

"Experience shows ever more and more that the technical economy to be obtained by piling Pelion on Ossa in the agglomeration of vast business is nearly always less than was expected, and that the difficulty of the human element ever increases with increasing size. Much can be done by various schemes of reward and promotion as regards junior officials, and even the superior officials are stimulated by congresses and other opportunities for submitting their new ideas to the judgment of brother experts. But no fairly good substitute has been found, or seems likely to be found, for the bracing fresh air which a strong man with a chivalrous yearning for leadership draws into his lungs when he sets out on a business experiment at his own risk." Address before the Royal Economic Society, January 9, 1907, printed in 17 *Economic Jour.* 17

in straight out competition. The so-called "independents" become then only *quasi*-competitors. Under such circumstances the big business may feel constrained to fix its prices only moderately high. This clearly tends toward a lethargic if not stagnant condition in the whole industry, notwithstanding reasonable-plus profits. And in spite of its underlying economic weakness the industrial *quasi*-monopoly, putatively so powerful merely on account of its overtowering size, may retain a considerable part of its power over a generation or more, to the appreciable, if not directly demonstrable, detriment of the public interest. This is the writer's view of our experience with the steel trust and the harvester trust, and if this view is a just one and if the experience in these cases is typical, it points to the vindication of the common-law attitude toward combinations in restraint of trade and monopolies as declared in the Sherman Act and originally enforced thereunder.

*Myron W. Watkins.*

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THE HARVARD LEGAL AID BUREAU, 1921-1922. — The Harvard Legal Aid Bureau, incorporated in 1914 by students of the Law School for the purpose of rendering gratuitous legal assistance to those members of the community who could not afford to retain regular counsel, has this spring completed its eighth active year. Twenty men have been engaged in the Cambridge office of the Bureau at 763 Massachusetts Avenue, where during the six months of October through March a total of 232 cases were handled — a figure considerably in excess of those of previous years. In addition to this, fifteen men were assigned to the office of the Boston Legal Aid Society in Ashburton Place, Boston, to act as assistants to the lawyers there regularly employed by the Society.

An examination of the cases disposed of during the year discloses a remarkable variety, with a preponderance of wage claims, domestic difficulties, and claims under the Workmen's Compensation Act. Wherever possible the disputes were settled out of court; often this was accomplished by the intervention of the Cambridge Welfare Union or some other charitable organization. In those instances in which court action was necessary it was taken. The following examples are selected from the more interesting of the recent cases:

A painter died from carbon monoxide poisoning while working in the shipbuilding plant at Squantum, Massachusetts. Two law firms had successively taken the case for the widow, but both were discouraged by the difficulty of finding any witnesses, since the men who worked with

the deceased had scattered after the plant was closed down. As the insurance company of the employer refused to settle, a notice of disagreement was filed and a hearing had before a single member of the Industrial Accident Board. The hearing lasted three days. The evidence was undisputed that the deceased worked for three weeks on girders thirty feet above fifteen salamander stoves discharging an uncertain quantity of carbon monoxide; that he died eighteen days later from a massive cerebral hemorrhage accompanied by small perivascular hemorrhages; that he was suffering from hardening of the arteries, enlargement of the heart, and Bright's disease before he died, which diseases made him peculiarly sensitive to carbon monoxide by producing high blood pressure; but that deceased never went into a state of coma, and that no case of gas poisoning without coma was on record. The insurance company claimed that it was a simple case of spontaneous hemorrhage (apoplexy). For the widow it was argued that it was only necessary to prove an acceleration of an existing ailment;<sup>1</sup> and that the Board interprets this as including an increase to the results of an existing ailment, no matter how slight.<sup>2</sup> At the direction of the Board member the case was settled for \$2000 without appealing.

A seamstress, the plaintiff, was evicted from her house in an ejectment proceeding, and the sheriff hired the defendant, a moving and express man, to move the furniture to a storage warehouse. In so doing, the defendant dropped and broke a sewing machine. He later removed the machine from the warehouse against the plaintiff's orders. The declaration, drawn by a lawyer previously employed by the plaintiff, contained a count for injury to the machine, but no allegation of negligence was made and no count in trover was included. On this declaration judgment was given for the client, and the defendant has appealed. It is believed that the judgment below should be affirmed on the ground that the expressman, in the position of a common carrier, is subject to a relational duty rather than a duty arising out of contract.<sup>3</sup>

A client applied to the plaintiff employment agency for work, and received a card recommending him to X, who was represented as wanting a janitor at \$23 a week. The client signed a card in the form of a promissory note for the amount of one week's salary conditioned on his getting the job. Later in the day he went to a free public employment agency to which he applied for a position without mentioning his prior application to the plaintiff agency, and from them received a card to X who was said to be looking for a man for \$24 a week. He later discovered for the first time that the two X's were identical. Going to X he showed the card of the free agency only and obtained employment at \$25 a week. The plaintiff sued for \$25. At the trial it was contended for the defendant (1) that the agreement was aleatory and therefore no

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<sup>1</sup> Brightman's Case, 220 Mass. 17, 107 N. E. 527 (1914); Madden's Case, 222 Mass. 487, 111 N. E. 379 (1916). [The REVIEW does not itself assume responsibility for the statements of law or citations of authority in this note. They are introduced rather for the purpose of indicating the Bureau's treatment of the cases it tried. — Ed.]

<sup>2</sup> Homan's Case, 2 MASS. COMP. CASES, 775.

<sup>3</sup> STORY, BAILMENTS, § 1309; Finn v. Western R. R. Corporation, 112 Mass. 524 (1873).

contract;<sup>4</sup> and (2) that the defendant had given up what was merely the offer of the plaintiff, and had acted on the offer of the free agency;<sup>5</sup> or (3) that even if there were a contract the necessary condition had not been complied with because the defendant had obtained the job by his own efforts and not through any assistance of the plaintiff. After the trial the case was reargued twice and written briefs were submitted. Judgment was given for the plaintiff for \$23. As the plaintiff agreed to settle and waive all costs the case was not appealed.

**VALIDITY OF FEDERAL DEPARTMENTAL REGULATIONS INVOLVING CRIMINAL RESPONSIBILITY.**—The exigencies of government have increasingly demanded that official and individual conduct be controlled by expert and flexible departmental regulation rather than by the cumbersome processes of legislation.<sup>1</sup> Congress has therefore frequently authorized the heads of the departments to issue regulations,<sup>2</sup> the disregarding of many of which involves criminal responsibility. Is such regulation<sup>3</sup> a valid exercise of power by the executive? The subject may properly<sup>4</sup> be divided into two main heads: (1) Is a given regulation beyond the limits of the statute? (2) Is the statute beyond the limits of the federal constitution? A failure to regard this distinction has led to unfortunate confusion in the opinions.

Assuming that the defendant has violated a departmental regulation,<sup>5</sup> for which the government seeks to hold him criminally responsible, the court must determine whether the regulation is beyond the powers

<sup>4</sup> *Vogel v. Pekoc*, 157 Ill. 339, 42 N. E. 386 (1895); *Montreal Gas Co. v. Vasey*, [1900] A. C. 595.

<sup>5</sup> *Crowninshield v. Foster*, 169 Mass. 237, 47 N. E. 879 (1897).

<sup>1</sup> See G. Norman Lieber, "Executive Regulations," 31 AM. L. REV. 876, 880-890; J. B. Whitfield, "Legislative Powers That May Not Be Delegated," 20 YALE L. J. 87, 93; Stephen A. Foster, "The Delegation of Legislative Power to Administrative Officers," 7 ILL. L. REV. 397, 399-402.

<sup>2</sup> Courts take judicial notice of regulations. *Caha v. United States*, 152 U. S. 211, 221 (1894). It would seem good practice, however, to plead the regulations in the indictment. See *United States v. Slater*, 123 Fed. 115, 121 (D. Nev., 1903).

<sup>3</sup> Technically, a regulation does not include the special application by the executive of a rule to a particular concrete case. See GOODNOW, *PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES*, 322-345. This type of administrative action requires the exercise of a judicial function by the executive, and with this we are here not concerned. See *United States v. Moody*, 164 Fed. 269, 273 (W. D. Mich., 1908).

<sup>4</sup> See Bruce Wyman, "Jurisdictional Limitations upon Commission Action," 27 HARV. L. REV. 545, 550. And see *In re Gray*, 57 Can. Sup. Ct. 150, 156-157 (1918).

<sup>5</sup> If the defendant's act or omission to act is a violation of the express terms of some complete statutory prohibition or command, it is unnecessary to consider the regulation. See *United States v. Keitel*, 211 U. S. 370, 395 (1908); *United States v. Foster*, 233 U. S. 515 (1914). Cf. *La Bourgogne*, 210 U. S. 95, 134 (1908). And it may, of course, be that what the defendant has done or failed to do is not a violation of the statute or of the regulation, properly construed. In such a situation it seems clear that there is no basis for a criminal prosecution. See *United States v. Manion*, 44 Fed. 800, 801 (D. Wash., 1890); *United States v. Three Barrels of Whiskey*, 77 Fed. 963, 965 (Circ. Ct., E. D. N. C., 1896); *United States v. Lamson*, 165 Fed. 80, 85-86 (Circ. Ct., D. R. I., 1900). Moreover, it has been held that a refusal of the employee of a federal department to obey the order of a state court would not render him liable to imprisonment

conferred upon the department by Congress.<sup>6</sup> Since the purpose of the exercise by the executive of regulatory functions is to enable Congress more effectively to express its will, the rule-making power cannot be exercised beyond the limits designated by Congress.<sup>7</sup> In the last analysis, a solution of this problem is a matter of statutory construction,<sup>8</sup> and therefore each case should be decided upon its own peculiar facts. For example, much depends upon whether the scheme of Congressional legislation is minute or in outline. Thus, where Congress has explicitly enumerated the details of individual action, the department, in adding a further requirement to those specified in the statute, has been held<sup>9</sup> to have gone beyond the powers conferred upon it by Congress. On the other hand, as exemplified by two cases<sup>10</sup> decided in the present term

for contempt of court where such refusal was a compliance with valid regulations of the department. *Boske v. Comingore*, 177 U. S. 459 (1900). See *In re Lamberton*, 124 Fed. 446 (W. D. Ark., 1903).

<sup>6</sup> The sources of Presidential authority to issue rules and regulations are three: (1) As an exercise of special executive power expressly conferred by the Constitution — e.g., as commander-in-chief of the army and navy. (2) As an exercise of the general executive power to enforce the laws. (3) As an exercise of power specifically authorized by Congress. We are concerned here with the last only.

<sup>7</sup> See Morris M. Cohn, "To What Extent Have Rules and Regulations of the Federal Departments the Force of Law," 41 AM. L. REV. 343, 352. And see cases cited in note 8, *infra*.

<sup>8</sup> Decisions holding the regulation in question within the powers conferred upon the executive department by the enabling statute are: *United States v. Bailey*, 9 Pet. (U. S.) 238 (1835); *Thacher's Distilled Spirits*, 103 U. S. 679 (1881); *United States v. Hearing*, 26 Fed. 744 (Circ. Ct., D. Ore., 1886); *United States v. Boggs*, 31 Fed. 337 (S. D. Ill., 1887); *United States v. Ford*, 50 Fed. 467 (E. D. Mo., 1892); *Caha v. United States*, *supra*; *United States v. Reder*, 69 Fed. 965 (D. S. D., 1895); *United States v. Hardison*, 135 Fed. 419 (S. D. Ga., 1905); *Haas v. Henkel*, 216 U. S. 462 (1910); *United States v. Nelson*, 199 Fed. 464 (D. Idaho, 1912); *United States v. Antikamnia Chemical Co.*, 231 U. S. 654 (1914); *United States v. Birdsall*, 233 U. S. 223 (1914); *United States v. Foster*, 233 U. S. 515 (1914); *United States v. Smull*, 236 U. S. 405 (1915); *United States v. Coll y Cuchi*, 8 Porto Rico Fed. 255 (1915); *United States v. Alvarez*, 8 Porto Rico Fed. 260 (1915); *United States v. Morehead*, 243 U. S. 607 (1917); *Pakas v. United States*, 245 U. S. 467 (1918). See *Tyner v. United States*, 23 App. D. C. 324, 356 (1904); *United States v. Haas*, 163 Fed. 908, 910 (Circ. Ct., S. D. N. Y., 1908).

Decisions holding that the regulation in question was an exercise by the executive of power beyond that authorized by Congress are: *United States v. Two Hundred Barrels of Whiskey*, 95 U. S. 571 (1878); *United States v. Bedgood*, 49 Fed. 54 (S. D. Ala., 1891); *United States v. Eaton*, 144 U. S. 677 (1892); *United States v. One Package of Distilled Spirits*, 88 Fed. 856 (S. D. Ill., 1898); *United States v. Maid*, 116 Fed. 650 (S. D. Cal., 1902); *United States v. Hoover*, 133 Fed. 950 (D. Neb., 1904); *Robnett v. United States*, 169 Fed. 778 (9th Circ., 1909); *Dwyer v. United States*, 170 Fed. 160 (9th Circ., 1909); *Kettenbach v. United States*, 170 Fed. 167 (9th Circ., 1909); *Patterson v. United States*, 181 Fed. 970 (9th Circ., 1910); *St. Louis Merchants' Bridge Terminal Ry. Co. v. United States*, 188 Fed. 191 (8th Circ., 1911); *United States v. Eleven Thousand One Hundred and Fifty Pounds of Butter*, 195 Fed. 657 (8th Circ., 1912); *United States v. George*, 228 U. S. 14 (1913). See *Williamson v. United States*, 207 U. S. 425, 459 (1908); *United States v. Haas*, 167 Fed. 211, 215 (S. D. N. Y., 1906) (but see *Haas v. Henkel*, 166 Fed. 621 (Circ. Ct., S. D. N. Y., 1909), *aff'd* 216 U. S. 462 (1910)). Cf. *United States v. Sandefuhr*, 145 Fed. 49 (E. D. Ark., 1906).

<sup>9</sup> For example, *United States v. George*, *supra*.

<sup>10</sup> *United States v. Sacks*, U. S. Sup. Ct., Oct. term, 1921, No. 48. Congress authorized the Secretary of the Treasury to borrow money on the credit of the United States, and to issue therefor war-savings certificates of the United States. "Such war-savings certificates shall be in such form and subject to such terms and con-

of the Supreme Court of the United States, the broader the statutory enactments, the more play<sup>11</sup> there is for the exercise of regulatory powers. One of the things which has led to the confusion of the lower federal courts on this question is the quotation of abstract general principles from the opinions of the Supreme Court, and their attempted application, regardless of the particular circumstances of the case.<sup>12</sup> The wording of the statute, the history of the legislation, its purposes, the evil sought to be remedied, the good attempted to be secured,—all are matters to be taken into consideration in determining whether a given regulation is not<sup>13</sup> authorized by the statutes.

ditions . . . as the Secretary of the Treasury may prescribe." He was further authorized to issue stamps to evidence payments for or on account of such certificates (40 STAT. AT L. 291, 966). In pursuance of this authorization the Secretary of the Treasury promulgated a series of regulations (Treas. Circ. No. 94, Nov. 15, 1917; Treas. Circ. No. 128, Dec. 18, 1918) and issued war savings certificates and stamps thereunder. One of the regulations of the Secretary, embodied as a term of the war savings certificates, provided that a certificate is not a valid obligation of the United States unless a stamp is affixed thereto. The defendant was indicted for fraudulently altering an obligation of the United States, in that he did tear from the face of such a certificate a war savings stamp, and with having such altered obligation in his possession with intent fraudulently to pass it (CRIMINAL CODE, §§ 148, 151). A demurrer to the indictment was sustained by the District Court of the United States for the Southern District of New York. *Held*, that the judgment be reversed.

Another indictment under the same statute and regulations was sustained in *United States v. Janowitz*, U. S. Sup. Ct., Oct. term, 1921, No. 49.

<sup>11</sup> There has been some question whether the courts should refuse to give cognizance to a regulation merely because it is unreasonable. See John B. Cheadle, "The Delegation of Legislative Functions," 27 YALE L. J. 892, 921. Where the enabling statute is a broad one, such as Section 161 of the Revised Statutes, the problem is rather academic, for the courts refuse to uphold unreasonable regulation on the ground that it is beyond the power conferred upon the executive by Congress. See Thomas Reed Powell, "Administrative Exercise of the Police Power," 24 HARV. L. REV. 333, 344. Where, however, a particular regulation is specifically authorized by statute, the court cannot say that Congress did not mean to confer upon the executive power to issue the regulation, and so, though the court thinks the regulation unreasonable, it should be upheld if not beyond constitutional limitations. See Frank J. Goodnow, "Private Rights and Administrative Discretion," 83 CENT. L. J. 165, 166.

There seems to be here involved a neat system of checks and balances. The more particularized the statutory authorization, the less room there is for varied regulation, but the more unreasonable a given regulation may be. On the other hand, the broader the statutory authorization, the wider are the fields within which the executive may exercise his regulatory powers, but the more opportunity for the courts to declare an unreasonable regulation invalid as being beyond the authority Congress intended to confer. And see note 20, *infra*.

<sup>12</sup> The Supreme Court, in a famous *dictum*, said that while a regulation might have the force of law for civil purposes, it cannot be effective for the purpose of holding one who disregards it criminally responsible. See *United States v. Eaton*, 144 U. S. 677, 688 (1892). The broad language of the court seems to have led to a misapprehension of the problem by some of the lower federal courts. See *United States v. Maid*, 116 Fed. 650 (S. D. Cal., 1902); *Patterson v. United States*, 181 Fed. 970 (9th Circ., 1910). It is true, as a general principle of statutory construction, that criminal enactments should be strictly interpreted. But, where a regulation, under a fair construction of the enabling statutes, is within the rule-making power of the executive, it should follow that a violation of the regulation is criminally punishable if made so by the legislature. This the Supreme Court has recognized in later decisions. *Caha v. United States*, *supra*. See *United States v. Keitel*, *supra*, at 391-392. See also *United States v. Rizzinelli*, 182 Fed. 675, 678 (D. Idaho, 1910).

<sup>13</sup> The question is stated in the negative form advisedly. It is submitted that there should be a genuine presumption of the validity of an executive regulation.

Granting that the regulation which the defendant has violated is within the rule-making power of the department, the next question is to determine whether there are any constitutional limitations upon the legislative capacity to confer regulatory powers upon the executive.<sup>14</sup> There is, in the federal constitution, only one express<sup>15</sup> limitation — "due process."<sup>16</sup> Since the creation of criminal offenses is in its nature legislative,<sup>17</sup> it would seem that a person would be entitled, under the Fifth Amendment, to have Congress establish<sup>18</sup> the crime and provide the punishment therefor. Congress has never attempted to, and cannot constitutionally, abdicate its functions and permit the executive to declare anything it will a federal offense.<sup>19</sup> What Congress has done, and done so frequently as to indicate the evident governmental expediency therein, is to legislate on a given subject as far<sup>20</sup> as it deemed advisable, authorizing the executive department to issue rules and regulations thereunder, and making punishable by prescribed penalties a violation of the statute or the regulations. Do the alleged implied constitutional doctrines of the separation and non-delegability of governmental powers prohibit the legislative authorization of departmental regulation? Regulation, in so far as it is the expression of the will of the

See Jasper Yeates Brinton, "Some Powers and Problems of the Federal Administrative," 61 U. PA. L. REV. 135, 147. The courts sometimes talk as if to accord great respect to the executive ruling. See *Boske v. Conington*, 177 U. S. 459, 470 (1900). But, in practice, the presumption seems to be of no avail to protect a regulation independently thought by the courts to be *ultra vires*. See Thomas Reed Powell, "Separation of Powers: Administrative Exercise of Legislative and Judicial Power," 28 POL. SCI. Q. 34, 39, note 2.

<sup>14</sup> Where the enabling statute is unconstitutional for any reason, regulations issued in pursuance thereof are void. *United States v. Boyer*, 85 Fed. 425 (W. D. Mo., 1898). And, even though the statute is itself valid, a regulation will, of course, always be held unconstitutional for any reason that would nullify the same provisions in a statute. Cf. *Illinois Central R. R. Co. v. McKendree*, 203 U. S. 514 (1906).

<sup>15</sup> The "distributing clause," common in the state constitutions, is not a part of the federal constitution. See 35 HARV. L. REV. 450, 452. It does, however, provide that legislative, executive, and judicial power shall be vested, respectively, in Congress, in the President, and in the federal courts. CONSTITUTION OF THE UNITED STATES, Art. I., § 1; Art. II., § 1; Art. III., § 1.

<sup>16</sup> CONSTITUTION OF THE UNITED STATES, AMENDMENTS, Art. V. See Frederick Green, "Separation of Governmental Powers," 29 YALE L. J. 369, 373; Thomas Reed Powell, "Separation of Powers: Administrative Exercise of Legislative and Judicial Power," 27 POL. SCI. Q. 215, 216-217.

<sup>17</sup> There are no common law crimes in the federal courts. *United States v. Hudson*, 7 Cranch (U. S.) 32 (1812); *United States v. Coolidge*, 1 Wheat. (U. S.) 415 (1816).

<sup>18</sup> The whole problem turns on just how minute Congressional definition of the crime must be. It is clear, from the cases, that the statute need not state in detail every circumstance under which an act prohibited by law shall constitute a criminal offense. See cases cited in note 26, *infra*. It is submitted that Congress sufficiently defines the crime when it proscribes the violation of a reasonable regulation promulgated by the executive to carry out the purposes or provisions of the statute.

<sup>19</sup> But see, as to the penal system established by the executive in the Revenue-Cutter Service, LIEBER, REMARKS ON THE ARMY REGULATIONS AND EXECUTIVE REGULATIONS IN GENERAL, W. D. Doc. No. 63, Off. J. A. G., 1898, 46, note 1.

<sup>20</sup> See 15 ILL. L. REV. 108, 116. See LAPP, FEDERAL RULES AND REGULATIONS, Introduction. The more detailed the legislation, the less delegation of regulatory powers — and so the weaker the argument that the statute is constitutionally objectionable. On the other hand, the broader the legislation, the more delegation of regulatory powers — and so the problem comes nearer the line of constitutional prohibition. See note 11, *supra*.



state as a guide for the future conduct of itself and its citizens, is, in the nature of things, legislation.<sup>21</sup> Were these doctrines rules of thumb, it would seem necessarily to follow that such Congressional authorization would be unconstitutional. But, disregarding the *dicta* in the light of the decisions,<sup>22</sup> it seems clear, at least at the present time,<sup>23</sup> that there is no hard and fast rule forbidding the delegation of legislative functions to the executive departments. These doctrines are broad expressions of political philosophy, rather than constitutional limitations. The drawing of the line here, as in other fields of constitutional law, is one of degree. With an eye upon historical tradition as a political beacon,<sup>24</sup> the determination depends largely upon the nature of the problem "in view of what the times demand and of the end to be accomplished" in each particular case.<sup>25</sup> Looking at the business of the legislature, and how it can most effectively be discharged, the court, in the exercise of its negative function to hold statutes unconstitutional, should be slow<sup>26</sup> to declare that Congress has abdicated rather than fulfilled its powers by utilizing another authority in their exercise.

<sup>21</sup> See John B. Cheadle, *supra*, 27 YALE L. J. 892, 917-918. But see Edmund M. Parker, "Executive Judgments and Executive Legislation," 20 HARV. L. REV. 116, 123. In view of the fact that Congress primarily determines the subjects, character, and extent of departmental activities, executive regulations have been aptly called "subordinate legislation." See John A. Fairlie, "Administrative Legislation," 18 MICH. L. REV. 181. The same learned writer ingeniously suggests that since Congress possesses only legislative power, any delegation of power by it must be a delegation of legislative power; and so it is logically inconsistent for the courts to say that while Congress may delegate the power to make rules and regulations, yet it may not delegate legislative power. See John A. Fairlie, "The Administrative Powers of the President," 2 MICH. L. REV. 190, 207. Though this suggestion is in favor of the contention here made, it must be admitted that principles of constitutional law cannot be derived from mere arguments on language.

<sup>22</sup> It is necessary to distinguish what the courts say from what they do. They say that any delegation of legislative power to the executive is unconstitutional, but they are very liberal in their construction of what constitutes legislative power. The courts say that Congress may confer upon the executive department the power only to "fill in the details" of a statute, but, in any given case, the so-called details are, in fact, of wide scope. The courts say that Congress cannot delegate a "discretion as to what the law shall be," but this, in fact, does not seem to preclude the determination by the executive of broad policies. It has also been said that the legislature must establish a "primary standard," but in some of the actual decisions this has been of the most indefinite character, amounting to little more than an expression of the general purpose of the act. See cases cited in the first paragraph of note 8, *supra*; in note 10, *supra*; and in note 26, *infra*. See also Edward B. Whitney, "Another Philippine Constitutional Question — Delegation of Legislative Power to the President," 1 COL. L. REV. 33, 39, 45-48.

<sup>23</sup> While, perhaps, the framers of the Constitution regarded the strict separation of governmental powers as an important feature in the Constitution, it was soon learned that, in actual practice, the principle could not be made a rigid one. See Eugen Ehrlich, "Montesquieu and Sociological Jurisprudence," 29 HARV. L. REV. 582, 592 *et seq.* And see 26 HARV. L. REV. 744.

<sup>24</sup> See Felix Frankfurter, "The Constitutional Opinions of Justice Holmes," 29 HARV. L. REV. 683, 685.

<sup>25</sup> See John B. Cheadle, *supra*, 27 YALE L. J. 982, 920; Edward D. Martin, "The Lines of Demarcation Between Legislative, Executive, and Judicial Functions, with Special Reference to the Acts of an Administrative Board or Commission," 17 AM. L. REV. 715, 732; Stephen A. Foster, *supra*, 7 ILL. L. REV. 307, 412-413. See also 2 WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES, § 777.

<sup>26</sup> The lower federal courts seem more willing to declare a statute unconstitutional

**TRADE COMPETITION AS A JUSTIFICATION.**—Since the case of the Gloucester Grammar School<sup>1</sup> in 1410 the law has steadily<sup>2</sup> recognized an interest in freedom of trade competition.<sup>3</sup> With the growth of commercial activity that interest has received increasing consideration.<sup>4</sup> Today such widely divergent forms of activity—injurious to individuals or to classes of individuals—as price-cutting,<sup>5</sup> insistence on exclusive dealing agreements,<sup>6</sup> strikes,<sup>7</sup> boycotts,<sup>8</sup> and even the inducing of breach of contract,<sup>9</sup> are found justified by authority, although

on the ground that it delegates legislative power than the Supreme Court. *United States v. Blasingame*, 116 Fed. 654 (S. D. Cal., 1900); *United States v. Matthews*, 146 Fed. 306 (E. D. Wash., 1906); *United States v. Grimaud*, 170 Fed. 205 (S. D. Cal., 1909). See *United States v. Louisville & N. R. Co.*, 176 Fed. 942 (N. D. Ala., 1910). But the Grimaud case has been reversed, and the others in effect overruled, by the Supreme Court. *United States v. Grimaud*, 220 U. S. 506 (1911). *Accord*: *United States v. Breen*, 40 Fed. 402 (Circ. Ct., E. D. La., 1889); *United States v. Ormsbee*, 74 Fed. 207 (E. D. Wis., 1896); *Dent v. United States*, 8 Ariz. 413, 76 Pac. 455 (1904); *United States v. Deguirro*, 152 Fed. 568 (N. D. Cal., 1906); *United States v. Domingo*, 152 Fed. 566 (D. Idaho, 1907); *United States v. Fale*, 156 Fed. 687 (D. S. D., 1907); *United States v. Moody*, 164 Fed. 269 (W. D. Mich., 1908); *Lockwood v. United States*, 178 Fed. 437 (3rd Circ., 1909); *United States v. Fizzinelli*, *supra*; *United States v. Stephens*, 245 Fed. 956, 965 (D. Del., 1917); *United States v. Olson*, 253 Fed. 333, 238 (W. D. Wash., 1917); *United States v. Casey*, 247 Fed. 362 (S. D. Ohio, 1918); *United States v. Scott*, 248 Fed. 361 (D. R. I., 1918); *Sugar v. United States*, 252 Fed. 74 (6th Circ., 1918); *United States v. Pennsylvania Central Coal Co.*, 256 Fed. 703 (W. D. Pa., 1918).

It is significant that not only has the Supreme Court never held a Congressional statute unconstitutional on the ground that it violates the doctrine said to prohibit the delegation of legislative powers to the executive departments, but it has reversed decisions of the lower federal courts holding *contra*. *Prather v. United States*, 9 App. D. C. 82 (1896) (writ of *erro dismissis*—164 U. S. 452 (1896)); *In re Kollock*, 165 U. S. 526 (1897); *In re McCaully*, 165 U. S. 538 (1897); *Wilkins v. United States*, 96 Fed. 837 (1899) (writ of *certiorari* denied—175 U. S. 727 (1899)); *United States v. Grimaud*, *supra*; *Selective Draft Law Cases*, 245 U. S. 366, 389 (1918); *McKinley v. United States*, 249 U. S. 397 (1919).

<sup>1</sup> Y. B. 11 HEN. 4, fol. 47, pl. 21 (1410). This was an action by the two masters of the grammar school against the defendant for establishing a rival school whereby their receipts were reduced. It was held that the action would not lie. For another early case involving competition see Y. B. 22 HEN. 6, fol. 4, pl. 23 (1443).

<sup>2</sup> Even the early English statutes against reprobating, forestalling, and ingrossing, although in fact stifling to business activity, were enacted in the interest of free individual competition. For a general discussion of these statutes see 3 STEPHEN, HISTORY OF THE CRIMINAL LAW, 199.

<sup>3</sup> It should be noted that our ancestors were concerned with free competition because of its effectiveness in reducing prices. See S. C. T. Fodd, "The Present Legal Status of Trusts," 7 HARV. L. REV. 157, 150; COKE, THIRD INST., 195.

<sup>4</sup> *Mogul Steamship Co. v. McGregor*, 23 C. B. D. 508 (1880), is probably the leading case on the subject. See S. C. Basak, "Interference with Trade," 28 LAW QUAR. REV. 52, 68.

<sup>5</sup> *Mogul Steamship Co. v. McGregor*, *supra*. See KALES, CONTRACTS AND COMB. IN RESTRAINT OF TRADE, § 94.

<sup>6</sup> *Scottish Co-od. Wholesale Soc. v. Trade Defense Assoc.*, 35 SCOT. L. REP. 645 (1808); *United Shoe Machinery Co. v. La Chappelle Co.*, 212 Mass. 467, 99 N. E. 286 (1912).

<sup>7</sup> *Karges Furniture Co. v. Union*, 165 Ind. 421, 75 N. E. 877 (1905); *Pickett v. Walsh*, 102 Mass. 572, 78 N. E. 753 (1906).

<sup>8</sup> *Mills v. U. S. Printing Co.*, 91 N. Y. Supp. 185 (1904).

<sup>9</sup> *Chambers v. Baldwin*, 91 Ky. 121, 15 S. W. 57 (1891). The weight of authority, however, is *contra*. *Lumley v. Gye*, 2 El. & Bl. 216 (1853). See H. Gerald Chapin, "Interference with Contractual Relations," 1 N. J. L. REV. 144, 161.

in varying degree,<sup>10</sup> as incidents of a free competition in which the law has an interest.<sup>11</sup> But despite a venerable past of judicial elucidation the limits of trade competition as a justification are far from certain. This much, however, seems clear: nothing can be gained by trying to delimit the phrase "trade competition."<sup>12</sup> With each individual trying to get for himself as much of the world's goods as possible,<sup>13</sup> all parties to the economic struggle become competitors.<sup>14</sup> Between any two persons the competition may be worked out through numberless transactions and through the medium of many intervening parties; or it may be immediate. In any event, it exists. And the day of the self-sufficient husbandman having passed, there is no phase of economic activity that does not directly or indirectly partake of the nature of buying and selling, *i.e.*, trade.<sup>15</sup>

Trade competition is not an end in itself. Normally, however, it stimulates to industry, promotes invention and the elimination of waste, results in lowered prices and the improving of service,<sup>16</sup> and it is hard, therefore, to imagine circumstances in which there is not some interest in it as a means to these desirable ends.<sup>17</sup> This interest is buttressed, moreover, by one in freedom of individual action,<sup>18</sup> which must always be curbed where free competition is suppressed. Permitting a free competition secures these two interests,—one social, the other

<sup>10</sup> Thus the strike for higher wages is legal everywhere, while the secondary boycott is legal probably only in California. *Parkinson v. Bldg. Trades Council*, 154 Cal. 581, 98 Pac. 1027 (1908). The secondary boycott here referred to is called by some writers the compound. See LADLER, *BOYCOTTS*, 64 and 177 *et seq.*

<sup>11</sup> The short list here given is by no means exhaustive. For some discussion of what may be justified by competition see Bruce Wyman, "Competition and the Law," 15 HARV. L. REV. 427.

<sup>12</sup> Attempts, however, have been made. See Edward F. McClennan, "Rights of Traders and Laborers," 16 HARV. L. REV. 237, 249; Jeremiah Smith, "Crucial Issues in Labor Litigation," 20 HARV. L. REV. 253, 357. As well as the logical difficulty involved, such attempts almost led to disastrous results in the case of labor disputes, since the conflict between employers and employees was thought at first (and even now at times) to fall outside of the definitions laid down. See H. Gerald Chapin, *supra*, at 158; CLARKE, *LAW OF THE EMPLOYMENT OF LABOR*, 287. See *Vegehlahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077 (1896); *Berry v. Donovan*, 188 Mass. 353, 74 N. E. 603 (1905).

<sup>13</sup> "One of the eternal conflicts of which life is made up is that between the effort of every man to get the most he can for his services and that of society . . . to get his services for the least possible return." *Per* Holmes, J., dissenting in *Vegehlahn v. Guntner*, 167 Mass. 92, 108, 44 N. E. 1077, 1081 (1896).

<sup>14</sup> "I have seen the suggestion made that the conflict between employers and employees is not competition. But I venture to assume that none of my brethren would rely on that suggestion. If the policy on which our law is founded is too narrowly expressed in the term free competition, we may substitute free struggle for life. Certainly the policy is not limited to persons of the same class competing for the same thing. It applies to all conflicts of temporal interest." *Per* Holmes, J., in *Vegehlahn v. Guntner*, 167 Mass. 92, 107, 44 N. E. 1077, 1081 (1896).

<sup>15</sup> The word "trade" in the phrase "trade competition," while originally of a quite definite significance, serves now only to confuse. See Jeremiah Smith, *supra*, 356 and 357. The word "economic" might better be substituted.

<sup>16</sup> See 2 TAUSSIG, *PRINCIPLES OF ECONOMICS*, c. 65.

<sup>17</sup> This involves, of course, an acceptance of current economic theory. But see REEVE, *THE COST OF COMPETITION*.

<sup>18</sup> See Roscoe Pound, "Interests of Personality," 28 HARV. L. REV. 343, 355.

individual.<sup>19</sup> But the results of free competition are complex, and there may occur cases wherein the securing of those two will result in injury to other interests, social and individual, so serious that the loss is greater than the gain. In such instances, trade competition is not a justification. Thus where workmen are induced to break their contract of employment, it is generally held that there is no justification.<sup>20</sup> It is considered more desirable to secure the community in its transactions, even at the expense of social and individual interest involved in a free competition, than to preserve the latter at the expense of security of transactions. But if there is no contract, and the security of transactions, therefore, is not menaced, advantages of free competition clearly outweigh the injury to the tenuous relation<sup>21</sup> that exists between the employer and the employee at will.<sup>22</sup> The interest in security of transactions is not, however, the only one that may be persuasively balanced against freedom of trade competition. In a recent Alabama case<sup>23</sup> the plaintiff, injured while in the employ at will of a construction company insured with the defendant, refused to compromise and turned his claim over to an attorney. The defendant thereafter, by threatening to cancel its insurance, forced the construction company to discharge the plaintiff. The latter was given a cause of action. Here free competition,<sup>24</sup> if permitted, would secure to the insurance company its freedom of action and to society, doubtless, in the long run certain advantageous results, but it would involve an interference with the freedom of action of the employee and with his right of recourse to legal assistance, a right in which the law has amply demonstrated its interest.<sup>25</sup> This complex of results is not so desirable as the complex attained by eliminating the method of competition here used, and trade competition, therefore, was not accepted as a justification.<sup>26</sup> To catalogue and decide all the cases in which trade competition may be offered as a justification would be impossible, but those mentioned

<sup>19</sup> There is also a social interest in the individual interest in freedom of action. See KALES, *op. cit.*, §§ 1, 2.

<sup>20</sup> So. Wales Miners Fed. v. Glamorgan, [1905] A. C. 239; Printers Club v. Blosser Co., 122 Ga. 509, 50 S. E. 353 (1905). See William Schofield, "The Principle of *Lumley v. Gye*, and its Application," 2 HARV. L. REV. 19.

<sup>21</sup> Merrill v. W. U. Tel. Co., 78 Me. 97, 2 Atl. 847 (1896).

<sup>22</sup> Allen v. Flood, [1898] A. C. 1; Bowen v. Matheson, 96 Mass. 499 (1867); Nat. Prot. Assoc. v. Cumming, 179 N. Y. 315, 63 N. E. 369 (1902). See Beekman v. Marsters, 195 Mass. 205, 211, 212, 80 N. E. 817, 819 (1907).

<sup>23</sup> U. S. Fidelity & Trust Co. v. Millonas, 89 So. 732 (Ala. 1921). — The plaintiff was injured while in the employ of a construction company insured with the defendant. The plaintiff refused the defendant's offer of settlement and sought the aid of an attorney. In accordance with its custom when a workman refused to compromise but sought legal aid, the defendant caused the construction company to discharge the plaintiff, who was not under a contract of employment, by threatening to cancel its insurance. *Held*, that the plaintiff recover.

<sup>24</sup> The object of the competition here was the difference between the defendant's offer and the plaintiff's demand. Note that the parties are competitors within Lord Fry's definition of competitors as those "who seek to enjoy or possess the same thing." *Mogul Steamship Co. v. McGregor*, *supra*, at 626.

<sup>25</sup> Note the attorney-client privilege. See 4 WIGMORE, EVIDENCE, § 2291.

<sup>26</sup> A well-reasoned case in accord is *London, etc. Trust Co. v. Horn*, 206 Ill. 493, 69 N. E. 526 (1903).

indicate how the decision must always be reached. In some cases the process of balancing complexes of results may have long ago resulted in a crystallized rule behind which the courts rarely look to regard the substance. This is doubtless the case with a method of competition so anti-social as violence. But new cases will arise that will fit under no rules, or analytical counsel may question the old. Then courts must seek fundamentals. In particular they must ask whether trade competition in the type of case before them is worth more than it costs.<sup>27</sup> If the answer is not in the affirmative, trade competition is not a justification.<sup>28</sup>

It may be doubted whether a court is competent to apply a rule so broadly framed as the above. When, for example, in the field of labor disputes, a court allowed trade competition to justify a strike for higher wages<sup>29</sup> but not a secondary boycott<sup>30</sup> for that purpose, was it really competent to determine that the compromise on the question of wages arrived at through a struggle thus limited would be the one socially most desirable? And while, of course, some of the cases in which trade competition is offered as a justification are so clear that there could scarcely be error,<sup>31</sup> in the main there is presented to the courts a vast medley of problems where the considerations are nicely balanced and where the final decision should be preceded by thorough and extended investigation, and must depend on views of expediency, policy, social and economic theory; problems, in short, that call for law making rather than law declaring. In this field the legislature should be exhorted to act.<sup>32</sup> But if the problems press for decision before legislative aid arrives, the courts, keeping in mind fundamental considerations, should deal with them.<sup>33</sup> For a refusal to act decides something as clearly as does the issuance of an injunction.

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JURISDICTION TO CONFISCATE DEBTS. — A sovereign in the exercise of his war powers can confiscate all property of the enemy found within

<sup>27</sup> In the recent case of *Gottlieb v. Matchin*, 191 N. Y. Supp. 777 (1921), picketing, although generally legal in New York, was enjoined in the case of a strike of the employees of a milk company. The danger to the health of the community and the particular hardship on invalids and children were given by the court as the persuasive considerations. This is a striking application of the mode of attack argued for above.

<sup>28</sup> In the field of monopoly the distinction between fair and unfair methods of competition has long been seen to turn on the desirability of the results which the practice in question will achieve. See W. H. S. Stevens, "Unfair Competition," 29 POL. SCI. QUAR. 282; CLARK, CONTROL OF TRUSTS, 103.

<sup>29</sup> *Karges Furniture Co. v. Union*, *supra*.

<sup>30</sup> *Auburn Draying Co. v. Wardell*, 227 N. Y. 1, 124 N. E. 97 (1919).

<sup>31</sup> Mr. Albert M. Kales apparently believes that the courts customarily attempt nothing beyond such cases. See the "Prefatory Note" to his CONTRACTS AND COMBINATION IN RESTRAINT OF TRADE.

<sup>32</sup> "... government, politically organized society, should meet each emergency requiring alteration of municipal law by the employment of such governmental agencies as in their nature are best suited for the purpose." *Per* Fred F. Lawrence, "Precedent vs. Evolution" 12 MAINE L. REV. 169, 171.

<sup>33</sup> See Fred F. Lawrence, *supra*, at 175.

his jurisdiction.<sup>1</sup> The right to confiscate debts is included.<sup>2</sup> But in modern times, however much this may be practiced as a matter of military expediency, civilized nations, as a matter of international law, have generally abandoned the right to confiscate debts due to private enemy individuals.<sup>3</sup> The United States has always maintained the right to confiscate debts<sup>4</sup> in wartime, but has exercised it only in qualified form. During the Revolution, some of the states offered to give a valid discharge if debts due to enemy individuals were paid to the state.<sup>5</sup> In the Civil War, credits likely to be used in aiding the Confederate cause were confiscated.<sup>6</sup> In the World War, the Alien Property Custodian was authorized by the President, under the Trading With The Enemy Act,<sup>7</sup> to require that debts due to alien enemies be paid to him.<sup>8</sup> But

<sup>1</sup> See *Brown v. United States*, 8 Cranch (U. S.) 110, 122 (1814); *Miller v. United States*, 11 Wall. (U. S.) 268 (1870); and see 1 HALLECK, INT. LAW, 3 ed., 532, 533. So, *a fortiori*, property may be seized and sequestered. *Central Union Trust Co. v. Garvan*, 254 U. S. 554 (1920). And so in conquered territory enemy property may be seized as booty. Debts are sometimes so seized. See G. G. Phillimore, "Booty of War," 3 J. COMP. LEG. 214, 219, 227; 28 YALE L. J. 478. Mere conquest, however, does not operate to change individual rights in property, although it is in the power of the conqueror so to do. See *United States v. Percheman*, 7 Pet. (U. S.) 51, 86 (1833); *McMullen v. Hodge*, 5 Tex. 34 (1849). See also Berkeley Davis, "Confiscation of Property in Warfare," 19 LAW NOTES (N. Y.) 85, 86.

<sup>2</sup> See *Ware v. Hylton*, 3 Dall. (U. S.) 199, 226-231, 263-266 (1796); *Fritz Schultz, Jr., Co. v. Raimes & Co.*, 99 Misc. 626, 164 N. Y. Supp. 454 (1917), *aff'd* 100 Misc. 697, 166 N. Y. Supp. 567 (1917).

<sup>3</sup> See *Brown v. United States*, *supra*, at 123; *United States v. Klein*, 13 Wall. (U. S.) 128, 137 (1871); *Lamar v. Browne*, 92 U. S. 187, 194 (1875); *Stöhr v. Wallace*, 269 Fed. 827, 839 (S. D. N. Y., 1920); *United States v. Capital Stock*, 5 Blatch. 231 (Circ. Ct., S. D. N. Y., 1865). See 1 HALLECK, INT. LAW, 3 ed., 533-538; 28 YALE L. J. 478; HAGUE CONVENTION (1907), LAWS AND CUSTOMS OF WAR ON LAND, Art. 46, 36 STAT. AT L. 2306; Art. 53, 36 STAT. AT L. 2308. But see Berkeley Davis, *supra*.

<sup>4</sup> See *Brown v. United States*, *supra*; *Miller v. United States*, *supra*.

<sup>5</sup> *Cf. Camp v. Lockwood*, 1 Dall. (Pa.) 393 (1788). See 7 MOORE, DIG. INT. LAW, 310.

<sup>6</sup> See Acts of Aug. 6, 1861, and July 17, 1862, 12 STAT. AT L. 319, 589. The Act of 1862 included debts. See *The Confiscation Cases*, 20 Wall. (U. S.) 92, 94 (1873). But only the property of adherents or aiders of the enemy could be confiscated. *Miller v. United States*, 11 Wall. (U. S.) 268 (1870); *United States v. Capital Stock*, *supra*. Proceedings were against the debtor, and not *in rem*. *Phoenix Bank v. Risley*, 111 U. S. 125 (1884), *affirming* *Risley v. Phenix Bank*, 83 N. Y. 318 (1881); *Chapman v. Phoenix Bank*, 85 N. Y. 437 (1881). See 7 MOORE, *op. cit.*, 294. It has been suggested that these acts were not real confiscation acts but only penal statutes punishing treason. 28 YALE L. J. 478, 481. But the Supreme Court has held that pardon for treason did not invalidate a prior seizure; the confiscation being not a punishment for treason, but the exercise of a belligerent right against a public enemy. *Semmes v. United States*, 91 U. S. 21 (1875). And the acts were held constitutional as an exercise of the war power of the United States, and not as an exercise of the municipal power in punishing an offense against the United States. *Miller v. United States*, *supra*.

<sup>7</sup> See 40 STAT. AT L. 411. Amended, 40 STAT. AT L. 459, 460, 1020; 41 *id.* 35, 977.

<sup>8</sup> Congress may in wartime provide for the sequestration of enemy-owned property. *Central Union Trust Co. v. Garvan*, *supra*; *Fischer v. Palmer*, 259 Fed. 355 (M. D. Pa., 1919). The Act as amended properly includes choses in action. *Streb v. Chatham & Phenix Nat. Bank*, 108 Misc. 368, 178 N. Y. Supp. 309 (1919). See also *Kohn v. Kohn*, 264 Fed. 253 (S. D. N. Y., 1920) (debts); *Stoehr v. Wallace*, 255 U. S. 239 (1921) (stock certificates); *Salamandra Ins. Co. v. N. Y. Life Ins. and Trust Co.*, 254 Fed. 852 (S. D. N. Y., 1918) (chase in action against special fund), commented upon 28 YALE L. J. 499. But see *Am. Exchange Nat. Bank v. Palmer*, 256 Fed. 680 (S. D. N. Y., 1919).

this was for custody only, and was sequestration, not confiscation.<sup>9</sup> Absolute confiscation of debts is still attempted during insurrections in the smaller nations. What jurisdiction must be had over the parties to make confiscation valid?

A sovereign having jurisdiction over the person or property of the debtor has power to take his property equal to the amount of the debt. But this would be a mere act of tyranny, unless at the same time his obligation to the creditor were validly extinguished so that he would not have to pay over again in another jurisdiction.<sup>10</sup> The only way of effecting this result is to bring the creditor into the same or related proceedings. If the sovereign establishes a claim against the creditor which another jurisdiction will recognize, he may then proceed against the debtor, take the debtor's property in satisfaction of his claim against the creditor, and in the other jurisdiction the creditor could not then assert that the debtor still owed the debt to him. This proceeding is exactly the equivalent of garnishment. As a practical matter, in wartime the sovereign could never proceed in court against an enemy creditor who was outside his jurisdiction; and so the sovereign could validly assert a claim only if the enemy creditor were within the jurisdiction. This requisite was satisfied in the federal confiscation of debts due Confederate creditors, in the Civil War, for the United States never relinquished jurisdiction over the whole country. It was often not satisfied in the World War sequestrations, where debts due absent Germans and Austrians were paid to the Alien Property Custodian; but as no confiscation was attempted, jurisdiction over the creditor was unnecessary. However, in spite of this necessity of the sovereign's having a valid claim binding upon the creditor in other jurisdictions, in order to relieve the debtor from future liability, the American courts have paid little attention to the creditor, although they have insisted upon proper procedure against the debtor.<sup>11</sup> This was a result to be expected in the United States, where the same loose doctrine prevails as to garnishment of choses in action.<sup>12</sup> Foreign sovereigns would be justified in such a case in saying that no

<sup>9</sup> Although originally the purpose of the Act was merely to sequester enemy property during the war, by an amendment allowing the sale of property and retention of the proceeds by the Custodian, German ownership of American industries was as far as possible abolished. See A. Mitchell Palmer, "The Great Work of the Alien Property Custodian," 53 AM. L. REV. 43, 51 *et seq.*; A. Mitchell Palmer, "Enemy Property in America," 1919 PA. B. A., 259, 275. This did not amount to absolute confiscation; but some anxiety has been felt as to whether such proceeds might eventually, contrary to modern practice, be confiscated. See A. W. Lafferty, "Should America Return Private German Property?" 15 ILL. L. REV. 79; 28 YALE L. J. 478.

<sup>10</sup> Even the American courts recognize that in order to have a valid confiscation of a debt the debtor must be exonerated from further liability. Thus seizure of Confederate treasury notes was held not to amount to a sequestration of the debts of the bank, since the notes were issued in violation of law and their seizure would not absolve the debtor from further liability. *Nelligan v. Citizens' Bank of Louisiana*, 21 La. Ann. 332 (1869).

<sup>11</sup> *Miller v. United States*, *supra*; *Alexandria v. Fairfax*, 95 U.S. 774 (1877); *Phoenix Bank v. Risley*, *supra*.

<sup>12</sup> *Chicago, Rock Id., & Pacific R. R. v. Sturm*, 174 U.S. 710 (1899); *Harris v. Balk*, 198 U.S. 215 (1905). See *Miller v. United States*, *supra*, at 297. See Joseph H. Beale, "Jurisdiction *In Rem* to Compel Payment of a Debt," 27 HARV. L. REV. 107, 111.

valid discharge of the debt had been given, and that the attempted confiscation amounted only to a seizure of the debtor's property.

This would have to be the only significance of an attempted confiscation of a debt by one who was not a sovereign but a mere insurgent; unless he had legally proved his claim against the creditor so as to bring the case within the proper principles of garnishment.<sup>13</sup> Seizure of the money might be justified as an act of warfare, where necessary for the prosecution of hostilities, but could not amount to confiscation of the debt, since even if the creditor were in the neighborhood the rebel leader is invested with no sovereign powers,<sup>14</sup> and would not have the jurisdiction of a sovereign over the creditor to establish a valid claim against him. If, indeed, the insurgents succeeded in overthrowing the established government, and were recognized by another state so that the recognition related back to the inception of insurgency,<sup>15</sup> previous acts would be validated and regarded as acts of a sovereign;<sup>16</sup> a confiscation of a debt by the insurrectionary power would be effective if the creditor were within the jurisdiction at the time of the seizure. If the rebellion failed, all acts of assumed sovereignty done in aid of it would be regarded as null,<sup>17</sup> and the debtor would have no defense when sued in another jurisdiction.<sup>18</sup> Failure to recognize the revolutionary government by another state, if the debtor is sued there, works the same result.<sup>19</sup> Thus in a recent case<sup>20</sup> a Texas court held the debtor liable to the creditor in Texas, although the leaders of the Calles-Obregon insur-

<sup>13</sup> See Joseph H. Beale, *supra*, at 116.

<sup>14</sup> It has been suggested that each authority in fact supreme over a part of the country, with some probability of permanence, is the head of an independent state. See Thomas Baty, "So Called 'De Facto' Recognition," 31 YALE L. J. 469, 484. It is true that in some cases duties paid to insurgents were considered properly paid and were not required to be paid again. See 1 MOORE, *op. cit.*, 49. And *cf.* United States v. Rice, 4 Wheat. (U. S.) 246 (1819); Ford v. Surget, 97 U. S. 594 (1878); Thornton v. Smith, 8 Wall. (U. S.) 1, 8 (1868); Mauran v. Ins. Co., 6 Wall. (U. S.) 1 (1867). Mr. Cass in 1858 advanced the claim that acts of insurgents were lawful acts of sovereignty when done, irrespective of whether the movement finally succeeded or failed; but the United States later dropped the cases, recognizing that such a claim could not be sustained. See 1 MOORE, *op. cit.*, 43, 44. See note 17, *infra*.

<sup>15</sup> See 35 HARV. L. REV. 607.

<sup>16</sup> Underhill v. Hernandez, 168 U. S. 250 (1897); Oetjen v. Central Leather Co., 246 U. S. 297 (1918); Terrazas v. Holmes, 225 S. W. 848 (Tex., 1920). See Williams v. Bruffy, 96 U. S. 176, 185 (1877). And see 18 MICH. L. REV. 531.

<sup>17</sup> United States v. Sutter, 21 How. (U. S.) 170 (1858); United States v. Rose, 23 How. (U. S.) 262 (1859); Texas v. White, 7 Wall. (U. S.) 700 (1868); Williams v. Bruffy, 96 U. S. 176 (1877); Dewing v. Perdicaries, 96 U. S. 193 (1877). See 18 MICH. L. REV. 531.

<sup>18</sup> Williams v. Bruffy, *supra*; Stevens v. Griffith, 111 U. S. 48 (1884) (legacy); Keppel v. Petersburg R. R. Co., Fed. Cas. No. 7722 (Circ. Ct., D. Va., 1868) (dividends on stock); Vance v. Burtis, 39 Tex. 88 (1873).

<sup>19</sup> See 18 MICH. L. REV. 531. But see 35 HARV. L. REV. 607. And see Thomas Baty, *supra*, at 472.

<sup>20</sup> Russek v. Angulo, 236 S. W. 131 (Tex., 1922). — The plaintiff held a certificate of deposit issued by the defendants, bankers in Chihuahua, Mexico. A revolt was begun against the established government, and the insurgent authorities, having control of Chihuahua, assumed to confiscate the plaintiff's deposit on the ground that the plaintiff was an enemy of the insurgent party. The defendants paid over the money and were given a receipt purporting to release them from their obligation. The revolutionary party was successful in gaining control of the republic of Mexico, but had not been recognized by the United States when the plaintiff sued the de-



rection in Mexico had assumed to confiscate the debt. The Obregon party, though subsequently acquiring control of Mexico, had not been recognized by the United States at the time of the decision. The court properly interpreted the confiscation as merely a seizure of the debtor's money, and not a proper proceeding in the nature of garnishment. The striking thing about such a case is that a judgment against a debtor where the creditor has had no opportunity to be heard (and thus in effect the same as this act of attempted confiscation by the insurgent leaders), if rendered by a state court in the United States, would be upheld by the Supreme Court as a valid proceeding in garnishment.<sup>21</sup>

THE CONFLICT OF LAWS RELATING TO THE CREATION OF COVENANTS FOR TITLE. — When persons domiciled in one state execute in that state a deed whereby one of them purports to transfer to the other title to land situated in another state, the law of the *situs* determines what interests in the land, if any, are created thereby.<sup>1</sup> If by the law of the *situs* the words used in the conveyance import the usual covenants for title, will that law still control, or should the courts look to the law of the place where the deed was made, or to that of the domicile of the grantor? A recent California case,<sup>2</sup> in deciding this question, held that as to a covenant for quiet enjoyment the *lex rei sita* governed.

Since no other sovereign than that of the *situs* can exercise dominion over the land, that sovereign must have power to impose whatever requirements it may deem necessary as conditions precedent to the acquisition and transfer of title or any other rights therein. But, on the other hand, the law of the *situs* can have no extraterritorial effect and therefore "cannot control personal covenants, not purporting to be conveyances, between persons outside the jurisdiction, although concerning a thing within it."<sup>3</sup> If a man is held to have made a promise, it must be either because the law treats the mere doing of an act as such, or because he has used promissory words. The act of making a deed may have two effects: first, to create an interest in the land, and, second, to create a personal obligation on the part of the grantor. Whether a deed does have the latter effect should be determined by

fendants in Texas on the certificate of deposit, and recovered. *Held*, that the judgment for the plaintiff be affirmed.

<sup>21</sup> See Note 12, *supra*.

<sup>1</sup> *New Haven Trust Co. v. Camp*, 81 Conn. 539, 71 Atl. 788 (1909); *Middleton's Trustee v. Middleton*, 172 Ky. 826, 189 S. W. 1133 (1916); *International Paper Co. v. Bellows Falls Canal Co.*, 91 Vt. 350, 100 Atl. 684 (1917).

<sup>2</sup> *Platner v. Vincent*, 202 Pac. 655 (Cal., 1921). — The defendant, by a deed made in California, conveyed to the plaintiff land situated in Washington. By the law of Washington a deed containing the words "grant, bargain, sell, and convey" imports an express covenant of quiet enjoyment. (1915 REM. CODE, § 8748). The plaintiff, having been prevented from taking possession because of the superior right of third parties, sued in California, alleging a breach of this covenant. The defendant's demurrer, on the ground that no cause of action was shown by the law of California, was sustained. *Held*, that the judgment be reversed.

<sup>3</sup> *Per Holmes, J.*, in *Polson v. Stewart*, 167 Mass. 211, 214, 45 N. E. 737, 738 (1897). See also *Robinson v. Suburban Brick Co.*, 127 Fed. 804 (4th Circ., 1904); *Clement & Willett*, 105 Minn. 267, 117 N. W. 491 (1908).

the *lex loci contractus*.<sup>4</sup> That law alone can attach an obligation to the act of making. Whether the words are to be interpreted as promissory should depend on the law of the grantor's domicile.<sup>5</sup> If certain words are susceptible of more than one construction, the grantor must have intended to use them according to their meaning in the language he is accustomed to speak, — that of his home.

When the problem is to determine what covenants for title are to be read into a deed, do any further considerations enter? Technically all such covenants run with the land until breach.<sup>6</sup> But in the United States the somewhat anomalous doctrine exists generally that the covenants of seisin, of right to convey, and against encumbrances, are broken, if at all, as soon as made, and do not in fact run with the land.<sup>7</sup> The covenants of warranty and of quiet enjoyment, however, run in fact as well as in theory.<sup>8</sup> Since only the covenantee, in the case of covenants which do not run, can take advantage of a breach,<sup>9</sup> the courts concede that they are personal between the original parties, and that to ascertain whether they have been created it is necessary to refer to the *lex loci contractus*.<sup>10</sup> But by the weight of authority, the law of the *situs* determines whether or not covenants running have been created.<sup>11</sup> Is there any sound basis for this distinction?

Two questions arise in every case: first, Is there a promise? and second, Is there an obligation attached to it? The courts which apply the *lex rei sitæ* to covenants which in fact run with the land seem to deal, and erroneously, with the latter only. The reasoning of the cases usually is that there is something in the nature of these covenants so inseparably connected with the land itself that they cannot be disassociated therefrom. They can be transferred only with the land, they inure to the benefit of a subsequent assignee solely because of his privity of estate, and are, therefore, not strictly "personal" as between the covenantor and him.<sup>12</sup> But the fact seems to be overlooked that they do

<sup>4</sup> See *Blackwell v. Webster*, 23 Blatch. 537 (2nd Circ., 1886); *Kennedy v. Cochrane*, 65 Me. 594 (1876); *Baldwin v. Gray*, 4 Mart. N. S. (La.) 192 (1826).

<sup>5</sup> *Knights Templars, etc. Aid Assoc. v. Greene*, 79 Fed. 461 (Circ. Ct., S. D. Ohio, 1897); *London Assurance v. Companhia de Moagens*, 167 U. S. 149 (1897). See *Staigg v. Atkinson*, 144 Mass. 564, 12 N. E. 354 (1887); *McGahan v. Baylor*, 32 Tex. 789 (1870); *Cood v. Cood*, 33 L. J. Ch. 273 (1863).

<sup>6</sup> See RAWLE, COVENANTS, 5 ed., § 204.

<sup>7</sup> *Greenby v. Wilcocks*, 2 Johns. (N. Y.) 1 (1806); *Reinhalter v. Hutchins*, 26 R. I. 586, 60 Atl. 234 (1904); *Thompson v. Richmond*, 102 Me. 335, 66 Atl. 649 (1906); *Faller v. Davis*, 30 Okla. 56, 118 Pac. 382 (1911). See *Peters v. Bowman*, 98 U. S. 56 (1878).

<sup>8</sup> *Butler v. Barnes*, 60 Conn. 170, 21 Atl. 419 (1891); *Arnold v. Joines*, 50 Okla. 4, 150 Pac. 130 (1915). See RAWLE, *op. cit.*, §§ 131, 213.

<sup>9</sup> See RAWLE, *op. cit.*, § 204.

<sup>10</sup> *Bethell v. Bethell*, 54 Ind. 428 (1876); *Jackson v. Green*, 112 Ind. 341, 14 N. E. 89 (1887).

<sup>11</sup> *Lyndon Lumber Co. v. Sawyer*, 135 Wis. 525, 116 N. W. 255 (1908); *Dalton v. Taliaferro*, 101 Ill. App. 592 (1902); *Fisher v. Parry*, 68 Ind. 465 (1879). See *Beauchamp v. Bertig*, 90 Ark. 351, 119 S. W. 75 (1900); *Ellis v. Abbott*, 69 Ore. 234, 138 Pac. 488 (1914); *Newsom v. Langford*, 174 S. W. 1036, 1040 (Tex. Civ. App., 1915). In the last case the alleged covenantor was domiciled at the *situs*, but the *dictum* of the court is sweeping. See also 1 WHARTON, CONFLICT OF LAWS, 3 ed., § 276d; MINOR, CONFLICT OF LAWS, § 185.

<sup>12</sup> See *Dalton v. Taliaferro*, *supra*, at 595, 596; 4 KENT, COMM. 472, note a.

not give the grantee any interest in the land itself. They are rather in the nature of promises to indemnify him or his assignees in the event of his being injured by eviction or by being compelled to pay off an existing undisclosed encumbrance. In the case of covenants which run as well as in the case of those which do not, the injured party's right against the covenantor at law is solely to recover damages for the breach of the promise.<sup>13</sup> In either instance the grantee acquires no more than a personal right based on a contract in relation to the land, which in one case inures to the benefit of third persons. Though the effect of any covenant, which is found to have been made, may properly be held to depend on the law of the *situs*,<sup>14</sup> that law should not be able to impose on a man a personal promise he did not intend to make.<sup>15</sup> The result of making a distinction between the two types of covenants might be that if a covenantee sued on the breach of covenants of seisin and of warranty, alleged to be contained in the same deed, the deed would have to be interpreted as to the existence of one covenant by the *lex loci contractus*<sup>16</sup> and as to the other by the *lex rei sitæ*. There can be no sound basis to such an incongruous conclusion. Since all covenants for title are promises, the better rule would seem to be that to determine whether or not one is created<sup>17</sup> by the mere making of a deed the courts should uniformly look to the law of the place where that act was done.

Nevertheless, only one decision has been found sustaining this conclusion.<sup>18</sup> It is not impossible, however, that in jurisdictions where the question is still an open one the carefully considered opinion of that

<sup>13</sup> See RAWLE, *op. cit.*, § 354.

<sup>14</sup> When the deed is found to contain a covenant, it is necessary to refer to the law of the *situs* to determine whether or not it runs with the land. *Riley v. Burroughs*, 41 Neb. 296, 59 N. W. 929 (1894); *Succession of Cassidy*, 40 La. Ann. 827, 5 So. 292 (1888). What amounts to a breach also depends on the *lex rei sitæ*. *Kling v. Sejour*, 4 La. Ann. 128 (1849). And so does the question whether the grantor has capacity to convey. *Beauchamp v. Bertig*, *supra*, note 12.

<sup>15</sup> Professor Minor, however, approves the prevailing rule "since the grantor must be presumed to be acquainted with that law [of the *situs*] as well as his own, and to hold otherwise would tend to make title to the land uncertain." MINOR, *op. cit.*, § 185. But the effect of such a presumption, which in most cases would be contrary to fact, is to impose a personal obligation on the grantor irrespective of his intent. It is true that the obligation imposed by the *lex loci contractus* may also be contrary to his intent, but by doing an act subject to that law he has submitted to whatever consequences it may attach to the act, whereas he has done no act whatsoever at the *situs*.

<sup>16</sup> Or the *lex domicilii*, as the case may be. See notes 5 and 6, *supra*.

<sup>17</sup> But if a covenant of warranty is sought to be used to establish a title by estoppel, — to create an interest in the land itself, — the law of the *situs* must control. *Smith v. Ingram*, 132 N. C. 959, 44 S. E. 643 (1903).

<sup>18</sup> *Worley v. Hineman*, 6 Ind. App. 240, 33 N. E. 260 (1893). In distinguishing the rule that requires all questions concerning the title of real property to be decided by the law of the *situs* from the proposition that in actions to recover damages for breach of contract the law of the state where the contract was made governs, the court said: "The reason for the distinction must be obvious. In the one case it is the interest in the thing itself that is to be determined, and in the other it is a personal right growing out of the contract made in relation to that thing." 6 Ind. App. 248, 33 N. E. 262. The court then applied the rule of *Bethell v. Bethell*, *supra*, to a covenant of warranty and declared that the later case of *Fisher v. Parry*, *supra*, had been discredited in Indiana.

case will successfully overcome the weight of the courts which have unfortunately taken the contrary view.

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## BOOK REVIEWS

CRIMINAL JUSTICE IN CLEVELAND. Cleveland: The Cleveland Foundation. 1922. pp. 700.

The administration of criminal justice, especially in urban communities, presents no novel problem in the United States. For many years the importance of the problem and the difficulties of its solution have been steadily growing. Volumes have been written about it. There has seldom been a time in recent years when it has not been the subject of newspaper report and public discussion in some part of the country. Innumerable movements for reform have been inaugurated and run their course. Some peculiarly atrocious crime, some notorious failure of criminal justice, some scandal in the administration of criminal law, apparently fortuitous, actually inevitable, since these manifestations are only the external symptoms of an internal disorder, stirs the public conscience to demand action and reform. The action demanded has usually been the wreaking of vengeance. Incompetent or corrupt officials must be removed or punished and new ones substituted for them, who in turn are left to cope with all the forces which rendered their predecessors incompetent or corrupt. The demand for reform has usually found expression in new legislation creating new crimes or new machinery for the administration of criminal justice or both. More police are added to the force, new courts are created, new officials established, and then having treated the symptoms without really discovering the disease the public interest turns to other matters and we drop back into the old slough of despond. This has been the traditional procedure in our efforts to reform criminal justice, and the inevitable result has led even the most stout-hearted reformers to begin to despair of progress toward a more enlightened and efficient system.

In the spring of 1920 the civic consciousness of Cleveland, the fifth largest city in the United States, was aroused by the perpetration of an atrocious crime in which one of its municipal court justices was implicated. That this dramatic event did not stir into activity the usual agitation for vengeance and quick reform is probably due to the wise leadership in the civic organizations of Cleveland, which, headed by the Cleveland Bar Association, requested the Cleveland Foundation to undertake a survey of criminal justice in that city. The survey has now been brought to a conclusion and its results are embodied in the present volume. For the first time there is presented in it a thorough, painstaking, objective study and analysis, by experts, of the elements which enter into the problem of administration of criminal law in an American city.

I suppose no one would be more prompt than the authors of this survey to disclaim any pretensions to infallibility or any assertion that the survey was free from all error in its choice of particular subjects for investigation or in its conclusions. They had a difficult task to perform even had its precise limits been previously marked out, but in addition they had to blaze a new path in an unknown wilderness of social experiment. Yet seldom does one have the privilege of reading any study which is on its face more dispassionate or impartial or which bears such conclusive internal evidence that it has been made with exceptional skill and thorough integrity.

But more important than the complete verity of its data and conclusions is the fact that this survey presents in concrete and readable form a new approach to the problems of the reform of criminal justice in urban America. In this

respect the survey is epoch making, for the hope for all lasting social reform must rest upon our capacity to make social studies, as this one was made, by experts residing beyond the sphere of local influences, whose work is impersonal and impartial, with no aim at quick results, with no disposition to seek a victim, and with a genuine effort to search out those underlying causes which give impetus and direction to social tendencies.

Although this study was directed toward a distinctly local problem and for that reason cannot be taken as of universal application, the basic problems with which it deals lie at the root of the administration of criminal justice in practically every urban community in the United States. For that reason the Cleveland Survey has its lessons for those in every city who are engaged in the difficult undertaking of endeavoring to improve the administration of the criminal law. With respect to the fundamental difficulties of securing such improvement, one might substitute for the name of Cleveland in the survey, the name of numerous other cities in the United States, and when one comes to the analysis and appraisal of those forces which tend to thwart the due administration of criminal justice the survey may be as useful in any one of a dozen cities as in Cleveland.

The survey was made under the direction of Dean Pound and Professor Frankfurter, and its published results are embraced in seven distinct parts, representing the respective fields of inquiry which were deemed most important, as follows:

The Criminal Courts, by Reginald Heber Smith and Herbert B. Ehrmann.  
Prosecution, by Alfred Bettmann.  
Police Administration, by Raymond B. Fosdick.  
Correctional and Penal Treatment, by Burdette G. Lewis.  
Medical Science and Criminal Justice, by Dr. Herman M. Adler.  
Legal Education in Cleveland, by Albert M. Kales.  
Newspapers and Criminal Justice, by M. K. Wischart.

The introduction to the survey was prepared by Professor Frankfurter, and Dean Pound has added a summary. Together the introduction and summary constitute not only a review and summarization of the work of the survey, but an admirable handbook in which is set forth the fundamentals of the problem of improving criminal justice and the guiding principles which must necessarily control any successful effort at reform. It would be impossible in a brief review to present any adequate picture of the work of the survey. It is only possible to indicate in a general way its scope and nature. Any such investigation as was projected by the Cleveland Foundation must necessarily center upon the criminal courts, the prosecutor's office, and the police, as the three agencies immediately concerned with the administration of criminal law. A thoroughgoing study of these agencies, however, inevitably carries one into the fields of investigation treated by the other parts of the survey. In dealing with these agencies the treatment is necessarily to a large extent statistical, but statistics are not used with any illusion as to their real purpose and value. The statistical method of dealing with social problems often cannot be relied on as mathematical demonstration leading to specific conclusions, but it may be used to indicate tendencies, to mark out the boundaries of a problem and to point out the direction which should be given to a particular investigation of a non-statistical character. A large disproportion, for example, between the number of arrests and the number of convictions for crime could never lead either to the specific conclusion that there were too many arrests or too few convictions. Either conclusion or both might be true, but the principal fact once established constitutes an important statistical basis for further and more intimate study. It is with this general purpose and with commendable

restraint in drawing conclusions from statistical premises that the studies of the survey are made.

The survey as a whole is evidently dominated by the belief that facts have a reforming power of their own, and that it is more important to let the facts speak for themselves and that the reader should draw his conclusions from them than that the personal views and conclusions of the author should be unduly stressed.

What are the more significant facts in the administration of criminal justice so far as the courts are concerned? There is first the long and complicated procedure which lies between arrest and conviction, inherited from earlier times and from a simpler society than our own, affording too many opportunities for escape of the offender or unmerited mitigation of his punishment; there is the bench, subjected to the corrupting influences of machine politics and more recently to the pernicious political influences of particular racial or religious groups, labor organizations, and the like. There is the inadequate or improper functioning of courts because of insufficient records and lax methods of keeping them. Some offender is arrested for a shocking crime and then upon investigation, often conducted by newspapers, it is discovered for the first time that his career, now brought to its logical conclusion, has been dotted with criminal charges "nolle prossed," sentences suspended, bail jumped and forfeited, and in each instance judicial action has been taken without any adequate knowledge of the offender's previous contact with the courts. There is a lack of dignity and decorum in the conduct of court proceedings, with the inevitable loss of public respect for the administration of justice. There is the bar, recruited in part from candidates with wholly inadequate liberal and professional training, who are brought into it by the operation of the pernicious combination of the low-grade "cram" law school and the low-grade bar examination, — a bar until recently inactive in the matter of the selection of judges, in improving legal education, and in purging the bar of its unworthy members. And finally there is the lack of any adequate permanent system for gathering and disseminating public information about what is of first concern to the public, — the functioning of our system of administering criminal justice.

If we turn to the relation of the public prosecutor to the administration of the criminal law we find a like formidable list of subjects of inquiry. The "mortality" of cases passing through his office, occurring both in his office and in the courts, slackness on the part of the prosecuting officer in maintaining decorum and dignity of the court procedure, laxity in the selection of juries and the presentation of cases in court, indifferent and inadequate representation on the part of the prosecutor of the interests of the public wherever leniency is accorded to those accused of crime through the *nolle prosequi*, suspended sentence, reduced sentence, etc., — these are some of the many subjects considered, but the outstanding fact is that the weakest point in the functioning of the public prosecutor is in the organization and conduct of his office. In large measure the skill and integrity with which criminal justice is administered depend upon the functioning of that office. Yet less is known by the public of what goes on there than of any other part of the machinery of justice. This fact, coupled with the fact that the office is political and peculiarly subject to untoward political influences, accounts for the tendency toward laxity and inefficiency of office organization and office administration when they are of the first importance. Lack of system for the assignment of work and handling of cases, inadequate office records, carelessness in the preparation, filing, and recording of affidavits, entire absence of those methods of fixing personal responsibility which are essential to the conduct of a modern law office, necessarily make for inefficiency and give wide latitude and opportunity for corruption. With such possibilities, all too often becoming realities, in the administration of justice in the courts and in the office of the public prosecutor, it is little to be wondered

at that the machinery of justice does not work with that exactness and precision which the legal theory presupposes and that evasions of the criminal justice thrive through the "no papering" of cases (that is, failure to produce affidavits on which the prosecution of those who have been arrested may be based), the *nolle prosequi*, the suspended sentence, pleading guilty of lesser offenses, reduction of sentence, and the like.

Especially interesting are the reports on legal education and on the relations of the newspapers to criminal justice. The study of legal education presents in succinct and readable form an authentic account of the process which has been going on for the last twenty years in practically every large city of the country, of lowering the tone and standards of the bar through the great increase in the numbers of those entering the legal profession who are without adequate training and without the experience and educational background which make for moral responsibility as well as capacity for assuming the duties and responsibilities of the lawyer. The remedy by raising educational standards for admission to the bar through the active interest and cooperation of the bar is clearly indicated.

Of great importance is that part of the survey devoted to the influence of the newspapers on the administration of criminal justice. Necessarily this portion of the inquiry can be only to a very limited extent statistical. The influence of the press on public opinion, which after all is by far the most potent influence in law administration as well as its direct effect on the process of criminal justice, cannot be weighed and measured statistically. At most, certain tendencies of the press can be observed and noted and their current manifestations recorded, and some estimate made of their effect on the administration of the law. But this has been done with a thoroughness and at the same time with a restraint which will encourage the thoughtful consideration of this most difficult and important problem.

In brief, the survey establishes by specific example and illustration the tendency of the press to interfere with the administration of criminal law, not only by actual attempts at police and detective work but by irresponsible publicity, which embarrasses detection of wrongdoing and hampers the administration of justice through the creation of public sentiment inimical to the fair and impartial trials of criminal offenders. Back of this and of even more serious import is the ever-widening vicious circle of the stimulation, by sensational news methods, of the insatiable public demand for sensational news stories which is corrupting public standards and distorting the popular notions of justice and its administration. Sentimental and extravagant reports of crimes and criminals and criminal trials, the featuring of exaggerated accounts of crime waves followed by like exaggerated accounts of corrective measures adopted by police and courts, the featuring of the personality and official action of public officers, are familiar procedures by which the administration of justice is discredited and the soundness of public sentiment and judgment impaired. And all this is due to the necessities of competition and the feverish haste with which the journalistic enterprise, apparently, must be carried on, the financial limitations which necessitate low-paid reportorial and editorial staffs, and above all to the lack of professional standards which take adequately into account the public duties and responsibilities of journalism. At the same time there is brought home to every student of the subject the fact that the greatest single need for the improvement of our administration of criminal justice and one, which the newspapers apparently cannot supply, is suitable means by which the public may be fairly and intelligently informed about what is actually going on in the courts and how our whole system of administering criminal justice is actually functioning.

The necessity of a free press forbids coercive methods or structural reforms even were they otherwise practicable. Improvement must come from the

voluntary acceptance by the press of higher standards of professional and public obligation.

One might write of many interesting and important features of other parts of the report but time and space forbid. The conclusions to be drawn from the investigation are given in admirable fashion by Dean Pound in the summary. One may not agree with all his conclusions in detail, but in its broad aspect the survey is an admirable presentation of those elements in the problem which are fundamental. The whole undertaking for the improvement of the administration of criminal justice is not one of individuals or personalities so much as it is one of an adequate system; but back of this is the problem of adequate publicity and of securing the primary motive force of good citizenship, which working together will result in the selection of suitable individuals for public office and give to them the stimulation and support which are necessary to make any system work well, however skillfully it may be devised. Our system is bad of course, because it is outgrown, and because being adapted to country communities and the product of one type of social and political philosophy it is now being applied to communities which have gradually become urban and industrial with a changed social and political structure. The system must be changed and adapted to new conditions, and this is a relatively easy undertaking. But no system can be made to work without the support of informed, intelligent, and public-spirited citizenship. How to secure this support is the big problem presented by the survey, to which not only Cleveland but most other cities of this country must address themselves.

Dean Pound's suggestion of a ministry of justice is most helpful, but probably no one would be quicker than he to admit the inadequacy of the ancient device by which one public official is set to watch another. The survey taken as a whole, however, indicates very clearly the need of some permanent body whose business it is to study the functioning of the administration of criminal justice and to place the results of its investigations before the public at frequent intervals. We doubt whether this function can ever be left wholly to public officials. Some civic organization, not unlike the Cleveland Foundation, will ultimately have to be created in each community to undertake this work if real and permanent progress is to be made.

The civic organizations of Cleveland responsible for undertaking and carrying on the present survey and the authors of it may take just pride in their work, and all those interested in the improvement of the administration of criminal justice owe to them a large debt of gratitude and appreciation for bringing it to such a successful conclusion.

HARLAN F. STONE.

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INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES. By Charles Cheney Hyde. In two volumes. Boston: Little, Brown and Company. 1922. pp. lix, 832; xxvii, 925.

This is a laborious and praiseworthy piece of work. It places at the disposal of any one interested in International Law an indispensable supplement to all earlier treatises. As the title page indicates, the intent is to emphasize the interpretations and applications made by the United States. Yet the practices and contentions of other countries are not disregarded, and the author's presentation of his own country's point of view does not result in twists or in concealments. The author's ambition has clearly been not to demonstrate that his country has always been right, but merely to give to American facts, American documents, and American judicial decisions greater attention than can fairly be expected in a treatise produced by a foreigner.

The footnotes bristle with citations, thousands of them, giving the reader



both confidence in the text and gratitude for the means of making further investigations for himself. The text itself wins confidence, both by thoroughness of citation and by novelty in expression. Even when what is given is merely a doctrine which any one versed in the subject may be expected to know well, the phraseology is the author's own, so that the reader gains often a new point of view and enjoys always the certainty that an independent mind has inspected the ground. It is a pleasure, for example, to read the opening pages wherein the author discusses the definition of International Law, the sources, and the theory of a sanction. Then follows thoroughly modern matter regarding the international state, self-governing dependencies, protectorates, suzerainties, Cuba, Panama, Santo Domingo, Haiti, mandates, and kindred topics, with an easy transition to the discussion of international organizations.

There is a temptation to go through the whole of the work, pointing out at each step that the material is new or that at least the material is handled in an independent way. There is not room for the gratification of that temptation. The reader must and will find for himself that the temptation exists; and then he will have ample opportunity to indulge in the pleasure of reading these volumes from beginning to end. All that can or need be done just now is to point out to the prospective reader some of the topics which are interesting when taken separately, and still more interesting when taken in connection with one another.

The prominence of American material causes this work to have peculiar value for the small but growing class of scholars and statesmen caring for the relation between International Law and the Constitutional Law of the United States. The Constitution gives to Congress power to define and punish piracies and other offenses against the law of nations; and for this reason and others, as the author explains, International Law is part of the system of law enforced in our courts (§ 5). The Constitution prevents our several states from being states in the sense of International Law; and it is explained that similar lack of international capacity attaches to the Philippines and other dependencies (§ 8). The American Indians also receive comment (§ 10). So do Cuba, Panama, the Dominican Republic, Haiti, and Nicaragua (§§ 19-24). The power of the United States to annex territory, though such power is not expressed in the Constitution, is recognized by the Supreme Court (§ 58). The power of Congress to regulate foreign commerce carries with it the power to determine what aliens shall be excluded or expelled (§§ 59-64). The effect of the annexation of Texas upon the public debt of Texas is discussed from the point of view of both the Constitution and International Law (§ 128). It is shown that as regards international boundaries the views of the political departments of our national government are binding upon our courts (§ 151). The treaty-making power of the United States under the Constitution is said to have been used very slightly as regards the privilege of aliens in the several states to own and transmit property and to engage in occupations (§§ 203-204, 408-409). Some questions on taxation are shown to relate to Constitutional Law and International Law concurrently (§§ 205-206). It is noticed that the constitutional powers regarding commerce and taxation may be so combined as to discriminate against a foreign country (§ 207). The constitutional powers regarding trade-marks and copyrights may be used, as is shown, to encourage friendship with foreign countries (§ 208). It is explained that the national power over commerce includes the power to regulate international cables (§ 211), quarantine (§ 213), and pilotage (§ 214). If there exists by treaty or otherwise a duty to check acts or utterances injurious to a foreign government, there is question to what extent according to International Law the duty is affected by a constitutional guaranty of free speech (§ 217). The author uses both Constitutional Law and International Law in discussing whether a citizen or an alien may be punished in the United States for acts

done abroad (§§ 218, 238-243). When the Constitution speaks of piracies and felonies on the high seas, and offenses against the law of nations, its expressions are to be construed in the light of International Law (§§ 227, 231-232). When an alien is injured by mob violence, the constitutional division of power between the federal and state governments raises embarrassing international problems (§ 290). Citizenship of the United States is dependent upon the Constitution, the statutes, and treaties (§§ 342-393). The Constitution makes the executive department the vehicle of communication with foreign governments (§§ 408-410). The author discusses the limitations, if any, upon the treaty-making power (§§ 494-510), and the participation of President and Senate in ratification (§§ 516-521), and the duties of Congress and the courts after ratification (§§ 523-529). It is explained that under the Constitution a treaty supersedes an earlier statute (§ 526) and *vice versa* (§ 529). The authority of our courts in prize cases is shown to be derived from the Constitution (§§ 891-893).

Surely that list, though not exhaustive, gives adequate proof that these volumes contain much matter of value to persons studying the intimate connection between constitutional and international questions. The topics in that list are not, however, the only ones of special interest to Americans. A searcher for such other American topics finds among many the following: recognition of belligerents (§§ 43-51), the case of *The Caroline* (§§ 66, 248), the pursuit of *Villa* (§ 67), the case of *The Virginius* (§ 68), America and the policy of non-intervention (§§ 76-83), the Monroe Doctrine (§§ 85-97), the right of discovery and occupation (§§ 99-104), Danish West Indies (§ 113), the marine league and bays (§§ 141-148, 185), the Mississippi, the St. Lawrence, the Yukon, and the Rio Grande (§§ 161-165, 184), air-craft (§ 189), the Hay-Pauncefote Treaty (§ 198), the United States and the Chinese Boxer movement (§ 202), American missionaries (§§ 216, 391), asylum on foreign merchant vessels (§ 225), hovering laws and hot pursuit (§§ 235-236), *The Schooner Exchange v. McFaddon* (§ 252), extraterritorial rights in foreign countries (§§ 259-265), claims against the United States (§§ 270-292), claims against foreign governments (§§ 272-289, 293, 300-309), extradition (§§ 310-341), double allegiance and expatriation (§§ 372-392), *Koszta's case* (§ 396), passports (§§ 399-406), *Citizen Genet* (§ 424), consular jurisdiction and controversies regarding seamen (§§ 483-484), the Bryan permanent commissions of inquiry (§ 558), treaties of general arbitration (§§ 566-567), the Hague tribunals and the new Permanent Court of International Justice (§§ 568-576), the Tampico incident (§ 591), the limited war with France in 1798 (§ 599), civil war (§§ 600, 604), the Trading with the Enemy Act (§§ 610, 618-619), resident alien enemies (§§ 616-617), drafting resident neutrals (§§ 625-627, 651), the Armistice (§ 647), belligerent occupation (§§ 688-702), anchored mines and war zones (§§ 713-721), searches in port for contraband (§§ 727-730), armed merchantmen (§§ 742-743), submarines and commerce (§§ 747-751), destruction of neutral prizes (§§ 757-758), belligerent domicile (§§ 789-796), contraband (§§ 799-806), continuous voyage (§§ 808-813), the Trent affair (§ 818), blockade (§§ 824-843), neutrality (§§ 844-889), prize courts and procedure (§§ 890-903).

Yet these volumes are not wholly devoted to topics of peculiar interest to Americans. They give much attention to other fields. For example, there are discussions of many points under the Treaty of Versailles; and among these points are mandates and other impairments of independence (§§ 26-28, 114), just treatment of working men (§ 55), regional understandings (§§ 57, 97), self-determination (§§ 108-109), reparation (§§ 114, 125, 133, 298-299), apportionment of public debts (§§ 125, 130), the Covenant of the League of Nations (§§ 491, 585), treaties abrogated (§ 551), cession of merchant ships and waiver of claims (§ 765), the Paris Conference of 1919 (§§ 917-920).

Thus far the topics cited have special interest because they deal with the United States or with the World War. Much of the discussion deals with subjects of more general and permanent interest; for example, the distinction between justiciable and non-justiciable disputes (§§ 560-561), the effect of war upon contracts and remedies (§§ 606-614), the international rights and liabilities of corporations and of their stockholders or bondholders (§§ 771-780, 794-796) — the last topic being of importance to all lawyers, as it bears intimately upon the vexed problem of corporate entity.

The footnotes, as has already been said, teem with citations of books and articles and documents; and the lawyer will be pleased to find that they are about fourteen hundred judicial decisions. Mention of the thoroughness of the footnotes must not, however, be construed as a disparagement of the text; for the text, as has been shown, is crowded with important matter. In short, both the text and the notes entitle these volumes to be placed among those most useful to the practitioner and to the specialist — alongside Dana's *Wheaton* and Moore's *Digest*.

Now that this treatise covering substantially the whole of International Law has been successfully based upon emphasizing chiefly the practices and contentions of the United States, it is worth while to point out that many persons would have called this feat impossible. Is not the United States geographically isolated? Do not the teachings of Washington and Jefferson insist upon avoiding European entanglements? Are we not a peaceful people? Do not our years of peace vastly outnumber our years of war? The answer to each of those questions is Yes. Yet even in war we have had abundant experience. We have used armed forces against the Barbary States, France, England, Mexico, and Spain, besides our much more serious experiences with the Civil War and the World War. Thus it happens that the rights and duties of belligerents have been brought home to us more than once. At other times we have been neutrals; and as that has been our habitual attitude, we have seemed to the world to be the principal contestants in favor of neutral rights. Further, we were early in our definition of neutral duties.

A generalization approximately correct, but with substantial exceptions, is that the international history of the United States is full of attempts to make war less frequent, more humane to belligerents, and less burdensome to neutrals. In 1787, 1795, 1796, and 1797 the treaties with the four Barbary States gave early examples of a plan to postpone war until after investigation of facts. In 1793 and 1794 the attempt to define the duties of neutrals laid a foundation for the elaborate system which today tends to prevent neutral countries from becoming embroiled in war through misconduct of their citizens or governments. In 1817 the agreement with England regarding armament on the Great Lakes laid the foundation for all disarmament movements. In 1823 the Monroe Doctrine made the attempt, with miraculous success, to preserve the Western Hemisphere from European aggression. In 1863 the Instructions for the Government of the Armies of the United States in the Field — known as General Order No. 100 — originated or codified systematic and humane rules which eventually took the shape of Hague Conventions. It is possible to frame a list of at least twenty contributions of the United States toward International Law or international practice. Yet those contributions would have been unsuccessful without the coöperation of other nations; and the reason for calling attention to a few of the possible list of twenty is simply to give concrete instances to prove that the United States has really not been a hermit nation, and that hence its history and practices and contentions, like those of many another country, no doubt, might reasonably have been expected to give basis for a comprehensive treatise. Such was the view of the author of these volumes; and his success proves that he was right.

EUGENE WAMBAUGH.

**ALLIED SHIPPING CONTROL. AN EXPERIMENT IN INTERNATIONAL ADMINISTRATION.** By J. A. Salter. Oxford: at the Clarendon Press. 1921. pp. xxiii, 372.

"If an adequate history of the war is ever written it will probably give as much space to the economic as to the purely military struggle. It was as much a war of competing blockades, the surface and the submarine, as of competing armies. Behind these two blockades the economic systems of the two opposing groups of countries were engaged in a deadly struggle for existence, and at several periods of the war the pressure of starvation seemed likely to achieve an issue beyond the settlement of either the entrenched armies or the immobilized navies."

No one was more qualified to write a great chapter of the history of this economic struggle than the author of the present volume. When, in the months following the Armistice, guessing the name of the single individual who, barring Tommy Atkins, did most toward winning the war became one of the favorite, absurdly arrogant after-dinner amusements in England, there was surprising unanimity among diverse people "on the inside" in suggesting an obscure civil servant named Salter. It is feared that, despite his authorship of this fascinating book, the achievement of Mr. J. A. Salter will continue to remain caviar to the general. He speaks with intimate knowledge of a great experiment and yet he has accomplished an amazing feat in depersonalizing his account. In this book, Mr. Salter describes the work of the Allied Maritime Transport Council (the A. M. T. C.) and thereby describes the Allied control of shipping as an indispensable instrument of eventual Allied victory in the "war of competing blockades." Mr. Salter's creative powers largely contributed to the execution of the supply programs of the Allies and to the administration of the allotment of neutral tonnage during the most critical period of the war. But the tradition of the English Civil Service breathes through this book, and Mr. Salter's recital is a scrupulously scientific study. Unlike many more famous men, he did not scale world events down to the measure of his own humble personality. Mr. Salter's book is one to be read, and not to be read about. His story is too significant to be summarized, its details too massive to be mutilated.

But what's Hecuba to me? the lawyer will say, alert to take a jurisdictional point even in the realm of the mind. A scientific study of Allied control of shipping during the war may be important to the economist, and of general interest to the historian of the war, but what particular appeal does Mr. Salter's book make to the lawyer? The answer is furnished by Mr. Salter's sub-title, "An Experiment in International Administration." Mr. Salter makes the story of the A. M. T. C. a vehicle of inquiry into the circumstances which brought it into being, the scope of its operations, the principles which conditioned its success, all with a view of determining whether or not this extraordinarily successful piece of administration contains germs of permanent utility for the purposes of peace no less than the temporary uses of war.

So far as we are familiar with the English literature on the subject Mr. Salter has made the most fertilizing contribution to the problem of international administration. His thinking is muscular. He does not minimize difficulties, and avoids the foggy analogies which glide so cheerily from problems of war to problems of peace. In an admirable chapter on the difference between the war and peace problem (pp. 243-248) Mr. Salter clearly indicates the special conditions which war presents and the differences in available motive power. He concludes, however, that the basic theory upon which effective international administration, as illustrated by the A. M. T. C., succeeded during war may be utilized for the problems of peace. Indeed no other principle has any promise of success. The principle invoked was that of direct

contact between specialists. The most essential economic control of the Allies (shipping was the key to Allied success, but it was also at the core of Allied conflicts) was secured not by delegation of national authority into the hands of some economic generalissimo or even an international board with delegated authority; Allied control was secured by knitting together the representatives of the various nations through agreement of aims and by the common possession of all the facts necessary for translating those aims into action:

"The crucial development of the Allied organization was the extension of the principle of direct contact throughout the national controls, the formation of a machinery through which contact was regularly effected, and the linking up of the whole system by the continuous work of the staff of the big Councils and particularly the Transport Council.

"We have seen how Allied Program Committees, ultimately twenty in number, covered the whole range of imported commodities, and (in addition to their non-shipping duties) prepared programs of the shipping required for submission to the Transport Council through the transport executive. The members of these Committees were essentially national officers who met in conference or in constant association, for international work. In their own departments they represented the international point of view; in Allied meetings they represented the national point of view. And the agreement they arrived at in Allied discussion they carried into practice through their national departments. Thus the new Allied principle did not override or replace the national organizations — it penetrated them. It linked them together from inside. The Allied authority consisted of the national authorities themselves associated for a common purpose influenced by a common point of view and securing results through the executive action of the national system." (pp. 250, 251.)

"Thus the international machine was not an external organization based on delegated authority; it was a national organization linked together for international work and themselves forming the instrument of that work." (p. 252.)

The underlying thought, it is evident, was the systematic effort to contract the area of conflict and passion and to widen the area of accredited, and therefore accepted, knowledge as the basis of action. The application of this main thought to the adjustment of competing interests, such as were involved in shipping control during the war, gives rise to a body of main rules which were hammered out on the anvil of experience. They are formulated with great clarity by Mr. Salter and their pertinency to the problem of peace is unmistakable. (pp. 257-259.)

Mr. Salter's analysis of the ultimate problem of international coöperation for peace inevitably makes pertinent the experience of the particular experiment in international administration with which he was concerned. "What after all," he asks, "is the ultimate problem of international government?" It is, we may suggest, "the administrative division of the world in relation to the inevitable and constant change in the relative strength and development of different nations. . . . Any real hope of successful machinery being devised probably depends upon whether it is possible to drain some of their contents from the passions behind national feeling; and here the crucial point is whether it is possible to isolate questions of commercial interest and advantage and eliminate national feeling from them." (p. 270.)

From this point of view Mr. Salter approaches the problem of the League of Nations and luminously sketches his conception of the function of the League, namely, "not that of controlling the world from a new center of power, but of affording a new opportunity to the nations of the world to work out their new policy in coöperation. . . . It is a method by which the official policies of all countries can be penetrated by the influence of other countries, and, beyond that by the influence of the public opinion of the world. It is a method

by which simultaneously that world public opinion can itself be not only mobilized when it exists, but formed and educated. (pp. 276-277.)

"The central organization of the League will not be a center of controlling power, but an instrument to coördinate activity which is world-wide in its influence and in its effects. No organization which attempts to dominate can conceivably dominate within anything but the most limited scope and range. But an organization which is content with the more modest rôle of assisting the nations to govern themselves in coöperation may permeate and gradually transform the whole policy of the world. . . . This means, however, neither pessimism nor a narrow ambition for its work. One may hope by the gradual and careful extension of this organization, and these methods, to arrive at a time when no Minister and no official in any center of power in the world will frame his policy or carry out his daily executive work without a real consciousness of its reactions upon other countries and responsiveness to their claims." (pp. 279-280.)

Unwittingly Mr. Salter has written an eloquent book — the eloquence of lucidity, insight, hardy thinking, in seeking to evolve orderly processes for adjustment of the most complicated affairs, affairs enmeshed in passions and sentiment and obscured all too frequently by ignorance of the controlling facts. Mr. Salter is preoccupied with problems of international administration, but the controlling ideas which he brings to their solution have still great conquests to make in our national life. At bottom the working ideas which Mr. Salter derived from his experience in international administration are direct representation of the affected interests, continuity of contact among these representatives, an available and steadily increasing, because continuously developing, fund of scientific data, and an accommodation of the competing interests in the light of these authoritative facts instead of partisan presentation or assumption about facts. By such process, in the course of time, Law is evolved. The applicability of this process to many of our economic and industrial problems and its imperative demand, if we are to have civilized solutions, need not be labored.

FELIX FRANKFURTER.







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